2020 INSC 148

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 3346 OF 2018

Bharti AXA General Insurance Co. Ltd. ....Appellant(s)

Versus

Priya Paul & Anr. ....Respondent(s)

J U D G M E N T

MOHAN M. SHANTANAGOUDAR, J.

This appeal arises against the order of the National Consumer Disputes Redressal Commission (for short "National Commission") dated 22.05.2017 allowing the insurance claim filed by Respondent No. 1 pertaining to an aviation accident leading to the death of her son.

2. The brief facts leading to the instant appeal are as follows:

2.1 Respondent No. 1 had gone on vacation to Canada along with her family in June 2013. On 29.06.2013, the family visited the Pemberton Soaring Centre, a gliding facility at

Pemberton in British Columbia. Her son took the first turn for a sightseeing flight on a two-seater glider plane (Stemme S10-VT) flown by the pilot at the facility. While airborne, the glider exploded after colliding with a Cessna 150 aircraft, killing all occupants of both the glider and the Cessna. Respondent No. 1 filed a claim with the Appellant based on the Smart-Personal Accident-Individual Insurance Policy ("the Policy") taken by the deceased. The claim was repudiated on the basis that the deceased was travelling in a motorized glider for sightseeing, and hence was not travelling in a standard aircraft, and was further not a fare-paying passenger in any regular scheduled airline or air charter company, which excluded the accident from the purview of the Policy. We may refer to the relevant provisions of the Policy in this regard:

> "**7. General Exclusions of the Policy**
>
> PROVIDED ALWAYS THAT the Company shall not be liable under this policy for-
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> …
>
> **ix)** Any claim in respect of accidental death or permanent disablement of the Insured/Insured Person:
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> …
>
> iii) whilst engaging in aviation or ballooning whilst mounting into, dismounting from or traveling in

> any aircraft or balloon other than as a passenger (fare paying or otherwise) in any duly licensed standard type of aircraft anywhere in the world.
> …
> **xiv)** Insured/insured person whilst flying or taking part in aerial activities (including cabin crew) except as a fare-paying passenger in a regular scheduled airline or air charter company."

2.2 A complaint was filed with the National Commission on 3.2.2015, which allowed the same, directing the insurer to pay an amount of Rs. 1 crore with interest at the rate of 8% per annum. The National Commission held that a glider was an "aircraft" under Section 2(1) of the Aircrafts Act, 1934 ("the 1934 Act") and had not been expressly excluded under the Policy, unlike activities like hang-gliding and paragliding. Next, the National Commission held that the glider was a "duly licensed" aircraft, since the Pemberton Soaring Centre had a licence to conduct the business of sightseeing glider flights, and there was no evidence of a licence being required for individual aircraft under law apart from a private registration, which had been done for the glider in question, as evident from the aviation inspection report of the Transport Safety Board of Canada ("the TSBC Report"), which had also extensively referred to the glider as an "aircraft".

2.3 It was also held that the glider was a standard type of aircraft, placing the onus of bringing the case within an exclusionary clause on the insurer, who had failed to produce any certificate from the Canadian or Indian aviation authorities, or rule or regulation which defined a “standard” aircraft, in the absence of a contractual definition of the term, and particularly since it was noted in the TSBC report that the glider was certified, equipped, and maintained in accordance with existing regulations and approved procedures.

2.4 The Commission was also of the opinion that a person undertaking a round trip without a destination would also qualify as a passenger, and that the deceased was a fare-paying passenger on a sightseeing flight, and had taken the aircraft on hire. Considering the definition of “charter” in the Black’s Law Dictionary, which includes the hiring or leasing of a vessel such as an airplane, and the fact that charges were payable by the deceased for flying in the glider, the Commission also concluded that the plane was given out on hire by the Pemberton Soaring Company pursuant to its business, and it was an air charter company. The Commission declined from placing reliance on alleged correspondence with the attorney of the owner of the

Pemberton Soaring Company confirming that the accident did not fall into the purview of the Policy, for being hearsay.

