1992 2 CPR 561 : 1992 3 CPJ 376

NATIONAL CONSUMER DISPUTES REDRESSAL COMMISSION

Case No: None

V.Krishnaswamy — APPELLANT

Vs

MANAGER
SOUTHERN REGION,
AIR INDIA — RESPONDENT

Date of Decision: July 22, 1992

Citation: 1992 2 CPR 561 : 1992 3 CPJ 376

Hon'ble Judges: S.A.Kader , R.N.Manickam , Ramani Mathuranayagam J.

Final Decision: Complaint allowed

Judgement

1. THIS is a complaint under Section 17 read with Section 12 of the Consumer Protection Act

2. THE complainant is a non-resident Indian in America holding a green card and his Indian passport No. is 1-055322. He is a carrying on export and import business in leather goods, garments and food stuffs etc. He claims to be the President of Globe Enterprises and American Computer Technology and is having his office at No. 90, Winter AVE 2 FL, Staten Island. New York. THE complainant purchased an Air India Ticket bearing No. 02039001 at Kualalumpur on 25.4.92 with destinations at Singapore, Madras, Bombay, New York, London, Bombay, Madras, Singapore. He arrived in Madras on 16.2.92 and on 19.4.92 he got his ticket confirmed (O.K.) for his flight to Singapore from Madras by Air India flight No. AI 424 leaving the Meenambakkam Airport at 13.20 hours on 22.4.92. According to the complainant he had very important business to be transacted at Singapore on 22nd and 23rd of April "92 to sign a business contract with M/s. Master Spices Pvt. Ltd., Singapore and other business dealings with M/s. A.S.M.

Garments and Traders and M/s. Garden Gift Corner, Singapore. On 22.4.92, the complainant reached the International Airport at Meenambakkam at 12 noon. After paying the Foreign Travel duty, he got the boarding pass from the Air India counter and the security check for his luggages was also cleared. He then got immigration clearance and customs clearance and finally security check up for personal and hand luggage and was about to board the aircraft after completing all these formalities, when opposite parties 3 and 4 stop him at the entrance of the aircraft. His boarding pass was snatched away from him to the complainant''s utter shock and confusion. Even though he explained to them the importance of his trip to Singapore and the loss and damage that would be caused, if he was not allowed to board the flight, he was not allowed to board the aircraft. It is alleged by the complainant that he was manhandled and pushed to the waiting hall and taken to the Air India Office. He went down to the ground floor, where he got the luggage. He was waiting in the Air India Office behind the booking counter and after a very long time, his documents were got back and it was written on the ticket coupon as "Off loaded A. 1 -426/22 - APRIL. Due late reporting for Government formalities". This endorsement is incorrect and false. THE opposite parties 3 and 4 not only misdonducted and misbehaved themselves, but also made false entry in the ticket. According to the complainant his seat was allotted to somebody else. THE complainant was subjected to serious shock, mental agony and illtreatment for which he claimed damages in the sum of Rs. 1 lakh. If he had been allowed to proceed to Singapore and keep up his business contracts, he would have earned a profit of Rs. 8,50,000. In all he claimed damages in the sum of Rs. 9,50,000/-.

The opposite parties in their joint counter resisted the complaint and denied the allegations of the complainant. It is admitted that the complainant checked-in at the-eheck-in counter of the Air India at Madras with one piece of luggage (apart from his hand baggage) for flight No. A.1- 424, Madras to Singapore on 22.4.92. At the time of the closing of the counter, there was a total of 64 passengers including the complainant. At 13.15 hours, the opposite party''s staff found that only 63 passengers had boarded the plane and found out that the complainant was still in the customs area awaiting customs clearance. It was ascertained on enquiry that he was not being cleared by the Customs due to TBRE problem (Tourist Baggage for Re-export) This passenger while coming into India had imported items free of duty on condition that they would be re-exported at the time of the departure and he was unable to produce those items at the time of the departure and hence the customs authorities did not give clearance. At 13.20 hours, the customs authorities gave statutory clearance only for 63 passengers. As the scheduled departure time of 13.20 hours had already arrived, it was decided to release the flight with 63 passengers only. The load Sheet was amended and signed by the Commander. The doors were closed and the aerobrindge was disconnected. When the aircraft started pushing back, the complainant came rushing towards the area and he was stopped by Duty Officer, Mr. Djeakumar-opposite party No. 3. He explained to the complainant his inability to accommodate the complainant. It is true that the complainant was upset and agitated as he missed the flight, but it was denied that he was prevented while he was

