Indian Airlines Corporation vs Sm. Madhuri Chowdhuri And Ors. on 27 May, 1964

Equivalent citations: AIR1965CAL252, AIR 1965 CALCUTTA 252

JUDGMENT

P.B. Mukharji, J.

1. This is an appeal by the defendant, Indian Airlines Corporation, from the judgment and decree of P. C. Mallick, J. decreeing the plaintiffs' suit for the sum of Rs. 1,50,000/- and another sum of Rs. 5000/- with interest at the rate of 6 per cent per annum and with costs.

2. The suit arises out of an unfortunate and tragic air crash at Nagpur when a Dakota air plane VT-CHF crashed soon after it started flying from Nagpur to Madras. All the passengers and the crew were killed and the only person who escaped with severe injuries and burns was the Pilot, Desmond Arthur James Cartner. This accident took place on the 12th December, 1953 at about 3-25 a.m.

3. In that Aircraft travelled one Sunil Baran Chowdhury, a young man of about 28 years of age, a business man from Calcutta, who had flown from Calcutta to Nagpur and was taking his journey in that ill-fated Aircraft from Nagpur to Madras at the time of the accident. The plaintiffs in this suit arc (1) the widow of the deceased Sunil Baran Chowdhury, (2) his minor son and (3) his minor daughter. The widow as the mother of the minors acted as the next friend in the plaint. The Indian Airlines Corporation is the defendant in this suit. This suit was instituted on or about the 10th December, 1954, just before the expiry of one year from the date of the accident.

4. The plaint stales that the plaintiffs are the heirs and legal representatives of the deceased Sunil Baran Chowdhury and that the action is brought for their benefit. Sunil Baran was a passenger by Air from Calcutta to Madras via Nagpur in the Aircraft of the defendant Corporation and had duly purchased the ticket. The ticket had certain terms and conditions which will be relevant later on. It is pleaded in the plaint that as a result of the accident Sunil Baran was killed. In the particulars of the accident given in the plaint it is said that the accident took place on the 12th December, 1953 at 3-25 a.m. about two miles from the end of the runway of Sonegaon Airport at Nagpur when the said plane attempted to land owing to engine trouble immediately after it had taken off from the said aerodrome. On that ground it is pleaded that the defendant is liable for damages for breach of contract in not safely carrying the passenger and for breach of duties under the Carriage by Air Act and/or of the Notification thereunder. There is an alternative plea in the plaint which alleges that the deceased died of the said accident which was caused by the negligence and/or misconduct of the defendant Corporation or its agents. The plaint pleads specifically the particulars of negligence in the following terms:

(a) The port engine of the plane lost power after getting air-borne causing a swing and that it was due to defective supervision and check up.

(b) That the swing corrected itself when the port engine revived again.

(c) In spite of failure of the port engine and/or correction thereof, the Captain and/or Pilots in charge did not follow the ordinary and usual procedure under such circumstances, namely, did not throttle back the engine and land straight ahead though there was sufficient length of runway available in front, to land and pull up even with the wheels down and certainly with the wheels up.

(d) Even though the engine revived, the fact that the gear was down was overlooked by both the pilots.

(e) A false starboard engine fire warning precipitated the attempt at forced landing obviously on account of defective supervision and check up.

(f) The lack of sufficient intensive checks for emergency procedures during the past twelve months preceding the accident which it is alleged, if carried out, might have given the pilot confidence, apart from practice enabling him to deal coolly with an emergency of this nature.

5. On these grounds the plaintiffs claimed damages. The basis of the damage pleaded in the plaint is that the deceased belonged to a long-lived family and lost the normal expectation of a happy life of at least 65 years and that he was a well known businessman and industrialist in the City of Calcutta and that his average earnings were Rupees 60,000/- a year. It is also pleaded in the plaint that the deceased had a great future and was the support of the plaintiffs and by his death they had lost all means of support and living. It was, therefore, claimed that the estate of the deceased had suffered loss and damage which were assessed at a sum of Rs. 20,00,000/-. In addition the plaintiffs claimed that the said Sunil Baran carried with him Rs. 5000/- in cash and kind which was also lost by reason of that accident.

6. In the written statement the defendant, Indian Airlines Corporation, relies on the terms and conditions of the passenger's Air Ticket dated the 11th December, 1953 issued by the defendant to the said Sunil Baran Chowdhury. In particular the defendant Corporation relies on the exemption clause as an express term and condition of the said ticket which reads inter alia as follows:

"The carrier shall be under no liability whatsoever to the passenger, his/her heirs, legal representatives or dependants or their respective assigns for death, injury or delay to the passenger or loss, damage, detention or delay to his baggage or personal property arising out of the carriage or any other services or operations the Carrier whether or not caused or occasioned by the act, neglect or negligence or default of the Carrier, or of pilot flying operational or other staff or employees or agent of the Carrier, or otherwise howsoever and the Carrier shall be held indemnified against all

> claims, suits, actions, proceedings, damages, costs, charges and expenses in respect thereof arising out of or in connection with such carnage or other services or operations of the Carrier."

7. It is pleaded in the written statement that the deceased Sunil Baran knew all the said terms and conditions of the said ticket and that in any event the defendant Corporation brought to the notice of and or took all reasonable steps to bring to the notice of the deceased passenger the existence of the said terms and conditions. The defendant denied the existence of any contract other than that mentioned in the ticket or that it committed any breach of contract or that the Carriage by Air Act applied or that it had committed any breach of duty as alleged or at all. In particular the defendant denied the allegations of negligence and misconduct.

8. The defendant Corporation also denied all charges of defective supervision or check up. It denied also that in ease of immediate revival of the engine the usual or ordinary procedure was to throttle back the engine and to land straight ahead as alleged. It denied that the Captain or the Pilot in charge could land straight ahead or should have attempted to land straight ahead. It further pleaded in the written statement that the Captain and the pilots in exercise of their judgment decided on spot not to throttle back the engine and to land straight ahead as alleged. The defendant also pleaded that in any event it was at best an error in the judgment or decision of the pilot for which the defendant was not liable and that the pilot was a skilled and competent expert and he had acted bona fide reasonably and in good faith.

9. The defendant also pleaded that the Aircraft held a valid certificate of air worthiness and was regularly maintained in accordance with the approved maintenance Schedules and had the valid certificate of daily inspection, that the crew held valid licenses and were qualified to undertake the flight and had sufficient checks and training, and that the captain had sufficient flying experience or, the route. The all-up weight did not exceed the authorised take off weight. The aircraft carried sufficient fuel and oil. The engines were duly run up and tested by the pilots prior to take off and the take off run was normal. Most careful and reasonable examination of the plane was made before flight which did not reveal any defect or possibility of any failure. It also says that no mechanism has been devised whereby failure of engine of the plane could be completely eliminated. This will be found inter alia in paragraph 11 of the written statement.

10. The defendant denied all liability to pay damages as alleged or at all. The defendant also pleaded that the alleged moveable in cash and kind amounting to Rs. 5000/-, if any, was the personal luggage of the said deceased passenger and it was in the custody and control of the said deceased and not of the defendant Corporation or the pilot and that the defendant and/or its agents or servants did not lake charge of or were not in possession or control of the said moveables.

11. There was a long and elaborate trial of this unfortunate accident. Numerous witnesses were examined and a large number of documents are in evidence.

12. For the plaintiffs Sm. Madhuri Chowdhury, the widow, Anil Behary Bhaduri, Secretary of Chand Bali Steamer Service Co. where the deceased worked, Saraj Kumar Paul, an employee in the firm of

Messrs. A. C. Das Gupta and Co., Chartered Accountants, of the said Chand Ball Steamer Service Co. who produced certain balance-sheets of the Company and Mr. R. N. Banerjee, Barrister-at-Law and Liquidator of the said Chand Bali Steamer Service Co. were examined. Incidentally this witness Mr. Banerjee said that he was appointed a Liquidator of this Company, Chand Bali Steamer Service Co. in 1955. The evidence of these witnesses relates to the family status and condition of the deceased passenger and his probable or the then actual earning capacity.

13. On behalf of the defendant Corporation a large number of witnesses gave evidence. In the facts of this accident no one is alive except the pilot, to speak directly about the plane and its accident. Captain Cartner, therefore, is the most important witness on behalf of the defendant Corporation. The next important witness was Johnson Berry. He was also a pilot flying Indian Airlines Corporation Planes. In fact he was the senior Commander who had also been flying Dakotas since 1947. The importance of his evidence lies in the fact that he was present near about the spot when the accident took place. In the early morning of the 12th December, 1953, be was at Nagpur for operating the night airmail from Delhi to Nagpur and from Nagpur to Delhi. He was at that relevant time waiting at Nagpur to take night airmail back to Delhi. He was also in charge of a Dakota. His scheduled time to leave was at 3-20 a.m. This Madras bound aircraft which met with the accident was just in front of him to taxi out. Therefore, he was immediately behind this ill-fated aircraft, the distance between his piano and that plane would be hardly 100 yards. The importance of his evidence, therefore, cannot be over-emphasised. Strangely enough neither his name was mentioned nor his evidence discussed by the learned trial Judge.

14. The third witness for the defendant Corporation was Herber Vivian Dequadros who is also an expert, an Engineer and at the time of giving evidence was the General Manager and Chief Engineer of Jamair Co. Private Ltd. a private limited company operating in Calcutta as a non-scheduled operator as a charter company. The next was Basanta Kumar Bajpai, who was the Assistant Aerodrome Officer under the Civil Aviation Department-Director General of Civil Aviation, Union of India. He gave evidence inter alia to prove that Captain Cartner's licence was without any blemish and that he has not only authorised to fly Dakotas but Super Constellation, Constellation and Boeing type of aircraft. Then there was the evidence of Sooda Nathan Lokanath who was the Station Engineer, at Nagpur and who was also a witness before the court of enquiry. Other witnesses for the defendant Corporation were Kritanta Bhusan Gupta from the Traffic Department of the defendant "Corporation who spoke about the issue of the ticket and its conditions, Chattubhai Shomnath Gajjar also a Station Engineer in Bombay employed by Deccan Airways which previously controlled this line, N. B. Patel, who was a pilot in the Defendant Corporation, Kaparaju Gangaraju, Deputy Chief Engineer in charge of Hyderabad Station who gave evidence showing that the aircraft in suit came to Bombay on December 11, 1953 from Begumpet, Hyderabad and before it left Begumpet inspection of the aircraft was carried out. H. R. D. Suja who was in charge of loading and/or unloading the aircraft at Nagpur and who spoke inter alia of the list of passengers on board the Madras bound plane.

15. There were also other witnesses for the defendant Corporation like Rama Rao Prahlad Rao Huilgal, Area Manager of the defendant Corporation at Delhi who was in the Deccan Airways in 1947 as a Senior Captain. A. K. Rao, Aircraft Maintenance Engineer of the defendant Corporation at

Begumpet, Hyderabad, from which the aircraft flew, J. B. Bayas, Controller of aero-nautical inspection, New Delhi who inter alia gave evidence to say that no device has been found out by Science or Technology as yet by which air-locking can be completely excluded; a point which will be material later on when we shall discuss the judgment under appeal, D. N. Banerjee, the Traffic Assistant of Airways India Ltd. who spoke about the notice hung up in front of the Booking office at Mission Row, Calcutta, G. V. Rai, Inspector of the defendant Corporation who was at Begumpet in November, 1953 and finally S. V. Probhu who proved some signature and was Inspector on duty at Begum-pet

16. There is a large body of documentary evidence including log book entries, load sheet, certificate of inspection reports and sheets, daily reports, daily routine schedules of departure, Instruments and electrical routine check sheet, licences and also the report of the court of enquiry of the accident, apart from many correspondence and news paper reports.

17. It may be appropriate to mention here that immediately after the accident the Government of India Ministry of Communications, ordered a formal investigation in exercise of the powers conferred by Rule 75 of the Indian Aircraft Rules, 1937. Mr. N. S. Lokur was appointed the Chairman of this court of enquiry assisted by Captain K. Vishwanath of Air India International and Mr. M. G. Pradhan, Deputy Director General of Civil Aviation as assessors in the said investigation. This investigation was ordered on the 16th December, 1953 within four days of the accident. The report of this investigation and enquiry or what is called in this connection this Court of Enquiry was submitted to the Government of India on the 30th December, 1953. This is also marked as an exhibit in this suit and about its admissibility there has been some controversy which fortunately was not pressed in the long run.

18. The learned trial Judge held that the exemption clause was illegal, invalid and void and he also held on the facts that Captain Cartner, the pilot, was negligent and therefore, the defendant Corporation as the employer of Captain Cartner was liable in law. On a careful consideration of the learned Judge's decision on (1) the exemption clause and (2) the negligence of Captain Cartner, we have come to the conclusion that his decision cannot be sustained. We shall presently discuss these two questions which are crucial in this appeal.

19. In addition to these two points the learned Judge has discussed the doctrine of res ipsa loquitur and the applicability of common law in India and relying on his judgment in Sm. Mukul Dutta Gupta v. Indian Airlines Corporation dated 11-8-1961: he came to the conclusion:

> "In my judgment, the rules of justice, equity and good conscience applicable to internal carrier by air in India are not the rules of common law carrier in England, but the rules to be found in Carriage by Air Act, 1934. The Indian legislature has indicated that it should be applied to non international air carriage of course "subject to exception, adaptation and modification.""

Although the power to except, adapt or modify was given to the Central Government, yet the learned Judge himself applied them without the Central Government acting in the matter, in the belief that

it was open to him to extend that law in that manner, We are unable to accept this view and we are of the opinion that the learned trial Judge's view noticed above is erroneous.

20. The most important question in this appeal is the validity or otherwise of the exemption clause. The learned trial Judge has held the exemption clause to be invalid, illegal and void on that ground that:

> (a) it is against Section 23 of the Indian Contract Act, although however he has found that the agreement was not bad on the ground of unreasonableness;
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> (b) this exemption clause cannot deprive the heirs and legal representatives of the deceased because they did not enter into this contract and, therefore, such an exemption clause would be unavailing under the Fatal Accident Act under which the present suit for damages has been brought;
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> (c) this exemption clause is bad on the ground that somehow or other broad principles of the Warsaw Convention should be applied to India not as such but as rules of justice, equity and good conscience which according to the learned Judge this exemption clause violates. In other words, the learned trial Judge appears to take the view that the exemption clause is against the principles of some policy which though not technically applicable in this country is some how or other against some kind of equity and good conscience and, therefore will be regarded as against the public policy.