2.5 Aggrieved by this decision, the instant appeal was filed by the insurer.

3. Before us, learned Counsel appearing for the Appellant-insurer urged that the accident did not fall within the purview of the Policy for the following reasons:

3.1 *Firstly*, Counsel argued that the glider in question was not a standard aircraft, since it principally relied on aerodynamics to soar, whereas standard aircraft were powered. It was submitted that though the glider in question was equipped with an engine, this was solely for the purpose of take-off and landing and did not change the "non-standard" nature of the glider, especially when the TSBC Report itself noted that the glider was operating without power at the time of the accident. To buttress his argument, Counsel also referred to the definition of "glider" under the 1934 Act, and to the Glider Flying Handbook published by the United States Department of Transportation, Federal Aviation Administration. He also highlighted that the Pemberton Soaring Company had advertised itself as offering opportunities for undertaking non-powered flight; the pilot

himself had a separate licence for gliding; the Aircraft Rules, 1937 ("the 1937 Rules") distinguished between the licences for power-driven and non-power driven aircraft; and referred to alleged correspondence with Mr. Sean Taylor, the lawyer of Ms. Tracey Rozsypalek, the widow of the pilot and co-owner and operator of the Pemberton Soaring Centre, affirming that the glider was not a standard aircraft. He submitted that the definition of "aircraft" under Section 2(1) of the 1934 Act, which included gliders and even balloons, could not be relied upon as it militated against the intention of the parties to the Policy to exclude such vessels from the meaning of "*standard type of aircraft*".

3.2 *Secondly*, it was contended that the glider was not duly licensed, since the licence relied upon by the National Commission was only a municipal business licence.

3.3 Thirdly, learned Counsel submitted that the National Commission wrongly ignored that a person undertaking a full-circle flight could not be held to be a passenger.

3.4 *Fourthly*, he argued that the Pemberton Soaring Centre was not a regular scheduled airline or air charter company, again relying on the alleged correspondence with Mr. Taylor, a report

dated 21.05.2018 by the Canadian investigator Diligence International Group ("Diligence") highlighting the absence of a charter licence for the Pemberton Soaring Centre, also placing a sample Canadian charter licence on record for illustration purposes. He also referred to an email dated 21.10.2013 from Ms. Rozsypalek enclosing the business licence of the Pemberton Soaring Centre, to argue that this suggested that the facility in fact had no other licence, particularly for air charter business.

4. Learned Counsel for Respondent No. 1, on the other hand, argued in favour of the decision of the National Commission.

4.1 *Firstly*, he argued that the glider was a duly licensed standard aircraft. He emphasised that a glider is classified as an aircraft under the Aircraft Act; and that the failure to expressly exclude gliding activity from the purview of the Policy, as was done for hang-gliding and para-gliding, indicated an intention to the include the same. He submitted that though the glider was motorised, determining its status as a standard aircraft depending on whether the engine was on or off during the flight would unfairly lead to differential rules being applicable to the same vessel at different times.

4.2 He also highlighted that as per the TSBC Report, the glider, as well as the Cessna, were registered aircraft governed by the same Canadian regulations, particularly the Visual Flight Rules; the glider was privately registered, and was operated by a duly licensed pilot; and the operator was running under a licence to carry on the business of gliding. These were the only legal requirements to be satisfied to carry on the activity of gliding as a business lawfully. It was stressed that the TSBC Report found that the aircraft was certified, equipped and maintained in accordance with applicable rules, and no particular rule was urged to show that the glider was not a standard aircraft. Any such rule could in any case not have been in the possession of the complainant, and thus the burden lay on the insurer to produce the same.

4.3 *Secondly*, learned Counsel argued that the deceased was a fare-paying passenger at all times during the flight. He submitted that the glider had been consistently described in the records as having two seats, one for the pilot and one for the passenger; the National Commission rightly held so disregarding the fact that the journey was full-circle; and that the widow Ms.

Rozsypalek had herself stated in her email dated 21.10.2013 that the deceased was a fare-paying passenger on the glider aircraft.

4.4 *Thirdly*, he contended that the Pemberton Soaring Centre was an air charter company. To this end, he argued that the term "charter" implied the hire or lease of a vehicle in its entirety, which was being done by the facility while offering gliders for sightseeing; the National Commission rightly rejected evidence to the contrary from the purported attorney of the Rozsypaleks as hearsay; and that the second report dated 21.05.2018 issued by Diligence for the Appellant-insurer was an event subsequent to the filing of the complaint and decision of the National Commission, and hence liable to be disregarded.

5. Heard the learned Counsel on either side and perused the record.

6. We have already referred to the relevant exclusionary clauses of the Policy, but would like to reproduce it again for the purpose of convenience:

> "**7. General Exclusions of the Policy**
>
> PROVIDED ALWAYS THAT the Company shall not be liable under this policy for-
>
> …

ix) Any claim in respect of accidental death or permanent disablement of the Insured/Insured Person.