about to step into the aircraft or that his boarding pass was snatched away or that he was dragged away, assaulted or manhandled. He was offered a ticket in the next Air India flight on 23.4.92, but the complainant did not choose to travel on that flight. It is denied that his seat was allotted to somebody else. There was only 104 passengers on board on that day, while the total capacity was 181. The opposite parties therefore contended that there was no deficiency or negligence on their part.

Exhibits Al to A 10 and B 1 to B6 have been marked. The complainant has examined himself as PW 1. The third opposite party has examined himself as RW 1, the 4th opposite party as RW 2 and the Assistant Manager (Security) of AIR INDIA at Meenambakkam Airport as RW 3.

3. THE points that arise for consideration are: 1. Whether the opposite parties are guilty of deficiency of service or negligence? 2. To what relief, if any, is the complainant entitled?

Point 1 : The complainant is a holder of a Air India ticket under Exhibit Al which is purchased at Kualalumpur for his travel to various destinations, Singapore, Madras, Bombay, New York, London, Bombay, Madras, Singapore. He arrived in Madras on 16.2.92 and on 19.4.92 his ticket was confirmed for his travel from Madras to Singapore on 22.4.92 by Air India Flight No. 424 leaving Meenambakkam Air Port at 13.20 hours. Ik is the case of the complainant who has been examined as PW 1, that he reached the International Airport at Meenambakkam on 22.4.92 at 12 noon and after paying the Foreign Travel Duty, he put his luggage in the security counter, went to the Air India Counter, got the boarding pass and luggage tags, both for the booked luggage and hand baggage. He then went to the immigration counter and got clearance under Exhibit A2(a) in Exhibit A2, Passport He then went to the Customs counter and got customs clearance under Exhibit A2(b). He identified the baggage and proceeded to Personal security check and got security clearance with the stamp affixed on his boarding pass. When he proceeded along the aerobridge just at the entrance, he was stopped by opposite parties 3 and 4 (RW1 & RW2). He was told that he could not go by that flight and in spite of his entreaties and arguments for nearly 10 minutes, he was not allowed to board the plane. According to PW 1, at that time the doors of the aircraft were open and some passengers were going in. Only thereafter the doors of the plane were closed and he was asked to go down. He went to the customs counter and got back his luggage, which according to him was taken back from the plane. He then went to Air India Office where he was made to wait for a long time, finally his papers were taken away and an endorsement was made in Exhibit Al Ticket as "Off loaded Al 42622. April - Due late arriving for Government formalities". According to the complainant this endorsement is as false as the flight No. is

incorrect.

4. THE version of the opposite parties is this: it is admitted that the complainant was one of the 64 passengers earmarked for boarding this plane at Madras to Singapore. At about 13.15 hours, RW1 who is the third opposite party found that out of 64 passengers, only 63 boarded the plane. He asked RW2, the 4th opposite party to make an enquiry and RW2 found one baggage in the make-up area. He went to the customs counter and enquired of the Lady Customs Officer there, whose name is Miss. Devika Rao. She is said to have told RW2 that there was TBRE (Tourist Baggage for re-export) problem with respect to one passenger by name V. Krishnswamy (complainant) and that he had gone to the Customs Collector for clearance. THE Lady Customs Officer is also said to have told RW2 that she was uncertain whether and when the passengers flight would be cleared. RW2 is said to have conveyed this message to RW1 who was near the plane and RW1 informed the authorities that he was in the circumstances giving clearance for the flight. A few minutes later PW 1 is. said to have come again to the Customs counter while RW1 was present there and got the clearance from the Lady Customs Officer under Exhibit A2(b). It is the case of RW2 that even though he protested against giving customs clearance after the flight clearance was given, the Lady Customs Officer gave the clearance. THEreafter PW 1 got personal security clearance and came to the aircraft by which time, the doors of the plane were closed, the aerobridge was pulled back and the aircraft was being rolled out. RW1 claims to have explained the position to PW 1, but PW 1 was not convinced.

