
(1979) 12 GUJ CK 0011
In the Gujarat High Court
Case No : First Appeal No. 641 of 1975

Bhoi Vanaji Dhulaji and Another	Vs	APPELLANT
Patel Shivabhai Kashibhai and Others		RESPONDENT

Date of Decision : 06-12-1979

Acts Referred:

Citation : (1981) ACJ 107 : AIR 1980 Guj 154 : (1979) 2 GLR 342

Hon'ble Judges : K.X. Shah, J;D.H. Srukla, J

Bench : Division Bench

Advocate : Bhagubhai H. Shah, for the Appellant; K.C. Shah and A.H. Mehta, for the Respondent

Judgement

M.K. Shah, J.—The appellants, who are the original claimants, filed claim petition No. 95 of 1974 before the Motor Accident Claims Tribunal of Kaira at Nadiad claiming compensation in respect of the death of their son Balabhai arising out of an accident which occurred in the early hours of 15th May, 1,974 near Andharia Chakla in village Napad. The claimants alleged that these were the days when there was railway strike and the Government had permitted goods carrying vehicles to carry passengers "there in. Claimant No. I who is the father of the deceased, and others had been returning from a marriage party to Kaira traveling in a trailer attached to tractor No. GJS 3972 belonging to opponent No.1 Patel Shivabhai Kashibhai and it was driven by his driver-opponent No 2 Patel Kantibhai Somabhai and was insured with opponent No. 3 insurance company. It was the case of the claimants that on account of a rash and negligent act of driving on the part of the -driver of the said tractor, the tractor at teached thereto turned turtle and the deceased and other persons sustained injuries. The deceased was removed to the Civil Hospital at Kaira. The doctor in charge pronounced him dead. The claimants, therefore, filed the said claim petition claiming a total amount of Rupees 39,500 as compensation from the three opponents.

2. It was contended by opponent No. I that the tractor was entrusted by him to

his driver-opponent No. 2 for the purpose of doing agricultural work with a specific instruction that he should not make use of it for any other purpose and that opponent No. 2, without permission of opponent No. 1 carried a marriage party in the trailer which was attached to the tractor and, therefore, the said opponent viz. opponent No. 1 was not liable for any consequences of the accident which happened while the tractor was being driven in this fashion by opponent No. 2. Opponent No. 2's case was that he was driving the tractor as a driver of opponent No. 1 doing agricultural work with the tractor and that in order to plough some land at Kaira at the instance of opponent No. 1, he had brought the tractor to Kaira with specific instruction that the tractor was to be taken back after finishing agricultural work. However, when the claimants and others approached him and requested him to take the marriage party in the trailer representing that there was great hardship in going by train or by bus and also representing that they would not pass on the information to opponent No. 1 with regard to the said use of the tractor for them, the said opponent agreed to carry the marriage party and while he was returning with the said party, for no fault of his, the tractor and the trailer got separated because of the breaking of the joint rod, resulting in the accident it was the defence of the insurance company that opponent No. 1 allowed the tractor and the trailer to be used for a purpose other than the one provided in the contract of insurance and thereby committed a breach of the conditions embodied in the policy of insurance and the insurance company was, therefore, not liable to indemnify the insured.

3. On the evidence led before him, the learned District Judge constituting the Tribunal, held that the accident happened because of a rash and negligent act of driving on the part of opponent No. 2 and, though he held that "the said opponent was in the employment of opponent No. 1 as his driver, he came to the conclusion that the tractor was not being driven in the course of the employment and that the owner was, therefore, not vicariously liable for the tortious act of his driver---opponent No. 2. With regard to the quantum, he awarded a sum of Rs. 21,000 as compensation to the claimants and ordered that the same shall be recoverable with interest at 6% per annum from the date of the application till realisation together with proportionate costs from opponent No. 2 alone and not from opponent No. 1 or opponent No. 3. This award passed by the said Tribunal on 17th March, 1975, is challenged by the claimants with regard to the quantum of compensation awarded, as also with regard to the finding that opponents Nos. 1 and 3 are not liable, for the same. The appellants are the original claimants and the respondents are the original opponents.

4-6. x x x x 7. That will take us to the question whether the insurance company with which the said vehicle was insured, is liable for the compensation awardable to the claimants.