…

iii) whilst engaging in aviation or ballooning whilst mounting into, dismounting from or traveling in any aircraft or balloon other than as a passenger (fare paying or otherwise) in any duly licensed standard type of aircraft anywhere in the world

…

xiv) Insured/insured person whilst flying or taking part in aerial activities (including cabin crew) except as a fare-paying passenger in a regular scheduled airline or air charter company."

6.1 To better appreciate the arguments advanced by the parties, it is also important to reproduce clause 7(xiii) of the Policy:

"**xiii)** Insured/insured person whilst engaging in speed contest or racing of any kind (other than on foot), bungee jumping, parasailing, ballooning, parachuting, skydiving, paragliding, hang gliding, mountain or rock climbing necessitating the use or guides of ropes, potholing, abseiling, deep sea diving using hard helmet and breathing apparatus, polo, snow and ice sport."

6.2 Clearly, Clause 7(ix)(iii) excludes accidental death or permanent disablement suffered by the insured while mounting into, dismounting from, or travelling in any aircraft or balloon, while engaging in aviation or ballooning. However, the insurer

would be liable if the accident occurred while such activity was being undertaken by the insured as a passenger of any aircraft or balloon, whether fare paying or gratuitous, in a duly licensed, standard type of aircraft anywhere in the world.

6.3 Clause 7(xiv), in comparison, is similarly worded as far as its exclusion is concerned, inasmuch as it pertains to accidental death or permanent disablement suffered by the insured while flying or taking part in aerial activities. This clause however contemplates that the accident would be included in the ambit of the Policy if it occurred while the insured was travelling as a fare-paying passenger in a regular scheduled airline or air charter company.

6.4 Clause 7 (xiii) excludes claims arising out of a wide variety of adventure sports and activities that have been specifically mentioned, such as bungee jumping, parasailing, and ballooning. Notably, though activities such as paragliding and hang gliding are included, gliding is not mentioned.

7. There is no dispute that the deceased was engaging in the activity of gliding, which is an aviation/aerial activity which would fall within the exclusion envisaged under Clauses 7(ix)(iii) and 7(xiv) of the Policy. The impugned judgment would be liable

to be confirmed if we determine that the gliding activity in question falls within the exemptions to the exclusions envisaged under these two clauses, that is to say, the deceased was travelling in a duly licensed standard type of aircraft, bringing him out of the exclusion in Clause 7(ix)(iii), *and* that he was travelling as a fare-paying passenger in an air charter company or regular scheduled airline, bringing him out of the scope of the exclusion in Clause 7(xiv). *Both* these clauses must be satisfied in order to evade exclusion from the Policy.

7.1 In view of the above, the questions before us for determination are, firstly, whether the glider involved in the accident was an *aircraft*; secondly, whether it was a *standard* aircraft; thirdly, whether the aircraft was duly licensed; fourthly, whether the Pemberton Soaring Centre was an air charter company or regular schedule airline; and fifthly, whether the deceased was travelling on the glider as a fare-paying passenger. The fourth question may be further limited to whether the Pemberton Soaring Centre was an air charter company, since Respondent No. 1 has not disputed that the Pemberton Soaring Centre was *not* a regular scheduled airline.

8. On the question of whether the glider is an aircraft, we must first refer to the definition of "aircraft" under Section 2(1) of the 1934 Act:

> "(1) "aircraft" means any machine which can derive support in the atmosphere from reactions of the air, other than reactions of the air against the earth's surface and *includes* balloons whether fixed or free, airships, kites, *gliders* and flying machines" (emphasis added).

8.1 Reference may also be made to the definition of "aircraft" under Section 3(1) of the Aeronautics Act, 1985 of Canada:

> "(a) until the day on which paragraph (b) comes into force, any machine capable of deriving support in the atmosphere from reactions of the air, and includes a rocket"; (*aéronef*)
> (b) [Repealed before coming into force, 2008, c. 20, s. 3]."

8.2 Evidently, a glider is included in the definition of an aircraft for the purposes of the relevant Indian and Canadian statutes. Additionally, the definition of "glider" itself, under Rule 3(26) of the 1937 Rules, describes the same as an aircraft:

> "(26) "Glider" means a non-power-driven heavier-than-air *aircraft*, deriving its lift in flight chiefly from aerodynamic reactions on surfaces which remain fixed under given conditions of flight" (emphasis added).