21. We are satisfied on this point that the learned Judge's decision that the exemption clause is invalid is erroneous. It is against both, the principles of law as well as against decided authorities which are binding on us and which have settled the law after a long series of many decisions on the point. The only case on which the learned Judge relied for his decision on this point is Secy. of State v. Mt. Rukhminibai, AIR 1937 Nagpur 354. What the learned Judge failed to appreciate about that case is that it is not an authority on the exemption clause at all. In fact it does not deal with the validity or otherwise of any exemption clause of this nature or of any exemption clause in a ticket containing these express terms exempting the liability for negligence. This case lays down the proposition that though there is a strong presumption that any rule of English law is in accordance with the principles of justice, equity and good conscience in England, yet the Court in India is entitled to examine the rules in order to find out whether the rules are in accordance with the true principles of equity. Sir Barnes Peacock said in the case Degumburee Dabee v. Eshan Chunder Sein, 9 Suth WR 230 whether the rules were in accordance with the true principles of equity (sic) and that the Courts in India had on several occasions, refused to apply a rule of English law on the ground that ft was not applicable to Indian society and circumstances. The only question on which these observations were being made by the learned Judges there in the Nagpur ease was how far the English doctrine of common employment applied in India to cases which in England would have come under the Employers' Liability Act. That was the only question. There no question turned up on exemption clause in a contract or as a term or a condition in a ticket for carriage exempting liability for negligence. All these observations, therefore, about common law, equity and good

conscience that are to be found there, are only obiter except in so far as they relate to the point of the doctrine of common employment. That was the only point discussed and decided there. We are satisfied that this Nagpur case is no authority for holding that in the instant appeal before us the exemption clause is illegal and invalid.

22. Before discussing the English law it will be appropriate to discuss the binding authorities and decisions so far as this court is concerned. It is laid down clearly and without any ambiguity by the Privy Council as early as 1891 in Irrawaddy Flotilla Co. v. Bugwan Das, 18 Ind App 121 (PC) that the obligation imposed by law on common carriage in India is not founded upon contract, but on the exercise of public employment for reward. In fact, that decision of the Privy Council is a clear authority to say that the liability of common carriers in India is not affected by the Indian Contract Act 1872. Therefore, no question of testing the validity of this exemption clause with reference to Section 23 of the Indian Contract Act can at all arise. The Contract Act does not profess to be a complete Code dealing with the law relating to contracts and the Privy Council says that it purports to do no more than to define and amend certain parts of the law. Lord Macnaghten, at page 129, put the law beyond any doubt in the following terms:

> "At the date of the Act of 1872, the law relating to common carriers was partly written, partly unwritten law. The written law is untouched by the Act of 1872. The unwritten law was hardly within the scope of an Act intended to define and amend the law relating to contracts. The obligation imposed by law on common carriers has nothing to do with contract in its origin. It is a duty cast upon common carriers by reason of their exercising a public employment for reward. 'A breach of this duty' says Dallas, C. J., Bretherton v. Wood, (1821) 3 B and B 54 is a breach of the law, and for this breach an action lies founded on the common law which action wants not the aid of a contract to support it'. If in codfying the law of contract the Legislature had found occasion to deal with tort or with a branch of the law common to both contract and tort, there was all the more reason for making its meaning clear."

23. Having regard to this decision of the Privy Council which we consider to be binding on us there is no scope left for further argument that an exemption clause of this kind is hit by any section of the Contract Act, be it Section 23 or any other section, because the Indian Contract Act itself has no application. In fact the subsequent observation of Lord Macnaghten at p. 130 of the report puts the whole position beyond argument and controversy so far as this court is concerned, when His Lordship said:

> "The combined effect of Sections 6 and 8 of the Act of 1865 (Carriers Act 1865) is that, in respect of property not of the description contained in the Schedule, common carriers may limit their liability by special contract, but not so as to get rid of liability for negligence. On the Appellants' construction the Act of 1872 (The Indian Contract Act) reduces the liability of common carriers to responsibility for negligence, and consequently there is no longer any room for limitation of liability in that direction. The measure of their liability has been reduced to the minimum permissible by the the Act of 1865".

24. Finally, therefore, Lord Macnaghten observed at p. 131 of the report as follows:

> "These considerations lead their Lordships to the conclusion that the Act of 1872, (Indian Contract Act) was not intended to deal with the law relating to common carriers, and notwithstanding the generality of some expressions in the chapter on bailments, they think that common carriers are not within the Act".

24a. No doubt, it may be essential to point out straightway at this stage that the Carriers Act of 1865 has no application to the facts of this case because that Act deals only with property and that also not in carriage by air.

25. Mr. Dutt Roy, appearing for the plaintiffs-respondents attempted to distinguish this Privy Council decision by saying that this decision was only concerned with Sections 151 and 152 of the Indian Contract Act which deal only with the bailment and therefore, was no authority on Section 23 of the Contract Act. We are unable to accept that distinction because the ratio of the decision of the Privy Council rests on the fact that the whole of the Indian Contract Act as pointed out by Lord Macnaghten did not apply to the law relating to common carriers

26. A Division Bench of this Court also had occasion to discuss the exemption clause and its validity in an Air Ticket. That will be found in Indian Airlines Corporation v. Keshavlal F. Gandhi, . This Division Bench decision is a clear authority for the proposition that the present appellant Indian Airlines Corporation is a common carrier and that the relationship between the parties to the contract of carriage is to be governed by common law of England governing the rights and liabilities of such common carriers. This Division Bench decision proceeds to lay down that the law permits common carriers totally to contract themselves out of liabilities for loss or damage of goods carried as common carriers. Then it comes to the conclusion that parties to the contract bind themselves by the contract and it is not for the court to make a contract for the parties or to go outside the contract. The Division Bench also expressed the view that if the contract offends against the provisions of the Contract Act, e.g., if opposed to public policy, then only the court may strike down the contract, but even then it cannot make a new contract for the parties.

27. The exemption clause which the Division Bench was considering in that case also exempted the Airlines Corporation from "any liability under the law whether to the sender or to the consignee or to their legal representatives, in case of damage or loss or pilferage or detention from any cause whatsoever (including negligence or default of pilots, agents, flying ground or other staff or employees of the carrier or breach of statutory or other regulations) whether in the course of journey or prior, or subsequent thereof, and whether while the freight be on board the aircraft or otherwise".

28. The Division Bench came to the conclusion that this contract did not offend against the provisions of the Indian Contract Act and that it gave complete immunity to the defendant Corporation from loss or damage to the goods consigned to its care for carriage.

29. The argument that Section 23 of the Contract Act was not considered in that case cannot also be a reason to hold that this particular section of the Contract Act makes this exemption clause bad. In

Bombay Steam Navigation Co. v. Vasudev Baburao Kamat," ILR 52 Bom 37: (AIR 1928 Bom 5) the view of Sankaran Nair, J., in his dissenting judgment in Sheik Mahammad Ravuther v. B. I. S. N. Co. Ltd., ILR 32 Mad 95, expressing the opinion that Section 23 of the Contract Act hits such exemption clause was rejected. In fact in a recent decision of the Madras High Court in Indian Airlines Corporation v. Jothaji Maniram, the point is made clear beyond doubt. There it is held that a common carrier is a person who professes himself ready to carry goods for everybody. In the case of a common carrier the liability is higher, because he is considered to be in the position of insurer with regard to the goods entrusted to him. But where it is expressly Stipulated between the parties that the carrier is no" a common carrier, that conclusively shows that the carrier is not liable as a common carrier. It was also distinctly laid down by that decision that even assuming that the carrier could be deemed to he a common carrier or held liable as such, it was open to such a carrier to contract himself out of liability as common carrier, or fix the limit of his liability. This Madras decision given by Ram-chandra Iyer, J., reviews all the relevant decisions on this point. It also notices at page 288 of the report the view of Sankaran Nair, J. and rejects it.

30. In a recent Division Bench decision of the Assam High Court in Rukmanand Ajitsaria v. Airways (India) Ltd., reported in AIR 1960 Assam 71 certain important propositions of law arc clearly laid clown. It is an authority to say that the liability of the internal carrier by Airways who is not governed by the Indian Carriage by Air Act, 1934, or by the Carriers Act, 1865 is governed by the English Common law since adopted in India and not by the Contract Act. It proceeds to lay down that under the English common law, the carrier's liability is not that of a bailee only, but that of an insurer of goods, so that the carrier is bound to account for loss or damage caused to the goods delivered to it for carriage, provided the loss or damage was not due to an act of God or the King's enemies or to some inherent vice in the thing itself. It also lays down that at the same time, the common law allows the carrier almost an equal freedom to limit its liability by any contract with the consignor. In such a case, its liability would depend upon the terms of the contract or the conditions under which the carrier accepted delivery of the goods for carriage. It provides that the terms could be very far-reaching and indeed they could claim exemption even if the loss was occasioned on account of the negligence or misconduct of its servants or even if the loss or damage was caused by any other circumstance whatsoever, in consideration of a higher or lower amount of freight charged. In unmistakable terms the learned Chief Justice of the Assam High Court says that, however amazing a contract of this kind may appear to be, yet that seems to be the state of the law as recognised by the common law of England and adopted by the Courts in India. Lastly this decision of the Division Bench of the Assam High Court is an authority for the proposition that the clause in a contract of carriage by air giving complete immunity to the carrier from liability could not be impugned on the ground that it was hit by Section 23 of the Indian Contract Act, because the Contract Act had no application to the case nor could it be said to be opposed to public policy. The learned Chief Justice of the Assam High Court points out that Exemption clauses of this nature have been upheld by the Courts and there being no other statutory bar as provided under the Indian Carriers Act or under the Indian Carriage by Air Act, which have no application to this case, under the common law a contract of this nature was permissible and therefore, this decision also dissents from the decision of Sankaran Nair, J. as mentioned above. Sarjoo Prosad, C. J., in this decision observes at p. 74 of the report quoted above on the point of Section 23 of the Indian Contract Act as hitting the validity of such an exemption clause as follows:

> "These weighty observations of Sir Sankaran Nair compel serious attention and attract by their freshness and originality; but it seems too late now to turn away from the beaten track of judicial precedents, which have since acquired all the sanctity of a stare decisis. I am, however, unable to understand, and I say so with the utmost respect, how the learned Judge could overlook the very point which the Judicial Committee of the Privy Council had decided and held that the carrier's liability was governed by the English common law and not by the terms of the Contract Act, especially when that decision was given by the Privy Council with full consciousness of the conflict of judicial opinion in India. That the said decision of the Judicial Committee has been subsequently followed in other cases is beyond question."

31. The Privy Council decision and all the Indian decisions, therefore, are against the finding of the learned trial Judge in this case. Looking at the English Law and the High authorities of the English Law the conclusion is further reinforced.

32. Before we discuss the English Law and the English decisions on this point we may notice this that Mr. Dutt Roy for the respondent realising the mass of authorities against his contention tried to distinguish them by saying that all these cases related to goods and not to human life. He appears to suggest, as the learned trial Judge has also said, that while for some reason or other there could be complete exemption including one for negligence in case of contract for the carriage of goods such a cause would be bad it is concerned the carriage of passengers and their life. In jurisprudence dealing with the law of Common carriers it is difficult to see how the difference could be drawn legally between goods and life.

33. Fortunately, however, this point is also decided by the high authority of the House of Lords and that also in recent times. In the leading ease of Ludditt v. Ginger Coote Airways, Ltd. 1947 AC 233 Lord Wright at p. 245 after quoting the words of Maule J., observed as follows:

> "In tin's passage Maule J. is speaking of carriers of goods, but the same principle is true, mutatis mutandis, of a carrier of passengers who in law is neither an insurer nor precluded from making a special contract with his passengers."

34. Lord Wright in the same report at p. 242 accepted the classic enunciation on this point by Lord Haldane in Grand Trunk Ry. Co. of Canada v. Robinson reported in 1915 AC 740: (AIR 1915 PC 53) where Lord Haldane stated at p. 747 (of AC): (at p. 55 of AIR) as follows:

> "There are some principles of general application which it is necessary to bear in mind in approaching the consideration of this question. If a passenger has entered a train on a mere invitation or permission from a railway company without more, and he receives injury in an accident caused by the negligence of its servants, the company is liable for damages for breach of a general duty to exercise care. Such a breach can be regarded as one either of an implied contract, or of a duty imposed by the general law, and in the latter case as in form a tort. But in either view this general duty may, subject to such statutory restrictions as exist in Canada and in Engand in

> different ways, be superseded by a specific contract which may either enlarge, diminish or exclude it. If the law authorises it, such a Contract cannot be pronounced to be unreasonable by a court of justice. The specific contract, with its incidents either expressed or attached by law, becomes in such a case the only measure of the duties between the parties, and the plaintiff cannot by any device of form get more than the contract allows him."

35. It is, therefore, clear that the distinction that the learned Counsel for the respondents attempted to make between a contract for carriage of goods and a contract for carriage of passengers cannot be sustained. Both can be limited and both can exclude liability even for negligence.

36. Without multiplying authorities on this point which in our view are almost unanimous today we shall refer to another decision of the House of Lords in Hood v. Anchor Line (Henderson Brothers) Ltd., reported in 1918 AC 837. The import of this decision answers some point faintly argued on behalf of the respondents how far small words printed at the foot of the document exempting liability were binding on the passenger. Lord Finlay L. C. at pages 842-843 observed inter alia as follows:

> "In my opinion the Courts below were right. Out of many authorities bearing upon the point I think it necessary to refer to three only--Henderson v. Stevenson, (1875) 2 HL Sc 470; Parker v. South Eastern Ry. Co., (1877) 2 CPD 416 and Richardson, Spence and Co. v. Rowntree, (1894) AC 217. The first of these cases is a decision of this House that a condition printed on the back of a ticket issued by a steamship packet company absolving the company from liability of loss, injury, or delay to the passenger or his luggage was not binding on a passenger who has not read the conditions and has not had his attention directed to the conditions by anything printed on the face of the ticket, or by the carrier when issuing it. The second and the third of these cases show that if it is found that the company did what was reasonably sufficient to give notice of conditions printed on the back of a ticket the person taking the ticket would be bound by such conditions.
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> * * * * * It is quite true that, it the contract was complete, subsequent notice would not vary it, but when the passenger or his agent gets the ticket he may examine it before accepting, and if he chooses not to examine it when everything reasonable has been done to call his attention to the conditions he accepts it as it is."

37. It has been found by the learned trial Judge that these conditions in the present case exempting the carrier from liability were duly brought to the notice of the passenger and that he had every opportunity to know them. Here in the Court of Appeal we are satisfied on the record that it was so.

38. Blackburn, J., in the well known case of McCawley v. Furness Rly. Co. reported in (1872) 8 QB 57 at p. 57 dealing with a ease of personal injury lays down the same principle that civil liability, as distinguished from criminal liability, can be excluded by an appropriate agreement, and observed as follows:

> "The duty of a carrier of passengers is to take reasonable care of a passenger, so as not to expose him to danger, and if they negligently expose him to danger, and he is killed, they might be guilty of man-slaughter, and they would certainly be liable to the relatives of the deceased in damages. But here the passenger was carried under special terms; that agreement would not take away any liability that might be incurred as to criminal proceedings, but it regulates the right of the plaintiff to recover damages. The plea stairs that it was agreed that the plaintiff, being a drover travelling with cattle, should travel at his own risk; that is, he takes his chance, and, as far as having a right to recover damages, he shall not bring an action against the company for anything that may happen in the course of the carriage. It would of course be quite a different thing were an action brought for an independent wrong, such as an assault, or False imprisonment. Negligence in almost all instances would be the act of the Company's servants, and "at his own risk" would of course exclude that, and gross negligence would be within the terms of the agreement; as to wilful, I am at a loss to say what that means: but any negligence for which the company would be liable (confined, as I have said, to the journey, and it is so confined by the declaration) is excluded by the agreement."