We shall now consider which of these 2 versions is probable. Admittedly PW 1 had checked-in at the check-in counter of the Air India at Meenambakkam Airport in time and got the boarding pass and 2 luggage tags for his luggage and for his hand baggage. (Exhibit A8 & A9). He then proceeded to the immigration counter and got clearance under Exhibit A2(a) in Exhibit A2, Passport This immigration clearance has subsequently been cancelled. PW 1 then went to the customs counter and got clearance under Exhibit A2(b). There is an endorsement to this effect: "Permitted to travel abroad as per A.C.C. Order file No. S/31/72/92 dt 20.4.92". It is obvious that the complainant has met the Assistant Collector of Customs even 2 days earlier on 20.4.92 and got permission to go abroad without the Tourist Baggage intended for re-export (vide Ex A 10) There could not therefore have been any TBRE problem for the complainant at the customs counter, nor could the Lady Customs Officer have told RW2 that she was not certain whether and when this passenger would be cleared by the customs. It is admitted that after clearance for the flight is given and after the issue of the General Declaration (Exhibit B 1), the custom would not give clearance to any passenger. According to RW 2 despite his protest, this clearance was given to PW 1 by the Lady Customs Officer after the

clearance of the flight. It is hard to believe. The principal person involved in this customs transaction who could have given first hand account of the matters in controversy and who could have nailed to the counter either of these 2 versions before us, is the Lady Customs Officer Miss. Devika Rao, who is admittedly still working in the Customs Section of the Airport in Madras. It is the duty of the opposite parties who relied upon the information alleged to have been given by this Lady Customs Officer about the delay in giving clearance to PW 1, to examine her, but they have not chosen to do so. No explanation is offered or even attempted to be offered for her non-examination. It has been repeatedly held by Courts in this country, that an omission to call such a material witness raises the inference that the evidence of that witness, if produced, would be unfavourable. In Surat Cotton Spinning and Weaving Mills v. The Secretary of State of India in Council AIR 1937 PC 152) where the defendant, Railways withhold the evidence of an important evidence like the guard of the train who could throw light as to how the consignment was delayed, their Lordship of the Judicial Committee of the Privy Council held that the Court was entitled to presume in terms of Illustration G to Section 114 of the Indian Evidence Act that the Guard''s evidence, if produced, would be un-favourable to the Railway Administration. In the instant case the failure of the opposite party to examine the Lady Customs Officer, who is the most material witness in this case, leads us to infer that her evidence, if produced, would be un-favourable to the opposite parties. In the circumstances, we are constrained to accept the testimony of PW 1 that there was no problem with respect to customs clearance. Exhibit B-2 is the load sheet which is signed by the Commander of the flight and it is seen there from that the total number of passengers has been reduced from 124 to 123. Certainly this load sheet must have been prepared before the plane took off. Exhibit B 1 is the General Declaration Form signed by the health officials, the immigration office and customs officials. It is not known as to when exactly this G.D. Form was prepared. There is reference only to 63 passengers and it is not corrected from 64 to 63. Certainly the customs would not have given clearance to the complainant after giving Exhibit B 1. In all probability the General Declaration document (Exhibit B 1) is got up for the purpose after the flight Whatever it may be, the testimony of PW 1 and the fact that he had obtained the approval of the Assistant Collector of Customs for flying abroad without the TBRE items as early as 20.4.92, under Exhibit A 10, Order which is incorporated in the Customs Clearance under Exhibit A2(b) clearly show that PW 1 could not have encountered any difficulty in getting customs clearance and the story trotted out by the opposite parties that because of delay on the part of the complainant in getting customs clearance, he could not be accommodated in this flight, stands exposed. It follows that there was deficiency of service and willful negligence in preventing PW 1 to board the plane. This is a clear case of misconduct on the part of RWs l & 2.