8.3 Similarly, under the Canadian Aviation Regulations (SOR/96-433), a glider is defined as "*a non-power-driven heavier-than-air aircraft that derives its lift in flight from aerodynamic reactions on surfaces that remain fixed during flight*".

8.4 Even the dictionary meanings of the term "aircraft" do not make any exception for gliders. For instance, the Concise Oxford Advanced Learner's Dictionary defines an aircraft as "*any vehicle that can fly and carry goods or passengers*",[1] while the Cambridge Advanced Learner's Dictionary defines it as "*any vehicle, with or without an engine, that can fly, such as a plane or helicopter*".[2] In turn, the former defines a "glider" as "*a light aircraft that flies without an engine*", while the latter defines it as "*an aircraft that has long fixed wings and no engine and flies by gliding*".

8.5 It becomes important to note at this juncture that though the glider in question was equipped with an engine, this was mainly for the purpose of adding self-launching capacity to the vehicle, as evident from the TSBC Report. Be that as it may,

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1 OXFORD ADVANCED LEARNER'S DICTIONARY (Oxford University Press, 9th edition, 2015).

2 CAMBRIDGE ADVANCED LEARNER'S DICTIONARY (Cambridge University Press, 4th edition, 2013).

the fact that the glider was motorised would not imply that it was not an aircraft at all. Even the TSBC Report unequivocally refers to the glider as an "aircraft" repeatedly. Importantly, the terms "aircraft" and "glider" have not been defined within the Policy. In such circumstances, we are of the view that the glider in question must be regarded as an aircraft under the Policy.

9. We may next address the question of whether the glider in question was a standard type of aircraft. We begin by noting that the Policy itself does not define what a "*standard type of aircraft*" is, and we are at a loss to understand the context in which the term has been employed in the Policy. Much of the argument advanced by the learned Counsel for the Appellant to distinguish between power-driven and non-power driven aircraft as being standard and non-standard relies upon common parlance; however, apart from this submission, learned Counsel has not been able to explain the exact meaning of the term "*standard type of aircraft*".

9.1 The nature of conventional gliders as not being power-driven has not been seriously disputed before us. Thus, we find it unnecessary to refer to the extensive literature relied upon by the Appellant to establish the mechanics of a glider's flight. At the

same time, since the glider in question was a *motorised* glider, being equipped with an engine for self-launching capacity, it is crucial to determine whether a distinction can be drawn between "standard" and "non-standard" aircraft on the basis of the nature of power they run on, whether a glider can be termed as a "non-standard" aircraft merely on that basis, and whether a motorised glider would therefore amount to a standard or non-standard aircraft.

9.2 It would be apt to refer to the 1937 Rules in order to determine whether a distinction of the nature described above is apparent therein. We would like to particularly refer to the scheme of granting licences within the rules, since the Appellant has sought to impress upon us that the 1937 Rules distinguish between the licences for power-driven and non-power driven aircraft, indicating that non-reliance on a motor engine for flying may be the basis to conclude that gliders are "non-standard" aircraft.

9.3 As far as the grant of pilots' licences are concerned, the 1937 Rules provide for different educational qualifications for issuance of licences for aeroplanes, helicopters, gliders, balloons, and microlight aircraft. For instance, as per Paragraph 1(e) of

Section E of Schedule II, the flying experience for a private pilot's licence for flying aeroplanes may be accumulated through the completion of not less than forty hours of flight time as a pilot of an aeroplane, which shall include:

> "(i) not less than twenty hours of solo flight time;
> (ii) not less than five hours of cross-country flight time in accordance with para 5(b) of Section A as the sole occupant of an aeroplane including a flight of not less than one hundred and fifty nautical miles in the course of which full stop landings at two different aerodromes shall have been made;
> (iii) not less than ten hours of solo flight time completed within a period of twelve months immediately preceding the date of application for the issue of licence;
> (iv) fifty percent of solo flying experience on microlight aircraft acquired during the preceding twenty four months from the date of application subject to a maximum of ten hours, may be credited towards the total experience required for the issue of the licence;
> (v) fifty percent of solo gliding experience shall count towards total flying experience requirement subject to a maximum of ten hours towards total flight time."