39. These weighty observations of Blackburn, J. found approval subsequently. Atkin L.J. in Rutter v. Palmer, (1922) 2 KB 87 at p. 94 referred to the above decision. In the ease of (1922) 2 KB 87 there was a clause "Customers cars are driven at customer's sole risk" and it was held that the above clause protected the defendant from liability for the negligence of his servants, and that the action failed. Discussing the general principles on this point and specially on the construction and interpretation of the words used in exemption clause, whether sufficient to exclude liability under a ton-tract or also of tort Denning L. J. in White v. John Warwick and Co. Ltd. (1953) 1 WLR 1285 at p 1293 lays down the following principles:

> "In this type of case two principles are well settled. The first is that if a person desires to exempt himself from a liability which the common law imposed on him, he can only do so by a contract freely and deliberately entered into by the injured party in words that are clear beyond the possibility of misunderstanding. The second is; if there are two possible heads of liability on the part of defendant, one for negligence, and the other a strict liability, an exemption clause will be construed, so far as possible, as exempting the defendant only from his strict liability and not as relieving him from his liability for negligence."

There, however, there was no finding on negligence and a new trial was ordered for a finding on that issue.

40. Without discussing any more English case law on the point we can profitably refer to the Third Edition Vol. 4 of Halsbury's Laws of England, Articles 465 and 466 at pages 186 to 188. The law is clearly formulated there. The statement of law there is that any contract which contains conditions enlarging, diminishing or excluding a carrier's common law duty of care to his passengers cannot, in the absence of any statutory restriction on the imposition of such conditions, be pronounced

unreasonable by a court of justice with a view to one party getting more than the contract allows him; but it would seem that conditions which are wholly unreasonable are not binding upon a passenger even if steps otherwise reasonable have been taken to give him notice of them. But then it stated that any term in a contract for the conveyance of a passenger in a public service vehicle negativing or restricting liability or imposing conditions as to the enforcement of liability in respect of the death or bodily injury of the passenger when being carried in or entering or alighting from the vehicle; is void. That moans that this exemption of liability may be prevented by statute and if that is so the statute inter alia will prevail. But then the point here in India is that no Act applies to internal carriage by air. The Warsaw Convention does not apply; nor is there any statute which prevents or limits the scope or content of such an exemption clause. Therefore, it is significantly pointed out in 31 Halsbury (Third Edition) in Article 1214 at pages 765-766 that, "There are no statutory terms and conditions for the carriage of passengers, but, as a common carrier could vary his liability by making a special contract, so railway undertakers can carry passengers on their own terms and conditions by means of a special contract usually made between the undertakers and the passenger by the buying of a ticket."

41. Taking a clue from this statement of the law Mr. Dutt Roy, learned Counsel for the respondent appealed to certain special statutes in India not connected with internal carriage by air. For instance he draws our attention to Section 82A of the Indian Railways Act introduced in 1943 by the Railways Amendment Act. It provides:

> "When in the course of working a railway an accident occurs, being either a collision between trains of which one is a train carrying passengers or the derailment of or other accident to a train or any part of a train carrying passengers, then whether or not there has been any wrongful act, neglect or default on the part of the railway administration such as would entitle a person who has been injured or has suffered loss to maintain an action and recover damages in respect thereof, the railway administration shall, notwithstanding any other provision of law to the contrary, be liable to pay compensation to the extent set out in Sub-section (2) and to that extent only for loss occasioned by the death of a passenger dying as a result of such accident, and for personal injury and loss, destruction or deterioration of animals or goods owned by the passenger and accompanying the passenger in his compartment or on the train, sustained as a result of such accident"

Sub-section (2) of Section 82A provides.

> "The liability of a railway administration under this section shall in no case exceed ten thousand rupees in respect of any one person."

Far from helping the respondent's contention on this point this statutory example goes against that contention. It shows that a statute had to he made in order to prevent the right to contract out If there was no such right then there was no need for such a provision. Secondly it also contains the remnant of a recognition of that right by limiting the quantum of damage so that even if in actual fact there is more damage in particular that damage is not recoverable. It is an implicit recognition

of the law that an exemption clause could be made under certain terms and conditions. The point is that if it was necessary to introduce such a statutory amendment to bring the railway accidents within the bounds of law, then applying the parity of reasoning it must follow that when such a law in the carriage by air within India is not similarly amended, it will not be right to import such notions from other statutes with regard to other carriers for it might equally be the policy to leave freedom of contract untouched in new vehicles of transport such as the air. Again on the other hand a loss of life whether it takes place on the land or in the air cannot mean different damages and if the Railways Act is to be the measure of such loss, a view which we reject, the Indian legislature in the Railways Act appears to put the maximum value of human life at ten thousand rupees.

42. The learned Counsel for the respondent in his journey for exploration in the field of other statutes came upon Section 63 of the Motor Vehicles Act which provides:

> "Any contract for the conveyance of a passenger in a stage carriage or contract carriage, in respect of which a permit has been issued under this Chapter, shall, so far as it purports to negative or restrict the liability of any person in respect of any claim made against that person in respect of the death of or bodily injury to, the passenger while being carried in, entering or alighting from the vehicle, or purports to impose any conditions with respect to the enforcement of any such liability, be void."

The answer on this point again is that this section of the Motor Vehicles Act is not such a statute or statutory provision which at all applied to internal carriage by air. It cannot be applied by analogy.

43. These statutory provisions in other statutes seem to indicate that the legislature in its wisdom, has not up till now thought fit to legislate on this point about internal carriage by air in India either to limit or exclude contract for exemption for liability.

44. On this overwhelming mass of authority we are bound to hold that both in respect of Contract Act and tort the present exemption clause set out above in the appeal before us is good and valid and it legally excludes all liability for negligence. We also hold that it cannot be held to be bad under Section 23 of the Contract Act as stated above.

45. It now remains to discuss the learned trial Judge's finding that this exemption clause is bad under the Fatal Accidents Act because it purports to bind the heirs and legal representatives of the contracting party who could not be bound by such a contract. A decision on this point must depend on the provision of the Fatal Accidents Act. The Fatal Accidents Act of 1855 provides by Section 1-A as follows:

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

felony or other crime."

"Every such action or suit shall be for benefit of the wife, husband, parent and child, if any, of the person whose death shall have been so caused, and shall be brought by and in the name of the executor, administrator or representative of the person deceased; and in every such action the Court may give such damages as it may think proportionate to the loss resulting from such death to the parties respectively, for whom and for whose benefit such action shall be brought; and the amount so recovered, after deducting all costs and expenses, including the costs not recovered from the defendant, shall be divided amongst the before mentioned parties or any of them, in such shares as the Court by its Judgment or decree shall direct."

46. A glance at the above provision, will at once make it clear that what is being preserved is the right of the contracting party to recover damages for neglect or default and nothing more. Significant words are "If death had not ensued" "the party injured to maintain an action and recover damages in respect thereof". Therefore, what is enuring to the benefit of the husband, wife, parent or child is the personal right to recover damages. Normally in the case of death this right is extinguished by death following the principle, actio personalis moritur cum persona. This Act prevents such extinguishment, though that is not its only effect. But nevertheless these heirs or the specified beneficiaries under the Act do not get any higher right, than that of the person had he lived. It is the same right as the person would have got to recover damages if he had not died. It is his claim. Therefore, he before death can contract to extinguish that right. When he does so the beneficiaries or his heirs under the Act then would not get that right. No doubt what the beneficiaries under the Act has got is a new right of action which was not there in the law before, but it is the same right of action which the contracting party would have got if he had not died. It is in that sense that the famous observation of Lord Blackburn in Mary Seward v. The owner of the "Vera Cruz" reported in (1884) 10 AC 59 at pp. 70 and 71 should be understood. Lord Blackburn said there:

"... I think that when that Act (Lord Campbell's Act) is looked at it is plain enough that if a person dies under the circumstances mentioned, when he might have maintained an action if it had been for an injury to himself which he had survived, a totally new action is given against the person who would have been responsible to the deceased if the deceased had lived; an action which, as is pointed out in Pym v. Great Northern Rly. Co. (1862) 2 B and S 759, is new in its species, new in its quality, new in its principle, in every way new, and which can only be brought if there is any person answering the description of the widow, parent, or child, who under such circumstances suffers pecuniary loss by the death. That is a personal action, if personal action there ever can be."

Although the Lord Campbell's Act in England and the Fatal Accidents Act here remove the operation of the maxim "actio personalis moritur cum persona" yet in so far as it gives a right to the specified beneficiaries under the Act, it is new cause of action, and that is what Lord Chancellor Selborne in the same case at p. 67 observed:

> "Lord Campbell's Act gives a new cause of action clearly, and does not merely remove the operation of the maxim, "actio personalis moritur cum persona", because the action is given in substance not to the person representing in point of estate the deceased man, who would naturally represent him as to all his own rights of action which could survive, but to his wife and children, no doubt suing in point of form in the name of his executor. And not only so, but the action is not an action which he could have brought if he had survived the accident, for that would have been an action for such injury as he had sustained during his lifetime, but death is essentially the cause of the action, an action which he never could have brought under circumstances which if he had been living would have given him, for any injury short of death which he might have sustained, a right of action, which might have been barred either by contributory neglience, or by his own fault, or by his own release, or in various other ways"

47. This principle was further explained and clarified and considered by the English Court of Appeal in Nunan v. Southern Rly. (1924) 1. K. B. 223, which specially considered the question at what point of time was it necessary to consider whether the deceased person would have had such a right of action. The Court of Appeal followed the dictum of Lord Dunedin in the House of Lords in British Electric Rail Co. v. Gentile, reported in 1914 AC 1934: (AIR 1914 PC 224) to the effect that:

> "Their Lordships are of opinion that the punctum temporis at which the test is to be taken is at the moment of death, with the idea fictionally that death has not taken place."

After explaining and following that dictum, Bankes L. J. at page 226 of the report of the case (1924) 1 KB 223 observes as follows:

> "On the authority of that decision one shirts with the question, what was the position of the deceased at that particular moment? In some cases the deceased may not have been entitled at any time to maintain an action for the injury complained of, as where he had by his own negligence contributed to that injury, or, before the act or neglect which caused the injury had been done or committed, he had contracted with the defendants that he would under no circumstances claim any damages for such an act or neglect. In other cases he may originally have been entitled to maintain an action for the injury and may by his own conduct have disentitled himself to maintain it, as where he has compromised a claim in respect of it, or has allowed the time to go by within which under some Act, such as the Public Authorities Protection Act, the action ought to have been commenced."

48. Lord Justice Scrutton at pp. 227-28 of the same report put the matter clearly beyond all doubts in the following terms:

> "The Fatal Accidents Act has, I think, been interpreted, by authorities which are binding on us, to mean that the dependants have a new cause of action, yet cannot

> recover on that cause of action unless the deceased had at the time of his death a right to maintain an action and recover damages for the act, neglect or default of which they complain. He may have lost such a right in a number of ways ho may have been guilty of contributory negligence; he may have made a contract by which he excluded himself from the right to claim damages, and in such a case as that the decisions in Haigh v. Royal Mail Steam Packet Co., Ltd., (1884) 49 LT 802 and the Stella, 1900 P. 161 show that the right of his dependants would be also barred. Again he may have lost his right from failure to make a claim within the period limited by some statute; or he may have lost it by reason of, a release by accord and satisfaction. In all these cases, if he could not have brought an action at the time of his death neither can his dependants."

49. These observations clearly lay down the law that if the deceased had by a contract during his life time excluded himself from the right to claim damage, his dependants or beneficiaries under the Act cannot claim it Following this principle, with which we agree, we are satisfied that the condition in the contract exempting liability is not hit by the Fatal Accidents Act and cannot be invalidated thereunder.

50. The learned trial Judge appears to apply the principles of Warsaw Convention embodied in the Carriage by Air Act of 1934 and by the application of those principles came to the conclusion that the exemption clause was bad and invalid because of such principles. It is difficult to accept the trial Judge's reasoning on this point and we are of opinion that he was clearly wrong in law in applying those principles. He realised his difficulties and therefore, he applied them as rule of justice, equity and good conscience. The Indian Carriage by Air Act, 1934, has no application whatever in the present case because:

> (1) it applies only in the case of international carriage by air which it is not in the present case and (2) the application of that Act to carriage by air which is not international can only be made by the Central Government by notification in the official Gazette which has not been done in this case, On those two grounds alone the learned Judge's application of the Act or its schedules is clearly wrong in the facts of this case.

51. The preamble to the Carriage by Air Act, 1934, itself expressly says that it is an Act to give effect to a Convention for the unification of certain rules relating to international carriage by air. The preamble also recites that the Warsaw Convention for the unification of certain rules relating to international carriage by air (sic) and which is to be found in the First Schedule to that Act. The clear definition of "international carriage" in Rule 1 of the First Schedule shows that this Warsaw Convention cannot be applied to internal carriage by air in India at all. Rule 22 of the First Schedule containing the Warsaw Convention limits the carrier's liability for each passenger to the sum of 1,25,000 francs. The next rule, Rule 23, says that:

> "Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in these rules shall be null and void, but the nullity of any

such provision does not involve the nullity of the whole contract which shall remain subject to the provisions of this Schedule." If this Act itself does not apply its schedule cannot apply and these rules of the Warsaw Convention cannot apply to the internal carriage by air in India. To apply them to India as principles of justice, equity and good conscience is to violate the statute. There is in this particular case no scope for the introduction of vague and undefined rules of justice, equity and good conscience because of the very specific provision of Section 4 of the Carriage by Air Act, 1934 which provides as follows:

"'The Central Government may, by notification in the Official Gazette apply the rules contained in the First Schedule and any provision of Section 2 to such carriage by air, not being international carriage by air as defined in the First Schedule, as may be specified in the notification, subject, however to such exceptions, adaptations and modifications, if any, as may be so specified."

52. In my judgment, this express provision in Section 4 of this Act excludes the application of the rules of Warsaw Convention to internal carriage by air in India unless the Central Government chooses to apply it and that also by proper publication in the Gazette and also with such exceptions, adaptations and modifications as it thinks fit. That shows that it bars the application of the rules of Warsaw Convention to internal carriage by air in India by judges through the back door of the vague conception of justice, equity and good conscience. The legislature by Section 4 did not leave any scope for such a course to be adopted. What the learned Judge has done in this connection is not to apply even the rules of the Warsaw Convention as it appears but he has picked and chosen some only of those rules and says that he would apply them on the ground of justice, equity and good conscience. We have no hesitation in holding that such a course is not permissible at all under the Act If anybody can modify, adapt or make exception, Parliament has expressly legislated it is the Central Government and not the Judge or the Court in India, Therefore, the learned trial Judge's application of some only of the Rules of Warsaw Convention by modification, exception and adaptation to the facts of this case is entirely illegal and erroneous. It may be emphasised in this connection that although the Warsaw Convention was signed on the 12th October, 1929 and although the Carriage by Air Act was passed in 1934 the fact that for these long thirty years up to this year 1964, the Central Government has not chosen to make any rules either with or without modification, adaptation or exception under Section 4 of that Act to apply them to Internal Carriage by Air Act in India, shows that Parliament in India is not prepared to apply these rules at this stage to internal carriage by air.