8. Mr. K. C. Shah, the learned Advocate appearing for opponent No. 1, contended that once it is established that passengers were carried for hire or reward in a vehicle irrespective of the fact whether the permit permitted such use or not, the

insurance company would be liable to third parties in respect of compensation awardable to them for which the driver, and vicariously the owner would be responsible, because as decided by the Supreme Court in Pushpabai Purshottam Udeshi and Others Vs. Ranjit Ginning and Pressing Co. (P) Ltd. and Another, and later followed by a Full Bench of this court in Ambaben v. Usmanbhai Amirmiya (1978) 19 GLR 913: (AIR 1919 Guj 9) the test to be applied is the user's test and not the business test and that, therefore, even if the vehicle is permitted by the competent authorities to be used for a particular purpose only and In breach thereof, it is used for a different purpose, even then, the insurance company would be liable, provided the policy is one which covers a risk compulsorily insurable u/s 95 of the Motor Vehicles Act ("the Act). We cannot persuade ourselves to accept the said proposition canvassed by Mr. Shah because the question, which arises in the instant case and which was, not germane to the issue involved in the said two decisions, is as to whether, if such use is contrary to a specific - condition embodied in the policy itself, such condition being one of the conditions set out in Section 96 (2) of the Act, the insurance company would be liable in such a case. The answer is obviously in the negative because as, inter alia provided by Section 96 (2) of the Act, the insurer to whom a notice as contemplated under the said section with regard to the bringing of the proceedings as the referred in the said section is given, shall be entitled to be made a party thereto and to defend the action on any of, the grounds set out in the said sub-section of Section 96. Ground (b) set out, so far as it is relevant for our purpose reads thus--

"(b) That there has been a breach of a specified condition of the policy, being one of the following conditions, namely: -

(i) A condition excluding the use of the vehicle,

(a) For hire or reward, where the vehicle is on the date of the contract of insurance a vehicle not covered by a permit to ply for hire pr reward, or

(b) To (d) x x x"

The rest is not material for our purpose If we look at the policy in the instant case, it contains, as its part, a Schedule and in the Schedule against the column "limitation as to use", it is mentioned as follows: -

"For agricultural and forestry purposes.,,

It then mentions-- "The policy does not cover: -

1. x x x x 2. Use for the carriage of passengers for hire or reward.

3. x x x x. It also contains in bold "letters in a box

"Important Notice in" the following words:-

"The insured is not indemnified if the vehicle is used or driven otherwise than In accordance with this Schedule x x". The rest is not material for our Purpose. It

would be thus seen that there is a specific condition embodied in the policy Which, apart from saying that the use of the vehicle shall be limited for agricultural and forestry purposes, also categorically states that the policy does not cover the use for carriage of passengers for hire or reward and it is also in clear terms mentioned that the insured is not indemnified if the vehicle is used or driven otherwise than in accordance with the Schedule. This would, therefore, fall squarely within the ambit of Section 96 (2) (b) (i) (a) of the Act and the insurance company will, therefore, be not liable for the award which may be passed in favour of the claimants and against the driver and the insured because admittedly, at the time of the accident, the vehicle was being used in breach of a specific condition which excluded use of the vehicle for hire or reward which vehicle, on the date of the contract of insurance, was not covered by a permit to ply for hire or reward, as is the undisputed position.

9. If we accept the proposition of Mr. Shah then, the provisions contained in Section 96 (2) will become redundant and nugatory and the very object and purpose of enacting that sub-section will be frustrated, besides depriving the insurer of a statutory defence available under the Act. The provisions contained in subsection (2) including the grounds on which- the insurance company can defend the action are to be read in the context of the earlier provisions contained in sub-section (1) of the said section. Sub-section (1) makes it obligatory on the insurer to satisfy judgments against persons insured in respect of third party risks. But by sub-section (2), it is provided that the condition precedent to this liability being incurred by the insurer is that a notice through court of the bringing of proceedings, or in respect of any judgment as long as execution is stayed thereon pending an appeal, is served on the insurer, and it is then provided that the insurer to whom notice of the bringing of any such proceedings etc. is so given shall be entitled to be made a party thereto and to defend the action on any of the three grounds mentioned in clauses (a) (i) (b) and (c) following thereafter. In the instant case, we are concerned with the grounds which are mentioned in clause (b) which provides that a breach has been committed of the specified condition embodied in the Policy relating to the category of the condition as is set out therein. The first one is a condition excluding the use of the vehicle, inter alia, for hire or reward where the vehicle is, on the date of the contract of insurance, a vehicle not covered by a permit to ply for hire or reward. It would be thus manifest that, but for the insertion of sub-section (2) following sub-section (1), liability of the insurance company, to satisfy an award against the insured in respect of third party risks, would be absolute. It is, therefore, that sub-section (2) is engrafted providing the contingencies in which the insurance company is absolved from this liability. The requirement provided is in the nature of a condition precedent requiring that a notice with regard to the proceedings etc has to be served on the insurance company. A further right is conferred on the insurance company to the effect that on service of such a notice it has a right to- be made a party to the proceedings and to defend the action on the grounds mentioned in clauses (a), (b) and (c). These provisions are vis-à-vis