9.4 To take another instance, as per Paragraph 1 of Section F, the flying experience required for a pilot's licence for flying microlight aircraft is completion of not less than forty

hours of flight time as a pilot of a microlight aircraft, which shall include:

> "(i) not less than fifteen hours of solo flight time of which not less than ten hours shall have been completed within a period of twelve months immediately preceding the date of application for the licence; and
>
> (ii) not less than five hours of cross-country flight time as the solo occupant of microlight aircraft including a flight over a distance of not less than fifty nautical miles from the aerodrome of departure and at least one full stop landing at a suitable aerodrome or landing ground other than the aerodrome of departure;
>
> (iii) the holder of a current Private Pilot's Licence (Aeroplanes) or a higher category of Licence (Aeroplanes) shall be exempted from the experience requirements. Such pilots shall, however, be required to carry out familiarisation flights which shall be followed by not less than three solo take-offs and landings. The familiarisation flights shall be carried out under the supervision of an approved Examiner or a Flight Instructor approved by the Director-General."

9.5 On the other hand, the flying experience required for a glider pilot's licence under Paragraph 1(e) of Section I of Schedule II is as follows:

> "(i) not less than ten hours of flight time of which not less than five hours shall be solo flight time; and

(ii) not less than seventy five take-offs and landings of which not less than twenty five solo take-offs and landings shall have been completed within a period of six months immediately preceding the date of application for licence."

9.6 Thus, it is clear that no uniform requirement of flying experience is prescribed for one set of aircraft as opposed to another; on the other hand, different requirements are prescribed for different types of aircraft.

9.7 Interestingly, there is a distinction maintained under Rule 48 between the fees payable for student pilot's licences and glider licences on one hand and remaining licences on the other, for the purpose of issuance, validation or renewal of licences. It is also relevant to note that a common student licence is envisaged for aeroplanes, helicopters and gliders, while separate student licences are prescribed for microlight aircraft and balloons.

9.8 In our considered opinion, the above scheme shows that the 1937 Rules do not maintain any uniform categorisation between powered and non-powered aircraft, far from terming any of these as "standard" or "non-standard". It does not appear to be the case that one set of rules is prescribed for powered aircraft, and another distinct set for non-powered aircraft. Thus, no

reliance can be placed on the Rules to further the Appellant's contention in this respect.

9.9 As far as the Canadian regime is concerned, no particular statutory provision was brought to our attention in this regard by either party. We may observe that the TSBC Report notes that the pilot of the glider had a private pilot licence for aeroplanes, valid for single-engine land aircraft, as well as a separate glider pilot licence. However, this distinction per se does not support the argument of the Appellant, since a brief perusal of the Canadian Aviation Regulations (SOR/96-433) reveals that under the Canadian regime as well, a distinction of the nature submitted by the Appellant has not been maintained. To take the licence regime as an example again, the regulations provide for several kinds of licences, which do not seem to be categorised on the basis of the powered or non-powered nature of the aircraft. For instance, the regulations provide for airline transport licences, commercial licences, and private pilot licences for aeroplanes; airline transport licences, commercial licences, and private pilot licences for helicopters; glider pilot licences; and pilot permits for gyroplanes, ultra-light aeroplanes, and so on.

9.10 From the above discussion, it is evident that no rigid distinction can be culled out between "standard" and "non-standard" aircraft. Though the Appellant in this case submits that this distinction can be drawn on the basis of whether the aircraft is power-driven or not, it can equally be argued that the term "standard" aircraft connotes only aeroplanes, or only aeroplanes and helicopters, or even includes microlight aircraft, and so on. The usage of as vague a phrase as "*standard type of aircraft*" in the Policy, thus, suggests to us that the same must be construed in a liberal manner so as to benefit the insured. In this regard, we may fruitfully quote the following observations of this Court in ***United India Insurance Co. Ltd.* v. *Pushpalaya Printers***, (2004) 3 SCC 694:

> "6. …It is also settled position in law that if there is any ambiguity or a term is capable of two possible interpretations, one beneficial to the insured should be accepted consistent with the purpose for which the policy is taken, namely, to cover the risk on the happening of certain event. Although there is no ambiguity in the expression "impact", even otherwise applying the rule of contra preferentem, the use of the word "impact" in clause 5 in the instant policy must be construed against the appellant. Where the words of a document are ambiguous, they shall be construed against the party who prepared the document. This

rule applies to contracts of insurance and clause 5 of the insurance policy even after reading the entire policy in the present case should be construed against the insurer. A Constitution Bench of this Court in General Assurance Society Ltd. v. Chandmull Jain [AIR 1966 SC 1644: (1966) 3 SCR 500] has expressed that (AIR p. 1649, para 11)

> "in a contract of insurance there is requirement of uberrima fides i.e. good faith on the part of the assured and the contract is likely to be construed contra proferentem, that is, against the company in case of ambiguity or doubt"."