Even assuming without admitting that PW 1 had a problem with the customs, had gone to the office of the Assistant Collector of Customs for clearance, and the Lady Customs Officer has doubted his clearance, could not RW1 and 2 have tarried a little, say 5 or 10 minutes - PW 1 has admittedly got clearance within 5 minutes - till the final word came

from the Customs Counter? Why was this hurry in clearing the flight? Keeping the flight schedule? No, stark insensibility.'' Is delay in flights for hours for the sake of VIPs and V VIPs unknown in our country wedded though we are to a democratic polity? Air India''s "MAHARAJA" cannot be expected to treat every passenger as a VIP it is often claimed to be so but should not "HIS HIGHNESS" show to an ordinary passenger, the elementary human courtesy, concern and consideration which every man owes to every other man? RWs 1 & 2 have in our view exhibit a callous, careless and cavalier attitude towards the inconvenience, may, hardship of a passenger holding a confirmed ticket and whose name has been included in the flight manifest. If this does not amount to negligence, what else could it be?

5. AGAIN even, assuming that PW 1 came to board the plane after the doors of the plane were closed and the plane was being pushed back from the aerobridge, it would not have been impossible to accommodate him by recalling the plane as in the case of emergency. But we are here dealing with two officers who are stone-walled and a passenger who is not a VIP. Whatever this may be, the undue and indecent haste with which the flight was ordered to take off without waiting for a few minutes more, amounts to gross deficiency of service and negligence.

6. ACCORDING to the complainant he was prevented from going in this flight by opposite parties 3 and 4 in order to accommodate some other persons. This motive attributed to the opposite parties does not stand scrutiny, for the simple reason that as per Exhibit B2, Load sheet, the plane was under loaded by 11139 kgs. There were therefore enough seats for passengers and space for luggage. The complainant is not able to satisfactorily explain the reason for not allowing him to board the flight, but it is needless for him to explain the motive when the facts are clear and when it is established beyond doubt that opposite parties 3 and 4 have acted in a high-handed manner in not allowing the complainant to board the plane and have come forward with a lame excuse that there was delay in customs clearance. On a consideration of all these facts we hold that there was negligence and deficiency of service on the part of the opposite parties 3 and 4 for which opposite parties 1 and 2 are vicariously liable.

Point No. 2 : The complainant has come forward with a claim of Rs. 9,50,000/-. According to him he was to enter into a contract with M/s. Master Spices Pvt. Ltd. Singapore on

22.4.92 and if that contract had matured, he would have earned a profit of Rs. 7,50,000/-. He had also dealings with M/s. A.S.M. Garments and Traders and M/s. Garden Gift Corner, Singapore and those dealings would have secured for him a profit of Rs. 1 lakh. For mental pain anuagony, for the ill-treatment and harassment, "the complainant has claimed compensation in another sum of Rs. 1 lakh, in all Rs. 9,50,000/-.

Mr. Nanavadhi, the learned senior Counsel from Bombay appearing for the opposite parties strenuously contended the under Section 73 of the Contract Act and Article 16.3.5 of the Warsaw Convention, the complainant is entitled to only damages which naturally arose in the usual course of things from the breach of contract or which the parties knew when they made the contract to be likely to result from the breach of it and that the carrier is not liable for any indirect or consequential damages. Section 73 of the Indian Contract runs as follows:

"When a contract has been broken, the party who suffers as such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby which naturally arose in the usual course of things from such breach, or which the parties knew when they made the contract to be likely to result from the breach of it. Such compensation is not to be given for any remote and indirect loss or damage sustained by reasons of the breach".

Article 16.3.5 of the Warsaw Convention lays down thus:

"Carriers" liability shall not exceed the amount of proven damages. Carrier shall not further more be liable for the indirect or consequential damages".