53. In that view of the matter so far as the exemption clause is concerned it is not necessary for us to discuss, far less to decide, the general proposition which the learned trial Judge lays clown that English Common Law of torts should not be applied in India and should be modified in their application to India not only by considerations of justice, equity and good conscience but also by looking at particular statute in England and introducing the principles of such English statute into India under the cover of rules of justice, equity and good conscience, and on the plea that the very home of Common Law has altered such rules of Common Law by statute. This Court is of the opinion that it is far too late in the day in India, specially in the field of torts to debar generally the

English Common Law and its broad notions. Specially in the field of torts there has been significantly little, if no codification at all here in India. Application of Common Law and particularly on the Original Side of this Court is recognised not only expressly by such provisions as in Clauses 4 and 18 of the Charter of 1774, Section 11 of the High Court Act, 1871, clauses 18 and 19 of the Letters Patent, Section 115 of the Government of India Act and Article 372 of the Constitution. Apart from the constitutional documents cited above many high authorities of case law have put the matter beyond doubt. Lord Macnaghten in 18 Ind App 121 (PC) already cited on another point observed at p. 125 of the report on ibis point as follows;

> "For the present purpose it is not material to inquire how it was that the common law of England came to govern the duties and liabilities of common carriers throughout India. The fact itself is beyond dispute. It is recognised by the Indian Legislature in the Carriers Act, 1865, an Act framed on the lines of the English Carriers Act of 1830."

54. Our Supreme Court clearly expressed the view in Director of Rationing and Distribution v. Corporation of Calcutta, that far from the Constitution of India making any change in the legal position it is clearly indicated that the laws in force, which expression must be interpreted as including the common law of England which was adopted as the law of this country before the Constitution came into force continue to have validity, even in the new set up, except in so far as they come in conflict with the express provisions of the Constitution. The learned Chief Justice of India observed at p. 1360 of that report as follows:

> "If we compare the provisions of Article 366(10) which defines "existing law" which has reference to law made by a legislative agency in contradistinction to "laws in force" which includes not only statutory law, but also custom or usage having the force of law, it must be interpreted as including the common law of England which was adopted as the law of this country before the Constitution came into force."

55. Setalvad in his Hamlyn Lectures on the Common Law in India at pages 30 to 56 points out that the principles of English Law came to be administered particularly in the mofussil as justice, equity and good conscience. In the High Court in its Original jurisdiction the position was otherwise. No doubt some of the peculiar common law doctrines were not adopted in India. Setalvad also points out at page 108 of that book that "An important branch of law which has remained uncodified in India is the law relating to civil wrongs". The learned author also points out at page 110 that a draft of a code of torts for India was prepared by Sir Frederick Pollock but it was never enacted into law and finally observes as follows:

> "In the absence of a code the law of civil wrongs administered in India is almost wholly the common law of England. So much of the English law as seemed suitable to Indian conditions has been applied as rules of justice, equity and good conscience."

The courts in India have made their own departures from the common law rules to adjust them to Indian conditions for instance-

(a) the doctrine of common employment as in the case already cited AIR 1937 Nag 354;

(b) non application of the English common law principle that although it is possible to bring separate actions against joint tortfeasors the sums recoverable under these judgments by way of damages are not in the aggregate to exceed the amount of the damages awarded by the judgment first given as in Nawal Kishore v. Rameshwar Nath, (S) . Setalvad also points out at page 34 of the Hamlyn Lectures that "The Indian law of torts still consists of the rules of the English common law applied by judicial decisions to India with some variations," It is unnecessary to pursue, therefore, this branch any further.

56. Before concluding our observations on the exemption clause it will be appropriate to state the position in law as put by she learned Editor of the Twelfth Edition of Clerk and Lindsell on Torts in Article 804 page 447 in the following terms:

"Subject to some statutory exceptions, it is always possible by a suitable contract to exclude liability for negligence. In every case whether liability is excluded depends on the true construction of the contract."

Numerous authorities there cited may be seen and it is needless for us to discuss them here. Lord Morton in Canada Steamship Lines Ltd. v. The King, reported in 1952 AC 192, summarised the principles of construction of exemption clause, with which we respectfully agree, by suggesting three principles, namely,--

(1) If the clause contains language which expressly exempts the person in whose favour it is made from the consequence of the negligence of his own servants, effect must be given to that provision;

(2) If there is no express reference to negligence, the court must consider whether the words used are wide enough, in their ordinary meaning, to cover negligence on the part of the servants of the person in whose favour clause is made; and (3) If the words used are wide enough for the above purpose, the court must then consider whether "the head of damage may be based on some ground other than that of negligence."

Applying those principles of construction the exemption clause in this case by express use of the words "negligence" and "however" cover the claim made in these two suits.

57. The learned Counsel for the respondent not only argued that the exemption clause was bad and invalid but also that it could be severed upholding the rest of the contract. The reason for his doing so apparently was that if the whole contract of the deceased under the ticket was bad then his presence inside the aircraft might be reduced to the presence of a trespasser whose right to claim damages would be more circumscribed because then the important question would arise whether there would be any duty to take care at all towards the trespasser who might not be an invitee. The

point does no more arise for our decision because we have held that the present exemption clause is good and valid. We need, however, say only this that we approve and follow the decision on this point by another Division Bench of this Court in .

58. No doubt in theory and also in practice some contracts can be partially good and partially bad, but then that depends on the question if the bad clause is at all severable without striking at the very root or foundation of the contract. In my opinion an exemption clause of this nature cannot be severed from the contract at all. It is the very basis and foundation of the contract of carnage. The carrier says that he is prepared to take the passenger by air provided the passenger exempts him from liability for negligence. Such a clause is the foundation of the contract. To suggest that this clause can be severed and the rest of the contract of the carriage can be enforced is to beg the whole question. No doubt the carriage is for the price of the ticket but then that carriage and that price are only on that very condition that the carrier shall be exempt from any liability as stated in the exemption clause. To exclude this clause and to uphold other clauses is to make an entirely new contract which the courts cannot and should not allow.

59. Lord Chancellor Viscount Haldane in 1915 AC 740: (AIR 1915 PC 53) observed at p. 748 (of AC): (at p. 56 of AIR), as follows:

> "In a case to which these principles apply, it cannot be accurate to speak, as did the learned Judge who presided at the trial, of a right to be carried without negligence, as if such a right existed independently of the contract and was taken away by it. The only right to be carried will be one which arises under the terms of the contract itself; and these terms must be accepted in their entirety. The company owes the passenger no duty which the contract is expressed on the face of it to exclude, and if he has approbated that contract by travelling under it he cannot afterwards reprobate it by claiming a right inconsistent with it. For the only footing on which he has been accepted as a passenger is simply that which the contract has defined."

60. Lord Haldane in that case also observed at p. 747 (of AC): (at p. 55 of AIR) as follows:

> "But in either view this general duty may, subject to such statutory restrictions as exist in Canada and in England in different ways, be superseded by a specific contract, which may either enlarge, diminish, or exclude it. If the law authorizes it, such a contract cannot be pronounced to be unreasonable by a Court of justice. The specific contract, with its incidents either expressed or attached by law, becomes in such a case the only measure of the duties between the parties, and the plaintiff cannot by any device of form get more than the contract allows him."

Reference in this connection may also be made to Cheshire and Fifoot, on Law of Contract, Fourth Edition at pages 326 to 329 and 8 Halsbury page 147 Article 256.

61. For these reasons I hold that the exemption clause in the contract is good and valid and is a complete bar to the plaintiffs' right of action in the present case.

62. The next point urged on behalf of the appellant was the question of the application of the doctrine of res ipsa loquitur in air accidents. Long and elaborate arguments have been advanced before us. The learned trial Judge has discussed it at length and came to the conclusion that the maxim of res ipsa loquitur applied to this case. Mr. Mitter, learned Counsel for the appellant has challenged that decision.

62a. On a careful consideration of different authorities, we have come to the conclusion that it is not possible to take a doctrinaire view on this branch of the law. There can be no general proposition. It cannot be said that res ipsa loquitur never applies in the case of air accident. Nor can it be said that that it always applies in case of all air accidents. In our opinion it depends on the facts and circumstances in the particular air accident, under consideration by the Court. Res ipsa loquitur means the things speak for itself. If the accident is such that it speaks for itself then in that case it applies to air accident just as much as it does in other cases. On the other hand if the accident is such that the thing does not speak for itself then it does not apply in the case of that particular air accident just as much as it would not apply in other cases. What however is important to bear in mind is the special context in which air accident takes place when judging whether the accident speaks for itself.

63. Charles S. Rhyne in Aviation Accident Law published in 1947 by the Columbia Law Book Company, Washington, at pages 130 to 188, has very carefully discussed this question of the application of the doctrine of res ipsa loquitur. One view is that the doctrine of res ipsa loquitur is inapplicable to aeroplane accidents and is based upon the belief that at the time of the occurrence of the accident the present stage of development of aviation would not allow for any conclusion that the accident would not have happened unless there was negligence on the part of the aeroplane operator. In other words, the doctrine has been held inapplicable because one of the requisites for its application, that the accident is such as does not in the ordinary course of things happen if due care had been exercised, has not been met With the technical knowledge of aircraft design, construction and maintenance which has been gained in the past several years, together with improved safety devices for aircraft and the progress made in accurately forecasting weather conditions, and with growing improvement in science and technology file application of the doctrine of res ipsa loquitur will be made easier. The other view which the courts have taken is that res ipsa loquitur is the doctrine of general application and although it developed at a time when aeroplane or air transport was not contemplated, it may be extended to it if the facts and circumstances so permit.

64. But a very good working test was laid down by the Massachusetts Supreme Judicial Court in Wilson v. Colonial Air Transport, Inc 278 Mass 420 which held:

> "the principle of res ipsa loquitur only applies when the direct cause of the accident and so much of the surrounding circumstances as were essential to its occurrence were within the sole control of the defendants or of their servants".

The facts of the case are also relevant because of the present facts in the appeal before us. In that Massachusetts case the plaintiff relied upon the doctrine where one of the engines of the airplane in

which he was riding as a passenger went dead necessitating a forced landing during which the plaintiff suffered damage. In this appeal before us that is also one of the questions. The Massachusetts Court held that without evidence being introduced showing whether employees of the air transport company, or others, inspected the plane prior to the flight during which the accident occurred, the Court could not determine if the defendant was in sole control of the surrounding circumstances essential to the occurrence of the accident and the res ipsa loquitur doctrine was therefore not applicable. Similarly it has been held by the United States Circut Court of Appeals, in Morrison v. Le Tourneau Co. of Georgia, 138 Fed 339 that the doctrine was inapplicable where there could be only conjecture as to what caused a plane equipped with dual controls to crash into the side of a mountain.

65. Shawcross and Beaumont on Air Law, Second Edition, 1951, discusses this question in Article 345, at pages 320 to 324. The learned Authors expressed their view at page 321 as follows:

> "It is of great importance in aircraft cases, and was the subject of much argument in the U. S. Courts and is applied in Canada. It is submitted that the application of the maxim must depend on the facts of each particular aircraft accident."

With respect we accept that view and hold that there can be no general proposition.

66. Among the illustrations given by Shaw-cross and Beaumont at page 323 is one where a machine crashed owing to the failure of one of its engines within a few seconds of leaving the ground, when the doctrine of res ipsa loquitar was not applied and in support of that three American cases were cited namely, Wilson v. Colonial Air Transport Inc (1932) US Av R 139; Hagymssi v. Colonial Western Airways, Inc (1931) US Av R 73 and Law v. Transcontinental Air Transport, Inc (1931) US Av R 205. There is another illustration given there of a case where the aircraft crashed without any apparent cause in the case of Smith v. Whitley and Nelson, (1943) US Av R 20. There the aircraft went into a spin and crashed and pilot gave evidence for the plaintiff that he did not know why. It was held by the Supreme Court of North Carolina that the doctrine of res ipsa loquitur did not apply because "any number of causes may have been responsible for the plane falling, including causes over which the pilot has absolutely no control, it being common knowledge that aircrafts do fall without fault of the pilot."

67. At this stage it will be appropriate to notice the leading decision of the House of Lords on this point in Woods v. Duncan, 1946 AC 401. In explaining the doctrine of res ipsa loquitur in that case which was the case where a submarine sank with loss of life, the House of Lords lays down that "the principle of res ipsa loquitur only shifts the onus of proof in that a prima facie case is assumed to be made out, throwing on the defendant the task of proving that he was not negligent; this does not mean that he must prove how and why the accident happened; it is sufficient if he satisfies the court that he personally was not negligent"

68. In this present appeal Captain Cartner who was the only witness to speak about the accident said in no unmistakable terms that he was not only not negligent but he used his best judgment and ability. In fact there was no other way out. The learned trial Judge of course in this case rejected

Capatin Cartner's evidence on this point and the reasons of that" rejection we shall presently examine.

69. In this respect it will, therefore, he necessary to notice some of the crucial observations made by the House of Lords in this case of 1946 AC 40L Lord Simon at page 441 of the report observed:

> "I have said that Lieutenant Woods can by an affirmative proof that he was not negligent discharge the burden that lies upon him without satisfying the Court how otherwise the accident happened and I think that he has done so."

At page 439 Lord Simon said:

> "But to apply this principle is to do no more than shift the burden of proof. A prima fade case is assumed to be made out which throws upon him the task of proving that he was not negligent This does not mean that he must prove how and why the accident happened; it is sufficient if he satisfies the court that he personally was not negligent It may well be that tire court will be more easily satisfied of this fact if a plausible explanation which attributes the accident to some other cause is put forward on hrs behalf; but this is only a factor in the consideration of the probabilities. The accident may remain inexplicable, or at least no satisfactory explanation other than his negligence may be offered yet if the Court is satisfied by his evidence that he was not negligent the plaintiff's case must fail."

70. I shall refer to some of the observations made in the speeches of Lord Russell of Killowen, Lord Macmillan, and Lord Simon in this case. Lord Russell at page 425 of the same report observed:

> "The principle does not involve this that, notwithstanding that affirmative proof, he must be held to have been negligent, unless he can solve the mystery and prove how the bow-cap came to be open at the critical moment."

Lord Macmillan at pp. 427 and 428 of the same report lays down the following principle:

> "Despite the searching investigation, official and judicial, to which the circumstances of the calamity have been subjected, it has proved impossible to ascertain some of the most crucial facts, and exactly what happened must now remain a mystery for all time. It is not the task of this House to find an Answer to the problems which the loss of the Thetis presents. The question for this House in these appeals is limited to one aspect of the matter, namely, whether on the evidence adduced enough has been established in fact to bring home liability in law to the defendants or any of them for the death of two of the men who lost their lives in the disaster."