9.11 In the instant case, we agree with the conclusion of the National Commission that had the insurer really intended to exclude gliding activity from the purview of the Policy, it could have done so expressly, similar to the manner in which hang-gliding and para-gliding were excluded in Clause 7(xiii) of the Policy. Similarly, the insurer could have also defined the phrase "*standard type of aircraft*" for the purpose of the Policy, but it chose not to do so. In these circumstances, it is not open to the insurer to reject a claim arising out of a glider accident by now arguing that a glider is not a standard aircraft by virtue of not principally being a powered aircraft. We are therefore compelled to conclude that regardless of whether the glider involved in the

accident was powered or non-powered, motorised or non-motorised, it was a "*standard type of aircraft*" envisioned in the Policy.

10. We now turn our attention to the issue of whether the glider in question was duly licensed. In this regard, it may be noted that the National Commission specifically took note of the Appellant's submission that the licence produced before the Commission was only a municipal business licence to be taken necessarily by any business-owner seeking to conduct a business in the municipal limits of Pemberton. The Commission went on to find that there was no evidence of a licence being required in respect of each aircraft/glider, and the private registration undertaken with respect to the glider in question, in addition to the municipal business licence, was sufficient compliance with the requirement of the aircraft being duly licensed.

10.1 We find ourselves in agreement with the National Commission in this regard. We have perused the business licence on record, as well as the observation in the TSBC Report that the the glider was registered privately, carrying registration as "C-FHAB", with serial number 11-016. We are moreover conscious of the specific finding in the TSBC Report that the glider was

certified, equipped and maintained in accordance with existing regulations and approved procedures, and compliant with rules such as the Visual Flight Rules. The Report further observes that even the pilot of the glider was certified and qualified for the flight as per existing regulations, indicating that such separate glider pilot licence was in accordance with the legal requirements. Thus, we conclude that it was rightly held that the aircraft in question was duly licensed.

11. The fourth issue to be determined is whether the Pemberton Soaring Centre was an air charter company. In this respect, we would first like to deal with the contention of the Appellant that one Mr. Sean Taylor, the attorney of Ms. Tracy Rozsypalek, the co-owner of the Pemberton Soaring Centre (who was also the widow of the deceased glider pilot, the other co-owner) had communicated to the insurance investigator Diligence that the Pemberton Soaring Centre was not an air charter company. We are of the view that the National Commission rightly disregarded this communication, though spoken to by the Managing Director of Diligence on affidavit, being hearsay evidence in nature. No affidavit from Mr. Taylor himself was placed on record, and indeed, there is nothing to show that he in

fact was the attorney of Ms. Rozsypalek. Thus, no reliance can be placed on the alleged communication with Mr. Taylor.

11.1 The Appellant has also submitted the report dated 21.05.2018 of the investigator Diligence, containing certain records such as communication with Canadian authorities, as well as a database search of air carrier licences, to show that no licence was possessed by the Pemberton Soaring Centre authorising it to operate as an air charter company. The Appellant also seeks to draw our attention to a sample licence of a Canadian air charter company to argue that no such licence was held by the Pemberton Soaring Centre. We are inclined to disregard these records, as the investigation based on which such records were collected was commissioned by the insurer after the impugned decision of the National Commission dated 22.05.2017, and more so after Diligence had already submitted an investigation report prior thereto. As per the second report itself, the first report was submitted on 03.02.2014, and the Appellant instructed Diligence to re-open investigation into the case on 20.02.2018, four years later, specifically on the question of whether the Pemberton Soaring Centre was an air charter company or regular scheduled airline. In our considered opinion,

the information that the Appellant now seeks to rely upon could easily have been obtained by it at the time of the first investigation by Diligence, and could have been placed before the National Commission. Particularly in view of the long lapse of time before the second report was commissioned, we are of the opinion that it is not open to the Appellant to place reliance upon the same at this stage.