These provisions apply to breach of contract. The case on hand is not one of a breach of contract, but is one of negligence. Where unliquidated damages are claimed, the principles of liability in tort and contract differ in certain respects. In the case of a breach of contract, the party aggrieved by it can claim damages for loss arising from special circumstances relating to him, only if the party liable for the breach had noticed of such circumstances when the contract was made but not otherwise. There is no such limitation of the rule of casual elation in tort. As observed by Scrutton L.J. in Repolemis (1921 (3) KB 562),

"Once the act is negligent, the fact that its exact operation was not foreseen or that the damage it in fact causes is not the exact kind of damage one would expect, is immaterial, so long as the damage is in fact directly traceable to the negligent act and not due to the operation of independent causes having no connection with the negligent act, except that they could not avoid its results".

Subsequent decisions have also introduced the test of foreseeability. In Wagonmound (1961 AC 388), the Judicial Committee of the Privy Council laid down the principle that as an essential condition of liability for negligence, the damage complained of must be of such a kind that a reasonable man should have foreseen. It is not necessary and it rarely

happen - with the precise damage that occurred was foreseeable, but if that kind of damage was foreseeable, the fact that the damage that occurred was larger in extent or of greater extent than could have been foreseen or expected would not absolve the defendant from liability.

7. IN the light of these principles, let us examine the claim of the complainant. According to the complainant, he expected to be in Singapore on the evening of 22.4.92 and to sign a contract for U.S. Dollars 300,000 with M/s. Master Spices Pvt. Ltd., Singapore. That was a contract for a period of 5 years and every shipment of the spices was worth U.S. Dollars 300,000. Exhibit A5 is a letter dated 16.4.92 from Severacre Exports Pvt. Ltd. asking PW 1 to be at Singapore on 22.4.92 to finalise this contract. With this letter is enclosed Exhibit A5(a) letter from M/s. Master Spices Pvt. Ltd. dated 14.2.92. On account of the inability of PW 1 to be at Singapore on 22.4.92, this contract could not be entered into as is seen from Exhibit A7 and Exhibit A7(a) letters. Another contract was with M/s. A.S.M. Garments & Traders, Singapore for a period of one year for a monthly shipment with U.S. Dollars 15,000. Exhibit A 4 is the letter from M/s. A.S.M. Garments & Traders requesting the complainant to be at Singapore on 23.4.92 for the finalisation of this Deed. Exhibit A 6 is another letter dated 24.4.92 from M/s. A.S.M. Garments expressing regret for the inability of the complainant to be at Singapore on 23.4.92 to sign the contract. According to the complainant if he had reached Singapore on 22.4.92, he would have successfully negotiated these 2 contracts and earned a profit of Rs. 8,50,000. The inability on the part of PW 1 to enter into contract is the direct result of his failure to board the Air INdia Plane on 22.4.92. PW 1 being a businessman, RWs 1 and 2 could have easily foreseen the consequences of his failure to go to Singapore on that day, especially because according to PW 1 he told RWs 1 and 2 of the imperative necessity for him to go to Singapore because of these two business commitments and there is no cross-examination on this aspect. We are, therefore, inclined to hold that the loss which PW 1 claims to have sustained is the direct result of the conduct of RWs 1 and 2 and one which was foreseeable by RWs 1 and 2 who have been duly informed thereof. However the claim of Rs. 8,50,000/- on the scope appears to be on the side of exaggeration. We are inclined to grant him compensation to the such of Rs. 2,00,000/-.on this aspect.

Undoubtedly PW 1 has suffered much mental pain and agony, on account of the conduct of RWs 1 and 2 who have without any reason prevented him from boarding the plane. We award compensation in the sum of Rs. 25,000/-.

8. IN the result we order as follows:

1. The opposite parties shall pay to the complainant Rs. 2,25,000/- as compensation for loss of profit and mental pain and agony. 2. The opposite parties shall also pay to the complainant Rs. 3,000/- as costs. Complaint allowed.