
(1982) 08 GUJ CK 0010
In the Gujarat High Court

Bai Dahiben

APPELLANT

Vs

Jesingbhai Bijalbhai and Others

RESPONDENT

Date of Decision : 20-08-1982

Acts Referred:

Motor Vehicles Act, 1988 — Section 95(2) , 96(2)(b)(i)(a)

Citation : (1984) 2 ACC 74

Hon'ble Judges : I.C. Bhatt, J

Bench : Single Bench

Judgement

I.C. Bhatt, J.—These two appeals arise out of Motor Accident Claim Petition Nos. 17/1971 and 18/1971 filed by the claimants arising out of a single accident which had taken place near Ankleshwar on Rajpipla Road at about 11.00 p.m. on 27-4-1971 in which truck No. GTB 6177 belonging to opponent No. 2 insured with opponent No. 3 and driven by opponent No.1 was involved. In both these claim petitions, the Motor Accidents Claims Tribunal, Broach District at Broach (hereinafter referred to as "the tribunal"), by his judgment and award dated November 21, 1972 has awarded an amount of Rs. 7, 800/- in claim petition No. 17/71 and Rs. 1,000/- in claim petition No. 18/71 and ordered the opponent No. 1 to pay the aforesaid amount to the respective appellant with interest at the rate of 6 percent p.a. from the date of the petition and proportionate costs thereon. However, both the claim petitions against opponent Nos. 2 and 3 were dismissed by the Tribunal with costs, Therefore, the respective appellants have filed these two appeals on the ground that the award should have been passed against respondent Nos. 2 and 3, that, is the owner of the truck and the insurance company. The claimants are: not claiming any additional amount of compensation in both these appeals. Mr. Desai, learned Counsel for the appellant stated that he does not press his claim for any additional amount of compensation in this appeal, but his only submission is that the award should have been passed against all the respondents.

2. So far as the question of negligence of the driver of the vehicle is concerned, it

has been held to be proved in this case and there is no appeal or cross-objections against the said finding of the Tribunal and, therefore, the said finding has become final.

3. So far as opponent No. 2 is concerned, it is difficult to understand how he is not made liable under the award even though the evidence is to the effect that the cleaner of the truck had permitted the deceased and one Bhikhabhai to board the truck. Even the Tribunal has given a finding in paragraph 27 of the award that deceased Naranbhai was in fact given a lift in the truck in question. The Tribunal has further observed that if the driver was not willing to give lift, he could have refused to proceed towards Rajpardi, but instead of doing so he is shown to have immediately proceeded towards Rajpardi after the deceased was given, lift in the truck in question. Deceased Naranbhai thus would be deemed to have been given the, lift with the consent and connivance of the driver of the truck. Once the driver and the cleaner have carried the passengers in the vehicle, the owner of the truck would be vicariously liable for the act of his employees, namely, the driver and the cleaner of the truck in question. If the driver and/or the cleaner have given lift to the passengers in the truck, that action of the driver and the cleaner would bind the owner of the truck also unless it is shown that, the said action is illegal or unauthorised or without authority. In *Orrerrod v. Crasville Motor Service Ltd.* (1953) 2 All E.R. 753 Lord Denning has observed as under:

It has often been supposed that the owner of a vehicle is only liable for the negligence of the driver if that driver is his servant acting in the course of his employment. This is not correct. The owner is also liable if the driver is, with the owner's consent, driving the car on the owner's business or for the owner's purposes.

In the present case the only question required to be considered is whether the passengers were carried for hire or reward and whether the owner permitted the truck driver and the conductor to carry such passengers. The suggestion is that they were carried by the driver and the conductor of the truck during the course of the employment of the owner of the truck, has not been accepted by the Tribunal.

4. Mr. V.J. Desai, the learned Counsel for the appellant has mainly concentrated in this appeal on the question that the deceased Naranbhai was carried in the truck not as a gratuitous passenger but it was for hire and reward and the deceased had agreed to pay a sum of Rs. 2/- to the driver and/or cleaner of the truck. On this question we have got the evidence of Dahiben Keshavbhai, Ex. 32, who has stated in paragraph 1 that the deceased had agreed to pay Rs. 2/- as hire charges to the truck driver for the baskets with him. But her evidence would not be very material because she could not have any personal knowledge about the payment to be made by the deceased. The important evidence on this point is of one Bhikhabhai Bhudarbhai, Ex. 39. This witness has stated that he was travelling by the truck in question from Ankleshwar alongwith Naran Karsan and