11.2 We are cognizant of the fact that the term "air charter company" has not been defined within the policy, and the National Commission, while concluding that the Pemberton Soaring Centre was an air charter company, relied upon the dictionary meaning of the word "charter", which connotes the hiring or lease of the entirety of a vessel. It appears that such term is not defined within any Canadian or Indian regulation, and indeed, no material has been placed on record regarding the regulatory regime governing domestic chartered flights in India, Canada, or any other jurisdiction. However, to throw light on the scope of air charter services, we may refer to international materials discussing the same, referring in particular to the definitions adopted by the International Civil Aviation Organisation ("the ICAO").

11.3 Any discussion on charter flights must first begin by differentiating between scheduled and non-scheduled flights. The ICAO essentially defines scheduled flights as those which are scheduled and performed as per a fixed timetable, or are so regular and frequent so as to constitute a recognizably systematic series, and are open to direct bookings by members of the public.[3]

11.4 In contrast, non-scheduled services are described as commercial air transport services performed as other than a scheduled service.[4] In the *Manual on the Regulation of International Air Transport*, the ICAO defines a chartered flight as a non-scheduled operation using a chartered aircraft. At the same time, a *charter* is stated to be a contractual arrangement between an air carrier and an entity *hiring* or *leasing* its aircraft. Importantly, reference is made to the "*single-entity charter*" or "*own use charter*", which is described in the following terms:

> "…the most basic and timeless type, the single entity charter or own-use charter, one chartered by one entity (e.g. an individual, corporation, government)

3 Glossary of Terms adopted by the International Civil Aviation Organisation, *available at* https://www.icao.int/dataplus_archive/Documents/20130729/GLOSSARY.doc.

4 International Civil Aviation Organisation, *The Manual on the Regulation of International Air Transport* (Doc. 9626, 3rd edition, 2016).

> *solely for its own use* for the carriage of passengers and/or freight, with the cost borne solely by that entity and not shared directly or indirectly by others." (emphasis added)

11.5 It is undisputed in the instant case that the glider in question could seat only two persons. Thus, in offering sightseeing services on a glider plane for a fixed consideration, the Pemberton Soaring Centre gave out the entirety of the aircraft on hire for the duration of the aerial journey, though one seat was reserved for the pilot. In our considered opinion, this practice may constitute an own-use charter. Moreover, we note that there is no dispute that the Pemberton Soaring Centre was an incorporated company. Keeping in mind that the Appellant has itself omitted to define what it means by an "air charter company" in the Policy, we are again, for the purposes of the Policy, inclined to extend the benefit of the ambiguity in the meaning of the term to the claimant. Thus, we affirm the National Commission's finding that the Pemberton Soaring Centre was an air charter company within the meaning of clause 7(xiv) of the Policy.

12. The last issue to be determined is whether the deceased was a fare-paying passenger on the glider in question. We find no force in the Appellant's contention that the deceased

was not a passenger merely because the journey was supposed to begin and terminate at the same location; indeed, this contention was duly dealt with and rejected by the National Commission. Needless to say, the purpose of the journey was to fly over various scenic spots, and after completion, the glider was to return to a designated location, presumably from where it took off. As noted by the National Commission, this would not be dissimilar to how a sightseeing bus might originate and terminate its journey at the same spot after passing by various places of interest. We find it difficult to conclude that a person undertaking such a journey would not amount to a "passenger".

12.1 Further, it is evident from the record that the journey on the glider was undertaken for a fixed consideration, though the ticket for the same has not been placed on record. Thus, we affirm the National Commission's finding that the deceased was a fare- paying passenger on the glider in question.

13. In view of the above discussion, we find that the accident out of which the instant claim arose was completely covered under the ambit of the Policy, since the deceased was travelling in a duly licensed standard type of aircraft, which brings him out of the exclusion in Clause 7(ix)(iii), *and* was

travelling as a fare-paying passenger in a flight of an air charter company, bringing him out of the scope of the exclusion in Clause 7(xiv). Thus, we find no reason to interfere with the impugned judgment, which found that the Appellant wrongly repudiated the claim filed by Respondent No. 1.

14. The instant appeal is therefore dismissed. Ordered accordingly.

.....J.
(MOHAN M. SHANTANAGOUDAR)

.....
J.
(R. SUBHASH REDDY)

NEW DELHI
FEBRUARY 07, 2020