I shall close the reference to this case with the following observations of Lord Simon at page 419 which reads as follows:

> "The case against Lieutenant Woods has been nut as an application of the principle known as res ipsa loquitur, since he was in charge of the forward compartment. Even so, that principle only shifts the onus of proof, which is adequately met by showing that he was not in fact negligent. He is not to be held liable because he cannot prove exactly how the accident happened."

On this principle, which we accept, it was wrong for the trial fudge to hold the defendant Corporation or Captain Cartner liable even if the theory of air lock as the cause of the accident did not find favour with the trial Court.

71. The position of the application of the doctrine of res ipsa loquitur has recently been considered and reviewed again in the decision of Moore v. R. Fox and Sons, reported in (1956) 1 Q. B. 596. In that case the doctrine of res ipsa loquitur was applied and it was painted out that the employers had not discharged the onus of proof placed on them merely by showing that the accident was inexplicable. The principle that this case appears to formulate is that it was not sufficient to show several hypothetical causes consistent with the absence of negligence and that the accident might have occurred without negligence on their part. It lays down the principle that to discharge the onus they (employers) had to go further and either show that they had not been negligent, or give an explanation of the cause of the accident which did not connote negligence by them. Mr. Dutta Roy the learned Counsel for the respondents relied on the judgment of Evershed M. R. in this case. There it was not affirmatively proved that the employers were not negligent, and only certain hypothesis was offered as probable causes of the accident. The situation here in the appeal before us is entirely different. Here there is positive proof and affirmative statement by the pilot himself that he was not negligent and also other evidence. In addition to it there is also the evidence that the cause of the accident was air-lock. Therefore, the principles laid down both by the House of Lords decision in 1946 AC 401 as well as by 1956-1 QB 596 are against the respondents. The present appeal satisfies the tests laid down by the House of Lords if the evidence of Captain Cartner and for the defendant Corporation denying negligence is accepted. It is necessary to point out here that the present appeal is not a case where there was no evidence by the defendant to prove that he was not negligent.

72. A subsequent development of the law was suggested by Lord Denning in House of Lords in Brown v. Rolls Royce Ltd., (1960) 1 All ER HL 577 by drawing a distinction between legal burden of proof and the shifting of inferences of fact, as evidence is tendered, which may cause negligence to be inferred unless further evidence is adduced, and in that sense only, may raise a presumption that needs to be rebutted.

73. The question of res ipsa loquitur really is one relating to the onus of proof. Ordinarily the onus of proof of negligence is on the person who alleges it. But where the doctrine of res ipsa loquitur applies it means that the thing itself speaks for negligence and carries an inference that there was negligence. Hence the res or the thing prima facie proves negligence and so the onus shifts on the defendant to prove that there was no negligence. This is important at the beginning to determine the onus of proof and as to who should lead evidence first. In this case it was immaterial because the Counsel on either side agreed that the defendant should first give evidence to show that the defendant was not negligent. Therefore, there was really no contest technically speaking when the

procedure was one of agreement about the onus of proof. Secondly, this point about the application of the doctrine of res ipsa loquitur becomes less important now when all the evidence has been gone into. When all the evidence is on the record the question of onus is no longer material and it is for us in the court of appeal to go over all the records, facts and evidence and to come to a decision of our own whether there was negligence on the part of the defendant or not. Nor is it any more a distinction between the legal proof and the shifting of inference as Lord Denning suggests. In Chandra Kishore Tewari v. Deputy Commr. of Lucknow in charge of Court of Wards, Sissandi Estate, the Privy Council pointed out at p. 219 on this question of burden of proof as follows:

> "In this case, however, the question is not of any practical importance since both parties have given ample evidence in proof and disproof of the genuineness of the letters and the Courts are called upon only to draw their conclusion on the question after consideration of the entire evidence and the fair probabilities of the case irrespective of technical considerations affecting the burden of proof."

Same view was expressed by the Supreme Court in Moran Mar Basselios Catholicos v. Thukalan Paulo Avira, AIR 1959 SC 31 at p. 38 by the observation:

> "The question of burden of proof at the end of the case, when both parties have adduced their evidence is not of very great importance and the court has to come to a decision on a consideration of all materials."

Again the Supreme Court in Paras Nath v. Smt. Mohani Dasi, AIR 1959 SC 1204 at p. 1205 observed "The onus of proof loses much of its importance where both the parties have adduced their evidence."

74. On these authorities and for the reasons stated above we hold that the maxim or res ipsa loquitur may or may not apply to air accidents, It will depend on the facts of each accident. The test is whether the accident speaks for itself or not. If it does then res ipsa loquitur applies; if it does not the maxim does not apply. Secondly we hold that it is a rule of evidence bearing primarily on the question of onus. It loses, therefore, its importance in a case where all the evidence has been tendered as fully as available and where no question arises about any evidence or any witness or any record being withheld. In other words the expression res ipsa loquitur means no mysterious law and if we may be permitted to quote a classic observation of Morris L.J., in Roe v. Minister of Health, (1954) 2 Q. B. 66:

> "This convenient and succinct formula possesses no magic qualities; nor has it any added virtue, other than that of brevity, merely because it is expressed in Latin."

75. The learned Editors of Clerk and Lindsell on Torts, Twelfth Edition, 1961, in Article 796 at page 442 mentions three factors and formulates the proposition in this way: The doctrine applies:

> "(1) When the thing that inflicted the damage was under the sole management and control of the defendant, or of some one for whom he is responsible or whom he has a

> right to control; (2) the occurrence is such that it would not have happened without negligence. If these two conditions are satisfied it follows, on a balance of probability, that the defendants, or the person for whom he is responsible, must have been negligent There is, however, a further negative condition; (3) there must be no evidence as to why or how the occurrence took place. If there is, then appeal to res ipsa loquitur is inappropriate, for the question of the defendant's negligence must be determined on that evidence."

We accept this enunciation of the principle on this point.

76. In view of the nature of the maxim of res ipsa loquitur as discussed above a further question arises in this appeal how far the pleadings affect this maxim. If the plaintiff himself in his plaint pleads particulars of negligence and particulars of the accident then the question is--Can the doctrine of res ipsa loquitur any more apply? In other words, if the plaintiff is not relying on the thing itself to speak and if the plaintiff himself alleges proof of negligence and specific causes of the accident then how far is he disentitled from invoking the doctrine of res ipsa loquitur. The learned trial Judge came to the conclusion that on the pleadings the plaintiffs had not disentitled themselves to rely on this maxim. We have already set out in detail the particulars of the plaint and the particulars of negligence and accident given therein. We do not quite appreciate why the learned Judge came to this conclusion In the facts of this case specially when the defendant took upon himself the burden of disproving the negligence and going to the box first and specially when all the evidence had been given before him. Mitter, however has insisted that as the learned Trial Judge has come to a finding the Court of appeal should give its decision on the question as it is one of vital importance.

77. As a broad proposition if the plaintiff alleges negligence and gives particulars then according to the well settled principles of evidence and pleading the plaintiff must bear the burden of proving what he pleads in the plaint. After all if the plaintiff gives particulars of the negligence and the defendant's case is that he had not been negligent then it is difficult for the defendant to disprove particulars of the alleged negligence which is denied by the defendant. It leads to a very illogical situation and strictly speaking it will not satisfy what Clerk and Lindsell described above as the "negative condition", namely, there must bo no evidence as to why or how the occurrence took place. If this negative condition is not satisfied the learned Authors further say that the doctrine of res ipsa loquitur does not apply.

78. The learned trial Judge realised the difficulty of this problem but he apparently treats the evidence, particulars and pleading in this case as mere guess work. The verification, however, docs not suggest that these particulars are mere matters of guesswork but they are said to be "matters of record" which obviously meant the records of the Court of Enquiry. The other reason which the learned trial Judge suggested was to quote his words "Indeed the cause of the accident had to be judicially determined. ..... .so as to absolve the court from making any enquiry as to any other probable cause. If the Court is not absolved from the responsibility of finding out the cause of the accident other than the one pleaded in the particulars the rule of res ipsa loquitur must apply having regard to the nature of the accident and to the fact that the cause of accident is unknown which is to

be found out on investigation".

These observations arc directly against the principles laid down by the House of Lords in 1946 AC 401 discussed above. We arc afraid, the learned trial Judge here has made a confusion between the burden of proof and the duties of the Court. The burden of proof is not upon the Court but upon the parties and the litigants before the Court. The burden of Court is the burden of the decision namely to find out on the evidence the correct conclusion. The Court in finding out the correct conclusion can come to any decision or finding by accepting or rejecting the plaintiff's or the defendant's version or can come to an independent version of its own, but which the court feels is established on the record.

79. We now come to the merits of this case to find out whether negligence has been established against the defendant or its servants or agents. It is perhaps not necessary for us to deal with the merits having regard to our decision on the exemption clause. Nevertheless as the learned trial Judge has discussed the merits and there have been elaborate arguments before us on the question of merits, I think it is necessary that we should express our opinion on this question also.

80. The learned trial Judge came to a number of findings on this point. First he finds fault with Captain Cartner that he did not inform the control power about the engine trouble and his decision to fend. According to him the pilot should have done that. Secondly he finds fault with the pilot because the under carriage was not geared up. Thirdly, the learned Judge holds that the "cut" in the port engine took place when the aircraft had just become airborne in about the middle of the runway and was flying at a speed of less than 100 miles per hour, and he did not accept the evidence of Captain Cartner that the speed was about 110 miles per hour when the port engine cut for the first time. The learned trial Judge apparently came to the conclusion that Captain Cartner was prevaricating to prove namely-

> (1) that the engine trouble took place when the aircraft was flying at a speed of over 100 miles, so that according to the emergency regulation the pilot should not land ahead; and (2) there was no runway left to land ahead. This the learned Judge holds to be an attempt to cover the pilot's negligence for not attempting to land ahead when there was engine trouble during the take-off and when the aircraft was flying at speed less than 100 miles per hour. Lastly the learned Judge came to the conclusion that there was no sufficient evidence to enable him to record a finding that the cause of the failure of the engine in this case was due to air-lock which was the evidence of Captain Cartner. In the circumstances the learned Judge found that the pilot Captain Cartner failed to comply with the rules laid down in the Operation Manual and that amounted to a breach of duty to take care which a pilot was bound to take in the interest of the safety to the aircraft and its passengers. He, therefore, held that there was negligence in law and it was an actionable wrong. This in brief is the main conclusion of the learned trial Judge on the question of negligence and on the merits of the case, which has been bitterly criticised by Mr. Gouri Mitter, learned Counsel for the Appellant

81. To deal with this question of merits it will be appropriate and proper in our view to bear in mind certain broad context of facts in which the accident took place. He time element is extremely important in this case. The time involved is so short that long hairsplitting arguments in a theoretical atmosphere to judge negligence appear to be not only unrealistic but also actually inaccurate. The accident took place within one minute from the time of take-off. See the answer of Capatin Cartner to question 288. Again the accident took place within 30 seconds from the time when the aircraft became air-borne. See Captain Cartner's answer to question 289, The time that elapsed between the engine reaching the height of 150 ft and the pilot's taking a turn on the left and the port engine failing for the second time the accident took place within 8 or 10 seconds. This is intended to show that there was and could be no time for communication with the control room. The whole accident took place within a minute when all the attention of the pilot had to be focussed on a fast developing scene of emergency. It is, therefore, incorrect in our view in such circumstances to hold pilot's failure to communicate with the control room as proof of negligence.

82. Now about the under carriage not being up. Here also the facts and the context of the facts must be clearly borne in mind. The evidence is that it takes about one whole minute for the operation for the whole under-carriage to go up. In fact the pilot gives the direction to the co-pilot and the co-pilot took at least 5 to 7 seconds to complete the whole operation. The evidence of Captain Cartner on this point may be found in his answers to questions 112, 113, 114, 115 and 116. He is supported also on this point by the evidence of Herbert Vivian Dequadros in answer to question 265 as well as by pilot N. B. Patel in his answer to questions 71 and 72. The evidence of Captain Cartner that he had ordered his co-pilot to put up the gear cannot, therefore, be disbelieved by the test of the fact that it was found by the Court of Enquiry that the landing gear at the time of the accident was fully in an extended position. The reason is that the evidence of Captain Cartner who is alive has to be accepted about his order to his co-pilot to gear up and his evidence also that his co-pilot started making the operation for gearing up must also be accepted. The fact that the gear did not go up is due to the fact that the going up of the gear itself takes a minute or a minute and a half and the accident took place before that period was out.

83. The next broad consideration which must always guide the Courts in these matters is the caution that an error of judgment in a situation like this in an emergency in the air is not to be lightly treated as negligence in law. The main principle is dearly formulated in 28 Halsbury Articles 10, 11, and 12 at pages 12 to 14. This principle may be stated in a few short broad propositions. The degree of care required is proportionate to the degree of risk, as explained in Paris v. Stepney Borough Council, 1951 AC 367. Again it has been said that special caution is required from those handling firearms or from those dealing with dangerous articles, such as gas or explosives. That principle may be extended to those handling aircraft but then it is said and pointed out in Halsbury that if a person is placed in a situation where risk of personal danger is so imminent as to amount to an emergency, he may be excused liability for an injury resulting from his acts. Self-interest and the instinct to preserve and protect one's own life indicate that conclusion. The test in such a case is not whether a better course was in fact open, but whether what was done was what an ordinary prudent man might reasonably have been expected to do in such an emergency, as explained in the observations of Lord Blackburn in the case of Stoomvaart Maatschappy Nederland v. Peninsular and Oriental Steam Navigation Co. (1880) 5 AC 876 at p. 891 and also in Esso Petroleum Co. Ltd. v. Southport

Corporation, 1956 AC 218. Where the emergency is so great that no reasonable exercise of foresight, care, or skill would have prevented the accident which caused the injury, no blame is attached to the defendant and there is no cause of action, so clearly laid down by Lord Hailsham in Swadling v. Cooper, 1931 AC 1 at p. 9.

84. This aspect of the case that an error of judgment is not actionable negligence in law is important in this appeal. We are not at all satisfied that in the fact of this case there was any error of judgment on the part of the pilot Captain Cartner. But even assuming that there was any error on his part, having regard to the principles aid down above, this Court cannot hold that such error was actionable negligence in law. It is emphasised by Shawcross and Beaumont on Air Law, Second Edition, 1951, page 320 that an error of judgment is not necessarily negligence, and if a pilot, without negligence on his own part, is confronted with a sudden emergency requiring an immediate decision he is only required to act as a reasonably prudent man would act in such an emergent situation. In support of that proposition the learned Editors cited Parkinson v. Liverpool Corporation, (1950) 1 All ER 367. The facts of this appeal clearly show that there was an emergency of the most acute kind. Things happened in quick succession such as port engine cutting dead, false fire alarm signal and the starboard engine also failing and all this happening within the short span of barely a minute.