according to him Naran Karsan had told him that he had agreed to pay the freight of Rs. 2/- to Rs. 3/- to the driver for the baskets carried with him. In the cross examination he has denied that he had no talk with Naranbhai in the truck. He has further stated that he had not paid any hire charges to the driver of the truck in question. It appears from the cross-examination of this witness that no question was put to him that deceased Naranbhai had not agreed to pay Rs. 2/- or Rs. 3/- to the driver or the cleaner of the truck. There is evidence of Jesingbhai Bijalbhai Ex. 53, who was the driver of the truck in question. In paragraph 2 of his evidence he has stated that Naranbhai Karsanbhai und Bhikhabhai Bhudarbhai were standing near the cross road of Ankleshwar. They entreated him to give them a lift in the truck. He refused to give them any lift and therefore they entreated the cleaner of his truck to give them a lift in the truck stating that no vehicle would then be available to them for going to their village. He further stated that the cleaner then gave them a lift in the body part of the truck. He has further stated that he had not charged any fare from Naranbhai and Bhikhabhai for giving them lift in the truck nor had they agreed to pay any fare to him or to the cleaner for the same. In cross-examination in paragraph 4 he has denied that Naranbhai was carrying baskets with him and that he had agreed to pay Rs. 2/- as freight to him for carrying the same in the truck. He has further stated that he did not know as to what talks had transpired between the cleaner and Naranbhai. It is difficult to understand why a truck driver who was returning empty to Rajpipla from Ankleshwar would allow any person to travel by his truck without any charges. It is difficult to accept the story of the driver that the cleaner of the truck had allowed them to board the truck without any payment. In fact, if the cleaner of the truck had allowed them to board the truck against the desire of the truck driver, the truck driver would have objected to it. In fact, it appears from the evidence on the record that initially the truck driver had objected to these persons being given lift in the truck, but ultimately, it appears that at the request of the cleaner, the truck driver might have agreed to allow these persons to board the truck. Bhikhabhai has stated in his deposition that Naranbhai had told him that he had agreed to pay freight charges. Whether the amount was paid to the cleaner or not could have been verified from the evidence of the cleaner of the truck but the cleaner of the truck has not been examined in the present case. He was the best person to testi'y whether the amount was recovered by him from Naranbhai, on behalf of himself and the driver of the truck. In view of the fact that the driver had carried the passengers in the truck and in absence of evidence of the cleaner of the truck a presumption can be safely drawn that the cleaner and the driver of the truck have been paid by Naranbhai. The presumption can be drawn safely in view of the fact that if no amount was paid to the cleaner, on behalf of the driver and the cleaner, the driver would have certainly objected in carrying the said passengers by giving them lift and would have refused to proceed further. In fact, the driver had first refused to carry them, but, it appears that on the suggestion of the cleaner they were carried in the truck. Therefore, it should be presumed that the amount was paid to the cleaner on behalf of both of them. I,

therefore, hold that Naranbhai was carried in the said truck for hire or reward and he was not a gratuitous passenger and he cannot be said to be an unauthorised passenger or person travelling in the truck. It is therefore, clear that deceased Naranbhai was a paid passenger in the truck in question at the time of accident.

5. In the present case I have come to the conclusion that deceased Naranbhai was a passenger for hire or reward in the said truck and he had paid the amount to the cleaner on behalf of both, namely, the cleaner and the driver of the truck. In view of this situation, the owner of the truck would be vicariously liable for the act of his employees, i.e., the driver and the cleaner of the truck in question. In the present case Jesingbhai, driver of the truck, has been examined at Ex. 53. He has stated that he was a driver in the employment of Ismailbhai Umarjibhai Patel on his motor truck No. GTB 6177. He has further stated that he had carried metal to Amlakhadi in Ankleshwar taluka from village Zab in Madvr taluka. The truck was then partly unloaded at Amlakhadi at 9.30 p.m. and then he returned to Ankleshwar and the remaining metal was unloaded at Ankleshwar at about 10.00 p.m. Thereafter he proceeded to Rajpardi with an empty truck. He halted near the petrol pump at cross roads of Ankleshwar for taking petrol. In cross-examination he has further stated that he was going to Rajpardi at the time of the incident for loading the truck with metal. The metal unloaded at the crossing of three roads at Ankleshwar was meant for Kapadia Brothers the contractor. From this evidence of the truck driver, it is clear that the driver was driving the truck at the relevant point of time, that is to say, at the time of accident, during the course of his employment and on the owner's business or for the owner's purpose and there is no evidence to suggest that the owner had prohibited the driver or the cleaner of the truck to give the lift to the passengers. Therefore, in view of the fact that the accident had taken place at the time when the driver was driving truck for the owner's business or for owner's purpose and during the course of his employment, the owner is also liable. A presumption can be raised that there was an implied authority of the owner to allow such paid passengers in the truck as there is no evidence to show that the driver and/or cleaner of the truck was prohibited from carrying the passengers in the said truck. Therefore, it is clear that the action of the driver and the cleaner is in the course of employment and hence the owner is vicariously liable for the negligence. The Supreme Court in Pushpabai Purshottam Udeshi and Others Vs. Ranjit Ginning and Pressing Co. (P) Ltd. and Another, has accepted the test as laid down in Ormrod's case (1953) 2 All E.R. 753 that the owner is also liable if the driver is, with the owner's consent, driving the vehicle on the owner's business or for the owner's purpose. Thus, in view of this settled position of law and in view of the evidence on record, it is quite clear that the owner of the truck is vicariously liable for the act of the employees, i.e., the driver and the cleaner of the truck. Therefore, an award will have to be passed against the owner of the truck also.