85. The point is of practical importance in this ease, because the learned trial Judge came to hold that when the first failure of port engine took place the plane had become just air borne and was flying at a speed of 100 miles per hour at an altitude of 10 to 15 ft and that the rules prescribed in the Operation Manual were applicable and the pilot should have then attempted to land straight ahead either with the under carriage down or with the belly. In coming to that conclusion the learned Judge appears to have made some miscalculation on figures. But even on that basis he found that 820 yards run-way was left to land and that the learned Judge thought was sufficient for the pilot to land ahead. In coming to this conclusion the learned Judge missed the most significant evidence on the point and completely failed to consider its effect This finding that there could he any landing as suggested by the learned Judge in the theory that he has given in his judgment, was arrived at by ignoring a, vital evidence on this point. It was not merely the evidence of Captain Cartner but there was the evidence of a pilot of great experience who was just immediately behind this ill-fated plane and that is the evidence of Johnson Berry. Johnson Berry's evidence was not even mentioned in the whole of the judgment of the learned Judge and we consider this failure to realise the importance of the evidence of Johnson Berry vitiates the judgment of the trial judge on the point of negligence. This witness who can be said to be an eye-witness apart from Captain Cartner himself was particularly asked how long it took Captain Cartner for the aircraft from the height of about 150 ft. to touch the ground. His answer was that it was a matter of a second (see Berry's answer to question No. 32). He was then asked that after Captain Cartner had developed a swing on the left and that was corrected could he not land his aircraft on the remaining portion of the runway which was before him. The very clear evidence of Johnson Berry is that that would have been "equally risky to obtain a take-off at this stage because he had already crossed more than half the runway". See Berry's answer to question No. 33. His evidence is that there was barely less than half the runway left. In fact he said that it would be barely one-third of the runway that was left and that it was difficult to state correctly. Now the runway was of the total length of 2140 yds and if barely one-third

was left then that would be about 700 yds That was quite inadequate for the landing.

86. The learned Judge came to this wrong finding not merely because he missed the evidence of Johnson Berry but also because he ignored a good deal of expert evidence that was given in this case on the space necessary to land. There was no discussion of this Expert evidence in his judgment. That expert evidence was not only of witnesses but also of technical documents which were exhibited in this case which were not considered at all by the learned judge while he came to the conclusion on such a vital point. Marked portions of the operating instrument in the Flight Manual such as Exhibits 39(A), 39(B) and 39 (C) are extremely relevant, on the point which the learned Judge completely missed. They show that at least 1026 yds of runway were required for landing operation itself having regard to the stalling speed which means at least 72 miles per hour and it takes about 100 yds for every 10 miles of speed and another 100 yds to get down the ground level. In this connection the extremely important evidence of Huilgal in his answers to questions 137, 142-150, 151 to 163, 119 to 131 and questions 132-136 are decisive to show that the learned Judge's conclusion on this point cannot be sustained. No reason is given by him as it could not have been given why such evidence of Huilgal and Johnson Berry and such documentary evidence as (a), (b) and (c) series of Exhibit 39 should be rejected. It was, therefore, not enough for the learned trial Judge just only to discard the evidence of Captain Cartner on this point and overlook all this other crucial evidence of unimpeachable weight and veracity from the other sources on the very same point.

87. If, therefore, the alternative theory which the learned trial Judge has propounded in his judgment is described as "equally risky" by no less an expert as Johnson Berry then it appears in such a case that even if Berry is wrong and the learned Judge is right about aircraft manipulation, it is at best a case of error of judgment which is not actionable negligence.

88. It is essential to emphasise again that in accident cases on special emergencies such as this the common law rule of law that the conduct of the defendant Air Company or his employee must be judged by the standard of what an ordinary prudent man would do when faced with sudden emergency, should be sensibly and reasonably applied. In case of a sudden emergency a pilot is not required to exercise that degree of skill and care which would be required by a calm review of the facts long after the accident had occurred. The Courts are prone to this kind of unrealistic post mortem discussion and this was discouraged and condemned in Thomas v. American Airway Inc 1935 US Av R 102 and quoted by Charles S. Rhyne on Aviation Accident Law, 145. Another principle with which we also agree on the same page indicated by the learned Author is that "If a man is confronted with a dangerous situation not of his own making, and there are several Courses open to him, and he is required to make a quick judgment, the failure to exercise the best possible judgment would not of itself constitute negligence."

In support of that proposition the authority of Conklin v. Canadian Colonial Airways, 1934 US Av R 21 and 1935 US Av R 97 has been cited. Similarly in the Murphy v. Neely, 1935 US Av R 80 the pilot's action in cutting off the ignition of an aeroplane when confronted with an emergency landing was not held to be negligence.

89. Apparently the learned Judge was greatly persuaded by the decision of Goddard, J. Fosbroke Hobbes v. Airwork, Ltd. and British American Air Services Ltd., (1937) 1 All ER 108 where it is said that it is prima facie evidence of negligence on the part of a pilot if the aircraft crashes as it is taking off and before it attains the height at which the journey is to be performed. But the point here is not of prima facie evidence of negligence. The evidence is not merely of Captain Cartner himself although the importance of his testimony is unquestioned because he is the only surviving person to give evidence of the accident as all others on board the plane, passengers and crew alike, have died. There is also the evidence of technical documents as well as of expert witnesses mentioned above which showed that Captain Cartner was not negligent, even if we leave aside his very positive answer to question 321 when he said.

> "I acted to the best of my judgment and ability. I have a great deal of experience in handling Dakotas--in a single engine performance--in the airforce training where a great deal of time was allotted to training. I acted in the way my training called for and to the best of my ability and judgment."

90. In this connection interesting observations are to be found in the decision of Horabin v. British Overseas Airways Corporation, reported in (1952) 2 All ER 1016. " It lays down that the mere fact that an act was done contrary to a plan or to instructions, or even to the standards of safe flying, to the knowledge of the person doing it, does not establish wilful misconduct on his part, unless it is shown that he knew that he was doing something contrary to the best interests of the passengers and of his employers or involving them in a greater risk than if he had not done it. A grave error of judgment, particularly one apparent as such in the light of after events, is not wilful misconduct if the person responsible thought he was acting in the best interests of the passengers and of the aircraft. Lastly this decision lays down another important principle that in determining whether or not there has been wilful misconduct, each act must be considered independently, and, though each act may be looked at in the light of all the evidence, it is not permissible to put together several minor acts of carelessness, none of them amounting to misconduct in itself, and find that together they amount to misconduct.

91. Applying these principles we cannot hold in this case even assuming everything against Captain Cartner that his action was at all actionable negligence and we are bound to hold that it was at best only an error of judgment.

92. But the more serious consideration is that the facts of negligence have not been established against the defendant or its pilot Captain Cartner. It is needless to point out that the defendant Corporation was not negligent in appointing Captain Cartner. Captain Cartner has an unblemished license. He has been flying since 1945 when he was about 18 years of age. Me has been a full-fledged pilot from 1946. He has a very high number of flying hours to his credit. The evidence is that he has as many as 3676 flying hours' experience. He has been flying with credit not only Dakotas but also Super-Constellations. To employ such a person as pilot was not an act of negligence by the defendant Corporation.

93. The finding of the trial Judge that the pilot, Captain Cartner did not observe the rules of flight is erroneous. We shall briefly indicate why it is so. The learned Judge was misguided by the Operation Manual of the Deccan Airways Ltd. marked as Exhibit H(1) in the suit. According to the learned trial Judge, Captain Cartner, the pilot, did not observe the following rules of flight. "Engine failure during take off: When the engine fails before attaining the speed of 110 miles per hour, the following procedure should be carried out:

> "Close the throttle on the other engine and land straight ahead with under carriage down if you can slop before the end of the runway is reached, but before you come to the end of the runway if the aircraft is likely to continue into obstacle beyond the runway, retract the undercarriage and allow the aircraft to go on the belly as this will be safer."

Leaving aside Mr. Mitter's argument that the evidence that the speed was above 110 miles and this provision in the Operation Manual did not apply, there are other reasons why the application of the above rule has been inappropriate in the facts of this case. According to Captain Cartner he did follow the rules. His whole answer on this point is that this was not a case of engine failure as he understood it. It was not a case of any kind of defect in the engine itself. According to him the port engine when at first stopped revived almost immediately. A defective engine could not have revived. His evidence, therefore, is that there was something wrong with the feeding of the engine through the fuel pipe. Therefore, his evidence is that it must have been a case of air-lock. A point which we shall presently discuss. Captain Cartner's evidence on this point appears also to be correct because not only the learned trial Judge himself found as a fact that both the engines were in good condition and operative but that is also a fact found by the Court of Enquiry. There is also supporting evidence on the point. It is said that both the engines were in good working condition. The engines were tested after the accident and were found to be sound and good. If that is so then this was not a case of engine failure in the sense of defect in the engine itself. That being so, the above rule does not apply. It was not a case of defect in the engine. There is, therefore, no procedure laid down for the type or emergency which took place in this case. There was, therefore, no breach of any rule in the Operation Manual or of any statutory rules or regulations in this case. In fact no procedure is laid down as far as we can discover from records for such a kind of emergency.

94. Secondly, the more compelling reason why this cannot be a ground for finding negligence against Captain Cartner is that even if this Rule applied, as quoted above, its language shows that it leaves enough freedom and discretion, as it must, to the pilot whether the rules should be strictly adhered to or departed from. From an examination of the language of the rule quoted above it will be seen that the significant expressions are "If you can stop before the end of the runway is reached," "If the aircraft is likely to continue into obstacle. . . ." Now it is the pilot who is the judge to find out if he can stop before the end of the runway is reached or if the aircraft is likely to continue into obstacle. Now Captain Cartner's evidence is positive on the point that he could not stop before the end of the runway. It is not only his evidence but he is supported by almost all the documentary and oral evidence on the point without any exception. It is impossible for this Court to disregard the importance of unchallenged evidence on this point.

95. Indeed the learned Judge himself at one stage appears to find that and yet somehow misses its importance later on. Indeed the learned Trial Judge says in his judgment towards the end as follows:

> "Captain Cartner almost landed the aircraft with safety. But for the obstruction of the 'bund' he would have landed the aircraft safely. All subsequent acts of the pilot were clone with efficiency and courage and must be commanded. The accident, however, would not have happened if the pilot landed the aircraft ahead when there was the first failure of the engine during take off, when the aircraft was just airborne."

96. Now that finding shows that Captain Cartner almost landed with safety. It does shows that all his subsequent acts were done with efficiency and courage and were to be commanded. It also shows that it was not the fault in landing which was the cause of the aeroplane perishing but the obstruction was caused by the 'bund" outside the runway. Therefore, even on that finding it cannot be said that what the pilot did was actionable negligence.

97. As we have indicated above the pilot could not land the aircraft ahead when there was the first failure of the engine during take off. There arc two very significant reasons why he could not do so. In the first place this first failure of the engine passed off immediately it had occurred. It is not humanly possible in that fateful moment to come to a definite conclusion that he must land ahead immediately. It is neither reasonable nor practicable to hold it against the pilot. But the more cogent reason is that there was not enough space for landing or belly landing and the minimum space required on the evidence appears to be at least 1055-56 yds which were not there at that time.

98. This brings us to the question of air-lock. Captain Cartner's evidence is that this cutting of the engine was due to air lock. In answer to questions 203 and 204 he expresses his opinion that it was an air-lock and not a mechnical defect of the engine itself and his answers to question 1094 where he spoke of the faultly condition of both the engines must be read in that light. Air-lock is caused by a particle of trapped air which may be carried along and sent to the engine--to the carburettor of the engine. When one of these particles of airlock reaches the carburettor the engine is starved of fuel and loses power. This in simple language is an airlock as described by Captain Cartner in answer to question 213, and questions 234 to 236. Captain Cartner was very definite on this point and in cross-examination in answer to question 692 he said that the cause of the failure was airlock in this case. Captain Cartner also in answer to question 308 said "the left engine had no power at all at that time because it failed for second time completely failed and did not revise again." Proceeding further in answer to question 309 he said that it was not left to any action for consideration. Belly landing had just to be done and there was no choice left and his choice was a limited one, and it was in fact belly landing. Finally in answer to question 329 Captain Cartner definitely gave his opinion about the cause of this accident in these terms:

> "I felt that because of the left engine failure and subsequent accident that followed--it was due to airlocks or to airlock in instalments along the pipe line--airlock of the left engine."

Again in answer to question 351 when Captain Cartner was asked whether it was right to say that the port engine lost power after getting airborne because of defects of supervision or check up, he said;

> "I did not feel that all. Right from that day I have always felt that this was an airlock and that is what I said to the Court of Enquiry at the hospital. I felt it was an airlock which had caused the two failures of the left engine."

Therefore, Captain Cartner's evidence is positive and unchallenged that this accident in the facts and circumstances of the case was due to airlock. There is nothing in evidence to contradict this statement. The learned trial Judge's theory that airlock happens on occasions few and far between or once in a blue moon even assuming to be right on the evidence cannot contradict in the facts of this appeal, the positive evidence of Captain Cartner on this point.

99. It has been suggested that airlock was not likely in this case because of three reasons, namely-

> (1) airlocks arc not likely to happen in cold weather such as in December and they happen more or less in hot weather during day time and not at night;
>
> (2) airlocks are not likely to happen when the tank is full at the time of take off and they happen when the aircraft has made a long journey" and the tank has become somewhat emply:
>
> (3) airlocks usually happen only in a running plane and not when the plane actually is not in high flight and was barely taking off.

100. The other probable cause that airlocks cannot happen in quick succession seemed also to weigh with the learned Judge. Giving due weight to these considerations this Court is of the opinion that these inferences and these probabilities cannot override in the facts of this appeal, the positive evidence of Captain Cartner that in this particular case eliminating the other possibilities of vapour lock etc. airlock was the cause of the accident. Besides, there is evidence to show that airlocks also can happen in quick succession and there can be one, two or three airlocks. H. V. Dequadros another expert gave definite evidence that even though airlocks are rare they may occur in succession. In answer to question 194 he said "now this airlock may get broken up into five or six more and they may come out at one time or one may follow the other." He repeats the same in answer to question 238 while he was asked how many airlocks may come by saying--"may be one, may be two. From my experience I have had one." He repeats the same thing in answer to question 241. Again in answer to question 246 this witness says "He might have two, another might have three." talking about airlocks. Evidence of another Expert Captain Huilgal is also relevant when in answers to questions 177 to 179 he also expressed the view that it could be airlock. Specially in answer to question 179 he said this "To the best of my knowledge an airlock is a very peculiar thing. I have had personal experience of airlock recurring four or five times before I could clear it, as it happened with me at 8000 ft. I did not have any pressure of time on me to feel any emergency as such."

101. Mr. Mitter has strongly criticised the learned trial Judge's finding by saying that he had dismissed all the evidence of not only Captain Cartner but also of the other experts merely because of the possibility that airlocks happen only rarely and that it is a remote possibility and therefore, he cannot think about it in the present case. On the evidence we are satisfied that there is enough evidence to record a finding that the cause of the failure in this case was airlock however, normally unpredictable that may be.

102. This case of airlock seems to be also amply proved by the deposition of K. Gangaraju before the court of enquiry and which has been marked as Exhibit G in the present proceedings. Now Gangaraju's evidence there establishes a number of important points. Not only was he the Chief Inspector of Indian Airlines Corporation Line No. 5, but he also said this that he himself inspected the wreckage of this aircraft. The points that he makes are; (1) there was no defect in the engines and he had examined the engines after the crash; (2) from the wreckage it is not possible to say how the port engine failed; (3) The port carburettor filter was removed by the Director of Aeronautical Inspection and it was discovered that there was petrol still in the Carburettor (4) the record shows that no snags were ever reported about the port engine and (5) from the wreckage it could not be said that the engine or any of its parts were on fire since they are clean of any smoke. That being so the only cause for such an accident would be airlock. The evidence of Bayas in answer to questions 60, 61 and 64 to 65 establishes that no device has yet been invented to totally exclude airlock. There is also other evidence in support of this. Indeed there was no cross-examination to show that danger of airlock could be completely eliminated by any device. As the fuel feeding system was not defective and as there is no other cause either for negative elimination of other causes it is established beyond reasonable doubt that this particular accident on the facts was due to airlock.

103. We are, therefore, unable to hold that Captain Cartner was in any way negligent and we set aside the finding and judgment of learned Judge on that point.

104. Mr. Dutt Roy, learned Counsel for the respondent urged that even apart from Captain Cartner the defendant Corporation was negligent in so far as it allowed the Dakota to fly and this Dakota aircraft was not air worthy and it had mechanical and other defects. His first difficulty in this respect is that the findings of the learned trial Judge are against him. There is no cross-objection by the respondent in this matter. Nevertheless Mr. Dutt Roy argued that the plane was not airworthy and was defective, and therefore, the defendant Corporation was negligent in providing such an aircraft for carriage and so it was liable for damages for loss of life. His next submission on the point is that there was a previous accident in this very same plane. He put that question to K. Gangaraju, Deputy Chief Engineer in question No. 775. But his answer was "to my knowledge no accident took place". In fact all that this evidence shows is that there was a forced landing previously. Some suggestions thereafter came to be made to this witness that it made a forced landing in Jharsuguda in answer to questions 784 and 785 on the 30th September, 1953. But that was not an accident. Criticisms were made that the fuel pump drive shaft was broken, to which the answer given by Gangaraju as follows: "There are many cases of that nature" and in answers to questions 786 and 787 he says that fuel pump was replaced by a completely overhauled pump from the stores.

105. Mr. Dutt Roy's next submission was that Dakotas are very old types of plane and are not as such airworthy. We have given our anxious consideration to this branch of Mr. Dutt Roy's argument but we are unable to accept his submission on this point. The following facts are all against Mr. Dutt Roy's submission.

1. The aircraft held a valid certificate of airworthiness. It had been maintained in accordance with the approved maintenance schedules and had a valid certificate of daily inspection. That was also the finding of the court of enquiry.

2. The engines were duly run up and tested by the pilot prior to take off and the take off run was normal.

3. In fact the court of enquiry finds that the crew held valid licenses and were qualified to undertake the flight. The Captain had sufficient flying experience on the route.

4. The all-up weight did not exceed the authorised take-off weight and there is no suggestion that the position of the centre of gravity was not within the safe limits. The aircraft carried sufficient fuel and oil.

5. The Captain was in possession of all relevant meteorological communications and air traffic control information and other data required for the flight.

6. The weather conditions were good.

106. In fact this particular plane was flying on the route and flew from Begumpet, Hyderabad to Bombay and from Bombay to Nagpur without any trouble. Therefore, it was airworthy by all practical and reasonable tests and by all this mass of evidence, independently of the statutory presumption that what is stated in the certificate of airworthiness is correct. We are satisfied that this aircraft was airworthy and did not suffer from any lack of inspection or mechanical defect so as to bring home a charge of negligence on that aspect against the defendant Corporation.

107. This will be the proper stage where it is necessary to make a reference to the fact of the report of the Court of Enquiry and its contents. Apparently the learned trial Judge was greatly influenced by this report, not merely in ideas but it appears also by the actual language or expression used in the report. As already stated the accident took place on the 12th December 1953 at 3.25 a.m. when it was flying from Nagpur to Madras. The Government appointed Court of Enquiry under Rule 75 of the Indian Aircraft Rules, 1937, on or about the 16th December, 1953. The report of this Court of Enquiry was made on or about 30th December, 1953. The finding of the report briefly is that soon after the aircraft got airborne, at approximately 10 or 15 ft. from the ground, there was a failure of the port engine, but it picked up again within a few seconds and the aircraft was able to climb rapidly to a height of about 150 ft. At that height the Captain commenced turning to the left. During the process, the aircraft lost considerable height, and the starboard engine fire warning light came on. Being too near the ground the pilot decided to land, and in doing so, the aircraft hit the ground in a nose-down attitude; that on the impact with the ground, the aircraft was damaged, but travelled

further and hit a bund swung violently to starboard and caught fire; that neither of the propellers was feathered and both were in fine pitch; and that it was also found that both the engines had partial power at the time of the impact and both the propellers were rotating at the same speed. Under Rule 75(6) of the Indian Aircraft Rules "The Court shall make a report to the Central Government stating its findings as to the causes of the accident and the circumstances thereof and adding any observations and recommendations which the Court thinks fit to make with a view to the preservation of life and avoidance of similar accidents in future including, a recommendation for the cancellation, suspension or endorsement of any licence or certificate issued under these rules."

108. Now this report which is an Exhibit in this case marked Exhibit D although under objection by Mr. Mitter and which objection we shall presently deal with, contains some significant features. It has not recommended the cancellation, suspension or endorsement of the licence of Captain Cartner. Under Rule 75(6) of the Indian Aircraft Rules, 1937, the duty of the Court of Inquiry was to make a report stating its finding "on the causes of the accident." It appears that this report did not find "the causes of accident" but found in Paragraph 16 what is described as "Probable cause of the accident". In these matters it is essential to emphasise that in a Formal investigation under Rule 75 of the Indian Aircraft Rules by a Court of Inquiry assisted by experts there should be a strict finding on the causes of the accident and not "probable" causes Now under the heading "Probable cause of the accident" all that this report says is:

> "Loss of critical height during a steep left hand turn, with the under-carriage down, executed by the pilot at an unsafe altitude, in an attempt to return back to the aerodrome, after experiencing a temporary loss of power of the port engine soon after getting air borne. A false starboard engine fire warning precipitated the attempt at forced landing."

In this probable cause of accident this Court of Enquiry did not clearly suggest that negligence of Captain Cartner was the cause of the accident Many references were made from which an inference could be drawn about Captain Cartner's negligence but it was not put down by the Court that Captain Cartner's negligence was the cause of the accident. It is said in the report that Captain Cartner did not follow the procedure laid down in the Operation Manual and that weighed with the learned trial judge

109. We have given our reasons why we do not consider that Captain Cartner failed to follow the Operation Manual. In the first place we are of opinion that the Rules in the Operation Manual had no application to meet the particular emergency which arose in this case. In other words, it was not a case of engine failure or defect in the engine in which event the Operation Manual would come into play. Secondly, we have already stated that even the Operation Manual has given discretion to the pilot himself and we hold that Captain Cartner used his best judgment in the circumstances. We are, therefore, unable to accept the finding of the Court of Enquiry that Captain Cartner did not follow the Operation Manual. We confess that we are puzzled by the actual sentence used on this point in the report of Enquiry, which is very significant. We cannot but help reading the whole sentence in order to understand what is meant by the sentence. The report says on this point:

> "It is evident that the Captain did not follow the procedure recommended in the Operation Manual of Indian Airlines Corporation. Line 5, when the engine failure occurred, possibly because the engine had revived again."

I am not sure whether it is a finding that he did not follow the procedure Manual and that he should have done it or whether it is an explanation that he need not have followed it because the engine had revived. It appears to be a double edged statement. We do not, however, accept at all in the evidence before us in this Court that there was sufficient length of runway left in front of the Captain to land as it appears to have been found by the court of enquiry.

110. It is not necessary for us to say anything more on this report. This report does not bind us. We have to come to our independent finding on the evidence before us. The evidence before us is more complete and tested by cross-examination

111. It will be proper to dispose of a point of objection which Mr Mitter, learned Counsel for the appellant took. His submission is that the re port is not evidence The learned trial Judge treated it as evidence under Section 35 of the Evidence Act and marked it as Exhibit in the suit. Briefly put, Mr. Mitter's submission is that this is a formal investigation under Section 7 of the Aircraft Act, 1934 and Rule 75 of the Indian Aircraft Rules, 1937. But before this Court of enquiry according to Mr. Mitter there is (1) no one, (2) no parties and (3) no cross-examination. He submits that it is a kind of investigation as it is described under the rules. That only means that the report cannot bind the court. But these facts do not make the report inadmissible. On that point Mr. Mitter submitted that under Sub-rules (2), (4) and (6) of Rule 75 of the Indian Aircraft Rules it is the Central Government alone which can make the report published and there is no evidence whether the report was published by the Central Government. He also said that nobody came to prove that the report was published; only a printed copy was produced which according to Mr. Mitter's submission was not a proof under Sections 61, 63, 64, 67, 75 and 76 of the Evidence Act. He further submits that the learned Judge was wrong in treating it under Section 35 of the Evidence Act, because this report is not "an entry in any public or other official book, register or record" within the meaning of that section. He says it is a report by itself. It is an ad hoc report. It is not a report as contemplated under Section 35 of the Evidence Act. Therefore, Mr. Mitter submits that Section 35 of the Evidence Act is not at all applicable,

112. In support of Mr. Mitter's argument he has relied on a number of authorities to show that Section 35 does not apply and they are: Raja Leelanand Singh v. Mt. Lakhiputee Thakurain, 22 Suth WR 231. at p. 233; Mohan Bikram Shah v. Deonarain Mahto, AIR 1945 Pat 453 at p. 457: Jogesh Chandra v. Mokbul Ali, AIR 1921 Cal 474 at p. 475; Kali Prosanna v. Nagondra Nath, 44 Cal WN 873 at p. 884; Ghanaya v. Mehtab, AIR 1934 Lah 890 at pp. 891-892 and finally on Ramalakshmi Ammal v. Sivanantha Perumal Sethurayar, 14 Moo Ind App 570 at pp. 587-88 (PC). But this last case of the Privy Council is a judgment delivered before the Indian Evidence Act came into force.

113. As against this Mr. Dutt Roy, learned counsel for the respondents relied on the Privy Council decision in Raja v. Perianayagum, 1 Ind App 209 at p. 238 (PC) and Mt. Subhani v. Nawab dealing with Wilson's Manual of Customary Law in the form of questions and answers and is not really any

kind of report (sic). Mr. Dutta Roy also relied on the case of Baldeo Das v. Gobind Das, ILR 36 All 161 at p. 164: (AIR 1914 All 59 at p. 60).

114. This point on the facts of this case may be disposed of briefly. We accept Mr. Mitter's submission that this report of the Court of Enquiry, cannot be regarded as an entry in a public or official book, register or record within the meaning of Section 35 of the Evidence Act. It cannot, however, be disputed that this enquiry is a formal and statutory enquiry under Section 7 of the Aircraft Act 1934 read with Rule 75 of the Aircraft Rules. It was not a private enquiry. The enquiry related to the causes of accident. We consider this report to be a relevant fact under Section 5 of the Evidence Act because it bears on the question of the existence or non-existence of every fact in issue and of such other facts which are regarded as relevant under the Evidence Act. This report is also a fact which speaks of the occasion, cause or effect or facts in issue under Section 7 of the Evidence Act. The report is also admissible as a fact under Section 9 of the Evidence Act because it is a fact necessary to explain or introduce a fact in issue or relevant fact or which support or vebut an inference suggested by a fact in issue or relevant fact or fix the time and place at which any fact in issue or relevant fact happened. Now for these reasons we hold that the report of the Court of Enquiry in this very accident is a relevant fact and as such is admissible.

115. The next question is, how it should be proved. Before deciding this point, it will be appropriate to record here that this report was produced by the appellant's witness, Basanta Kumar Bajpayee from his file under cross-examination in answer to questions 162-165. It is admitted in those answers that the report is a printed report and published by the Government of India under Rule 75 of the Indian Aircraft Rules. This witness Mr. Bajpayee is the Assistant Aerodrome Officer under the Civil Aviation Department, Director General of Civil Aviation, Union of India. The report bears all the authentic marks of Official recognition such as the title "Government of India, Ministry of Communications," the insignia of three lions and the Asoke Chakra with the official caption and a title "Report of the Court of Enquiry on the accident to Indian Airlines Dakota VT-CHF on the 12th December 1953 near Nagpur". Its very first page contains the communication by the Court Mr. N. S. Lokur to the Secretary to the Government of India, Ministry of Communications, New Delhi. On those facts we have no hesitation in holding that it has been properly and duly proved under Section 81 of the Evidence Act which directs that the court shall presume the genuineness of every document purporting to be a document directed by any law to be kept by any person, if such document is kept substantially in the form required by law and is produced from proper custody. We hold that this report answers that description. It is certainly a document. Secondly it is a document directed in law to be kept by any person because under Rule 75(6) of the Aircraft Rules the court is obliged to make report to the Central Government. Naturally the Central Government has to keep this record and to receive it. Thirdly, it is also a document substantially in the form required by law because it contains the findings, circumstances, observations and recommendations as mentioned in Rule 75(6) of the Aircraft Rules. Lastly, it also answers the test of Section 81 of the Evidence Act because it was produced from proper custody in the sense that it was produced by a Government official who was directly connected with the Aerodrome under the Director General of Civil Aviation. We, therefore, hold this report to be both relevant and admissible as well as duly proved.

116. We, however, accept Mr. Mitter's submission that although the report is admissible and has been duly proved as a fact of this case, yet the evidence tendered before the Court of Enquiry is not necessarily evidence here unless these questions and answers put to the witnesses were put to these witnesses who deposed at the trial here and only those portions of that evidence before the Court of enquiry which was tendered before the witness concerned will alone be evidence here and not otherwise. This report, however, does not become evidence under Sections 2 and 3 of the Commercial Evidence Act, 1939.

117. At this stage a brief reference to the statutory provisions so far as the Air Law in India is concerned will not be out of place. So far as the carriers generally are concerned, one of the earliest statutes in India is the Carriers Act 1865.

But it is wrong to think that this statute at all applies to Carriage by air or even to passengers by Air. This Act is only limited to loss or damage to property and the common carrier mentioned there in is only the common carrier by land or inland navigation.