6. Learned Counsel Mr. Desai has also submitted that the insurance company

should also be held liable for the compensation amount. Therefore, in the present case the important question is whether the insurance company is liable, to pay the, compensation or not. In this regard-the insurance company in the written statement in paragraph 12, has only raised one contention that the deceased travelled by the said truck on his repeated request and that the said deceased, was neither the employee of the opponent No. 2 nor was he third party, and as such, under the terms and conditions of the policy, the applicants are not entitled to get any compensation from opponent No. 3, the insurance company. It is clear from the written statement that no defence has been taken with regard to the liability that on the date of the contract of insurance, the insured vehicle was expressly or implicitly not covered by a permit to carry any passengers for hire or reward. This point is neither taken in the written statement nor was it canvassed before the Tribunal, Mr. Amin, the learned Counsel for the respondent No. 3 has contended before me in this appeal that by accessory implication this point is covered once the specified condition in the insurance policy is proved. Now, so far as the insurance policy is concerned is at Ex. 54 and 55 and in the policy there is a clause imposing limitations as to use. It is mentioned in the policy that the policy does not cover use for the conveyance of passengers for hire or reward, so this clause clearly prohibits carrying of passengers for hire or reward and this is one of the contentions which has been missed by the respondent No. 3 and because of this, contention the respondent No. 3 has submitted that the insurance company is not liable to pay the compensation.

7. The learned Counsel for the appellants has relied upon the judgment of a full Bench of this Court in *New India Assurance Co. Ltd. and Another Vs. Nathiben Chatrabhuj and Others*, The Full Bench in paragraph 32 of the judgment has observed as under:

The liability in respect of the death of or bodily injury to a passenger carried for hire or reward on the insured vehicle when the accident giving rise to the claim occurred, including the liability in respect of the owner or hirer of the insured vehicle or his bona fide employees within the permissible limit, will be covered by the statutory insurance either by virtue of Section 95 (1)(b)(i) read with the second clause of the proviso or by reason of Section 95 (1)(b)(ii) of the Act. In such a case, the insurer will have to pay to the person entitled to the benefit of the award the sum assured, which shall not be less than the sum specified in Section 95(2), subject, however, in the right of the insurer to disclaim the liability, inter alia u/s 96(2)(b)(i)(a). The insurer, in order to successfully disclaim his liability on that ground, will have to establish:

(1) that on the date of the contract of insurance, the insured vehicle was expressly or implicitly not covered by a permit to carry any passenger for hire or reward.

(2) that there was a specified condition in the policy which excluded the use of the insured vehicle for the carriage of any passenger for hire or reward, and.

(3) that the vehicle was, in fact, used in breach of such specified condition on the occasion giving rise to the claim by reason of the carriage of the passenger therein for hire or reward.

If all these facts are established by the insurer, the benefit of statutory insurance will not be available in respect of such passenger. In other words, the claimant in such a case, be he the passenger himself or his dependant, will not be able to recover from the insurer the amount, if any, awarded in his favour to the extent specified in Section 95(2) and the insurer will not be liable to satisfy such award.

Mr. Desai, learned Counsel submitted that in the present case even though the insurance company has satisfied that there was a specified condition in the policy which excluded the use of the insured vehicle for the carriage of any passenger for hire or reward, the insurance company has failed to prove the fact that on the date of the contract of insurance, the insured vehicle was expressly or implicitly not covered by a permit to carry any passenger for hire or reward. The permit has not been produced by the concerned parties and therefore, there is no evidence on the record to show that the permit had prohibited carrying of passengers for hire or reward. Even it is clear from the record that this point was not agitated by the insurance company in the written statement and it was also not argued in the lower court. No evidence was led on this point. Therefore, in the absence of any evidence regarding the fact that on the date of the contract of insurance the insured vehicle was expressly or implicitly not covered by a permit to carry any passenger for hire or reward, the insurance company would be liable so far as the claim of the claimants in the present case is concerned. Even on behalf of the insurance company the learned Counsel has not submitted that they wanted to produce any such permit or that they wanted to get it produced through the owner of the truck respondent No. 2. They have not made any such request before me. Therefore, considering all the facts and circumstances of the case, I come to the conclusion that the insurance company is also liable to satisfy the claim of the claimants, i.e., the present appellants. Therefore, an award will have to be passed against respondent No. 3 also.

8. In the result, both these appeals are allowed. Respondent Nos. 1, 2 and 3 are jointly and severally held liable for the compensation amount. The amount of compensation awarded in both the cases by the trial court is Confirmed. The appellants do recover the amount of compensation from respondent Nos. 1, 2 and 3 jointly and severally and all the respondents, i.e., respondent Nos. 1, 2 and 3, who are jointly and severally liable to pay the said amount in both the cases are directed to deposit the said amount within a period of eight weeks from the date of receipt of certified copy of this judgment with interest at the rate of 6% p.a. from the date of the application till realisation and costs throughout. The award to be modified accordingly.

9. A copy of this judgment be sent to the Collector, Broach for information.