118. Although aeroplanes or Airships were nonexistent or barely existent in India in 1911, nevertheless India had an Indian Airships Act of 1911 being Act 17 of 1911. This was an Act to control the manufacture, possession, use, sale, import and export of airships. Under Sections 3, 5, 6 and 13 of this Act there was provision for making rules. It was under this Act of 1911 that the Indian Aircraft Rules of 1920 were made, The Indian Aircraft Rules of 1920 were particularly made under Sections 3 and 6 of the Indian Airships Act of 1911 described as the Indian Aircraft Act of 1911 (Act 17 of 1911). The next landmark was reached after the international Warsaw Convention and a special statute was passed in India called the Carriage by Air Act, 1934. As already indicated this was only an Act to give effect to an international Convention for the unification of certain rules relating to international carriage by air. It did not regulate internal carriage by air in India. In that year again there was another Act called the Indian Aircraft Act, 1934 (Act XXII of 1934). This was an Act to make better provision for the control of the manufacture, possession, use, operation, sale, import and export of aircraft. Section 5 of that Act gave rule making power to the Central Government. Section 20 of this Indian Aircraft Act, 1934 repealed the Indian Aircraft Act of 1911, and the entry relating thereto in the First Schedule to the Repealing and Amending Act, 3914 and the Indian Aircraft Amending Act of 1915. In this connection reference may be made to the Repealing Act 1938 (Act 1 of 1938) and in particular Section 2 In the Schedule thereof. The next statutory landmark is the Air Corporations Act, 1953 (Act 27 of 1953). The purpose of this Act was to provide for the establishment of Air Corporations, to facilitate the acquisition by the Air Corporations of undertakings belonging to certain existing air companies and generally to make further and better provisions for the operation of air transport services. The existing other companies which were taken over by the Air Corporations were Air India Ltd., the Air Services of India Ltd., the Airways (India) Ltd. the Bharat Airways Ltd., the Deccan Airways Ltd. the Himalayan Aviation Ltd., the Indian National Airways Ltd., the Kalinga Airlines and the Air India International Ltd. It will be seen from this that the Deccan Airways Ltd. was one of the existing companies which was taken over by the Corporations and this particular plane involved in the accident belonged to this Deccan Airways Ltd. Under the Air Corporations Act of 1953 two Air Corporations were established.

(1) The Indian Airlines Corporation which is the defendant in this suit and other is the Air India International. Section 7 of this Act describes the functions of these Corporations. Section 17 of this Act provides for the general effect of vesting of undertakings in the Corporation. Section 20 provides for the arrangement regarding officers and employees of existing air companies. Sections 44 and 45 of the Act gave the officer power to make rules and regulations. This completes a short picture of the statutory position of the Air Law in India.

119. The reason for making this brief reference to the statutory position of Air law in India is to indicate that no one of these Acts prevents the carrier from contracting out of the liability for negligence for an internal carriage by air in India. In that respect the position is different here in India than in England or in America where there are special and particular statutes bearing on the subject. The unqualified right of exemption recognised by the Common Law, was cut down by the Warsaw Convention and applies to international carriage under the Indian Carriage by Air Act of 1934. What is said in the International treaties or arrangements such as Warsaw Convention cannot under the cover of "justice, equity and good conscience" be judicially incorporated into the law of India--statutory or otherwise or else other statutes and foreign treaties will become law In India under that cover. This will be not only a most hazardous step but we consider it to be illegal to adopt and apply foreign treaties and contents of foreign statutes as rules of justice, equity and good conscience in India. In this view of the matter it will not be necessary for us to discuss the arguments in the cases cited before us on the question whether even if there was a statute preventing an exemption clause could it be waived by a passenger by signing a ticket with the above condition. The argument took the turn that such a clause can be for the benefit of the particular class of persons as passengers by air and therefore they could waive the benefit if they liked. We do not think it is necessary for us at all to discuss this in this appeal because the question in our view does not arise. It does nut arise because there was no law so far as internal carriage by air is concerned which prevents or limits the common law right to contract out of liability for negligence.

120. Finally it now remains for us to discuss the arguments advanced on the question of damage in this case. The learned trial Judge has awarded damages on two heads, He has given a lump sum of Rs. 1,50,000/- equally divided between the three plaintiffs--widow, son and the daughter. He has also given a decree for the sum of Rupees 5000/- which was said to be the value in cash and kind with the passenger who died.

121. The damage for Rs. 1,50,000/- is calculated under the Fatal Accidents Act. The material words used in the Fatal Accidents Act have already been quoted and in this connection of damage they are first in the preamble which says that it is an Act to provide "compensation to families for loss occasioned by the death of a person caused by actionable wrong;" then the material words are "the damage should be such as the Court may think proportionate to the loss resulting from such death to the parties respectively." It is said in Section 1A of the Act that the share of the damage to be divided among the parties should be in such proportion as the Court by its judgment and decree directs. It is also said by Section 2 of that Act that claim for the loss to the estate may also be added and the expression used there is "pecuniary loss to the estate of the deceased."

122. The learned trial Judge practically disbelieved the whole of the evidence regarding damage. He says that the deceased was a young man of 28 and was the only son of his father who was comparatively a prosperous man. The Chandbali Steamer Service Ltd. in which the deceased worked was a private limited company of which the father, mother and the deceased were members and were directors of the company. The learned trial Judge rightly disbelieved the books of account which were tendered to prove that the deceased was entitled to a remuneration of Rs. 1000/- per month plus 21/2 per cent commission on the total freight. It was said that this remuneration was based on a resolution of the Board of Directors, but no salary or commission was in fact proved to have been paid to the deceased. The entries in the books of account were unreliable because all of them were made at the end of the financial year, 31st March and were made according to the directions of the Directors. No balance-sheet of this company was tendered in evidence. It is proved that the company became insolvent in 1955 and went into liquidation within barely a year and half of the accident. The learned trial Judge records that there is no evidence about the cause of the bankruptcy of the company. From this it would appear that there was admittedly no earning by the deceased from this company either as a Director or otherwise.

123. It was suggested by the plaintiff widow that the deceased had a kind of transport business. Here again there is hardly any evidence. Not a scrap of paper was produced to prove the existence of this business or to show what was the income of the deceased from such business. In fact there was no reliable evidence at all to show or prove that the deceased had any bank account of his own or what was the state of that account at any relevant point of time or whether the deceased at all paid any income-tax.

124. In that state of evidence the learned trial Judge rightly refused to accept the evidence of the plaintiff widow that the deceased used to pay Rs. 5000/- a month for family expenses. The trial Judge finds that the father was well off and had a substantial income of his own and it was impossible for him to believe that the young son and not the wealthy father was financing the family. The learned trial Judge rightly points out that no reliable evidence is on the record to prove whether the deceased had any regular income out of which such a large sum of money could be paid by the deceased for meeting the family expenses. The learned trial Judge also records the fact that the deceased along with his father was doing the shipping business, but the learned Judge records that the ability of the deceased to conduct any business on sound basis has not been proved and there is no evidence on this point on which reliance could be placed. In fact there is no evidence on record to show what was the education or technical qualification of the deceased on the basis of which any computation or even a guess of his income could be made. No doubt it has been said that computation and damage under the Fatal Accidents Act cannot be accurate as it is a computation for expectation of life and probable chances of any improved condition of the family and only in that sense it is a guess work. But even then it is not a wild guess. It is a guess with reference to some working data and some evidence as to the nature and prospect of actual income of the deceased but nothing is available in evidence in this case.

125. It is also not in evidence whether even after the death of the deceased in this unfortunate air accident whether the deceased had any insurance on his life, and whether such insurance covers death and if so what, if any, money has been paid by the Insurance Company to the family of the

deceased or his heirs or nominees. No evidence has been led by the plaintiffs on this point although it bears on the question of damage.

126. The cases relied upon are clear on this question. As early as in 1925 in the case of Nani Bala Sen v. Auckland Jute Co. Ltd., AIR 1925 Cal 893 Page, J., after noticing Section 1 of the Fatal Accidents Act observed at p. 897 of the report as follows:

> "Such an investigation must always be more or less guess work, for it is impossible accurately to estimate the loss which has been sustained by the death of a husband or of a father. It is certain however, that the Court ought not to give sympathetic damages, or damages by way of consolation. In my opinion, in estimating the amount of the decree, to be passed in a case of this nature, the Court must view the matter broadly. No doubt, it must take into account the chances of life, the chances of any improved conditions in which the family of the deceased might have passed their days, it must take into account the standard of living of the family which was dependent upon the deceased, and, having regard to all the material circumstances, it must do the best it can to estimates what is a fair and reasonable sum to be awarded."

127. From the above observation it will be clear that damages under the Fatal Accidents Act cannot be either "sympathetic damages" or "consolation damages". Secondly, such damages must be a kind of an estimate, however, the guess work may be, on the pecuniary loss that is caused by the death; thirdly all the material circumstances of family income and dependents should be carefully borne in mind. By those tests the learned trial Judge observed that there was hardly any proof of damage in this case.

128. Subsequently a Division Bench of this Court in Sm. Jeet Kumari Poddar v. Chittagong Engineering and Electric Supply Co. Ltd., reported in 51 Cal WN 419: (AIR 1917 Cal 195) emphasised the point that damages for death under the fatal accident concerned came under two heads, namely, (1) loss caused to the beneficiaries and (2) loss suffered by the estate of the deceased. This decision draws the attention to the fact that in India unlike in England, they were both recoverable under Sections 1 and 2 of the Fatal Accidents Act. It also says that this distinction has unfortunately been overlooked in some cases in India. The importance of this decision on the question of damage lies in the principle laid down there that the main criterion in assessing damages under the first head is the loss of reasonably expected pecuniary benefit to the beneficiaries and the probable earnings and future prospects of the deceased. This Division Bench decision also excludes sympathetic damages or solatium for the loss of companionship etc. as outside the scope of Fatal Accidents Act.

129. The House of Lords in Taff Vale Rail Co. v. Jenkins, reported in 1913 AC 1 clarifies this position by saying that it is not a condition precedent to the maintenance of an action under the Fatal Accidents Act, that the deceased should have been actually earning money or money's worth or contributing to the support of the plaintiff at or before the date of the death, provided that the plaintiff had a reasonable expectation of pecuniary benefit from the continuance of the life. How far the principle of this decision applied is not the question here because there Lord Haldane was discussing the English Fatal Accidents Act The actual point of the decision, however, in our view,

can be correctly applied in this country and that is clearly stated in the speech of Lord Shaw at p. 9 of that report where his Lordship observed:

> "My Lords, another dictum has been cited--one by the late Lord Morris. His Lordship observed: "The loss must be a pecuniary loss, actual or reasonably to be expected, and not as a solatium";--had the sentence stopped there we should all, I presume, have agreed with it; but he proceeded--"and there should be distinct evidence of pecuniary advantage in existence prior to or at the time of the death". My Lords, with the utmost respect, I do not think that that is the law."

We are of the opinion that even under our Fatal Accidents Act the loss must be a pecuniary loss, though it need not be the actual loss and it may be the loss expected by reason of the death. But that does not certainly mean that the deceased must be found to be actually financing the beneficiaries.

130. We shall cite one more English decision and that is Flint v. Lovell, (1935) 1 K. B. 354 on the element of expectation of life. A point in that case which weighed with the English Judges was that the man who met with the terrible accident was an old man of 70 years at the time when the accident took place.

131. On the next head of damages amounting to Rs. 5000/- the position on evidence is plainly vague, uncertain and undependable. We have already noticed the pleading on the point and the pleading in the plaint is that this amount was the cash and kind carried by the deceased Sunil Baran while travelling by air. According to the evidence of the plaintiff widow in answer to question 52 the deceased passenger had Rs. 2300/- in cash with him when he left Calcutta in addition to the suits, a silver cigarette case, gold ring and a Rolex wrist watch etc. On this point there are two difficulties on the way of the respondents. There is no proof that the deceased had Rs. 2300/- in cash with him when he got into the plane at Nagpur for travelling to Madras. There is no proof whether this cash, whether in notes or rupees were burnt to ashes or not or whether they were stolen or not either before or after the accident. There is no entry in any books of account to show that the deceased took as much as Rs. 2300/- in cash in his pocket when he left Calcutta. In any event there is no proof that he had that money when he took the plane at Nagpur en route to Madras. So both on the point of actual proof on records as well as on the point of claim the evidence is unsatisfactory.

132. A somewhat similar question arose in Secy. of State v. Gokal Chand, ILR 6 Lah 451: (AIR 1925 Lah 636) where the deceased's death was caused by a collision between the train in which he was travelling and another train of the same railway administration. In an action under the Fatal Accidents Act for the pecuniary loss which resulted to members of the deceased's family from his death a claim was included for Rs. 1,300/- being the value of lost currency notes which the deceased was carrying with him on the night in question. A Division Bench of the Lahore High Court with Sir Shadi Lal, Chief Justice presiding, held that the defendant railway would not be liable for loss resulting from the wrongful act of a third party such as could not naturally be contemplated as likely to spring from the defendant's conduct. In fact Sit Shadi Lal, C. J., observed at p. 455 (of ILR Lah): (at p. 637 of AIR) of that report as follows:

> "It must be remembered that the evidence in this case does not show who took away the notes. If some person stole them, while the injured person was lying unconscious or dead, surely the railway cannot be held liable for the act of the thief. And it has been repeatedly held that the damage is too remote if it results from the wrongful act of a third party such as could not naturally be contemplated as likely to spring from the defendant's conduct."

133. The Supreme Court reviewed this question of claim of damages of this nature under the Fatal Accidents Act in Gobald Motor Service Ltd. v. Veluswami where Subba Rao, J. at p. 940 (of SCR): (at p. 6 of A.I.R.) lays down the principle as follows:-

> "'Therefore the actual extent of the pecuniary loss to the respondents may depend upon data which cannot be ascertained accurately, but must necesarily be an estimate, or even partly a conjecture. Shortly stated, the general principle is that the pecuniary loss can be ascertained only by balancing on the one hand the loss to the claimants of the future pecuniary benefit and on the other any pecuniary advantage which from whatever source comes to them by reason of the death, that is, the balance of loss and gain to a dependant by the death must be ascertained.
>
> The burden is certainly on the plaintiffs to establish the extent of their loss."

There in that case before the Supreme Court the learned Judge indicated how there was actual evidence: the means and status of the deceased, his earning capacity, the actual yearly expenditure and other relevant facts which are noticed at pp. 940-41 (of SCR): (at p. 6 of AIR). Judged by that test laid down by the Supreme Court, the evidence in the present appeal has hardly any value or weight.

134. The decision of the Supreme Court is also an authority on the proposition how a claim under Sections 1 and 2 of the Fatal Accidents Act is to be regarded. The rights of action under Sections 1 and 2 of the Act are quite distinct and independent; and it has been said that if a person taking benefit under both the sections is the same, he cannot be permitted to recover twice over for the same loss. In awarding damages under both the heads, there shall not be duplication of the same claim. These observations may be seen at pp. 945-46 (of SCR): (at p. 8 of AIR) of the report.

135. For reasons stated above and on the authorities discussed this appeal must be allowed. The suit must be dismissed. We hold that the exemption clause is good, valid and legal. We also hold on the merits that there was no negligence of the defendant Corporation or of the pilot Captain Cartner.

136. In the circumstances of the case we make no order as to costs.

137. In fairness to the defendant Corporation it must be said that Mr. Mitter, learned Counsel for the appellant, said without prejudice to the rights of his client, that as a matter of policy the defendant Airlines Corporation paid a sum of Rupees 20000/- to the representatives of each of the deceased passengers in this unfortunate air crash. For some reason or other according to him that offer was

not acceptable to the plaintiffs in this case. It is not for us to make any observation on this aspect of the ease, but this Court will only wish that this judgment will not stand in the way of any ex gratia payment which the Defendant Airlines Corporation makes usually or has made in this case to the representatives of other deceased person and in making such payment in this case also.

Masud, J.

138. I agree.