the liability of the insurer to satisfy an award against the insured concerning third party risks, and it would, therefore, be against the very spirit of the provisions of sub-section (2) to contend that, so far as third party risk is concerned, the insurance company is bound to satisfy the award, irrespective of any condition embodied in the policy since it would be a matter, inter se between the insured and the insurance company. Such an approach may be justifiable in respect of breaches of conditions contained in the policy provided the conditions are not covered by the categories of conditions specified in sub-section (2) of Section 96. But once it is demonstrated that the breach is in respect of a specific condition contained in the policy and that the infringed condition is the one falling within the ambit of the conditions set out in the said subsection, such an approach would be futile.

10. Mr. K. C. Shah drew our attention to the observations of this court in *Life Insurance Corporation of India and Another Vs. Kasturben Naranbhai Vadha and Others*, : -

"The company having undertaken the liability to third party, incurred by the persons specified in the policy, third party's right to recover any amount under or by virtue of the Provisions Of the Act was not affected even by the restrictive condition of the Policy. Once the company issued certificate-giving rise to the wider liability, it would have to identify the person specified in the policy. That is why even the avoidance clause provided that nothing in the policy or endorsement would affect right of the person to be indemnified by the policy or any other provisions to recover amount under or by virtue of the provisions of the Act."

Now, these observations are made while considering the question as to whether in case of a driver who was a licensed driver though not in employment of the owner and not driving for his purpose, the case being a case of permissive user by the original owner, the statutory indemnity clause in Section 95 (5) even in respect of such a person was applicable, and it was held that even if the owner was not vicariously liable and it was the driver alone who was liable to pay damages to the third party, the insurance company would surely be liable to pay the amount to third party, by reason of the statutory liability incurred on account of the driver's extension clause, as if the driver himself was the insured and it was the insurer within the meaning of Section 96, subject to the statutory limit. The question with regard to specific conditions in the Policy the breach whereof would afford a ground to defend the action to the insurance company did not arise before the court and, therefore, the question was not considered in the light of the provisions contained in Section 96 (2). This decision% therefore, does not help Mr. Shah.

11. In the case at hand, the question which directly arises is as to whether, by virtue of a specific condition in the policy laying down that the user was restricted for agricultural and forestry purposes and that the policy did not cover use for carriage of passengers for hire or reward coupled with a specific mention

in the caption "Important Notice" that the insured would not be indemnified if the vehicle is used or driven otherwise than in accordance with the schedule which contained these restrictions with regard to the use, of the vehicle, the insurance company would be absolved from the liability of satisfying the award with regard to third party risk by virtue of the provisions contained in sub-section (2) of Section 96; and as discussed above, on analysis of the section, we are of the view that in such a case, if it is proved that the vehicle - at the time of the accident, was used for carriage of passengers for hire or reward, in breach of a specific condition to that effect in the policy as aforesaid, then, the insurance company would not be bound to satisfy the award, so far as third party risk is concerned.

12. We are fortified in the view which we take by the observations of a Division Bench of this court in the case of *Jam Shri Staji Digvijaysingji and Others Vs. Daud Taiyab and Others*, . The observations appear at P. 410 and" they were made in support of the view taken by the court that any motor vehicle used for carrying passengers on hire or reward should be regarded, when so used, as a public service vehicle and therefore a transport vehicle, because it was the use of the motor vehicle for carrying passengers for hire or reward which determined the category of the motor vehicle - whether it was adapted for that purpose or not The odd observations run thus:-

"That is why u/s 96 (2) M (i) (a) the insurance company is provided a special statutory defence by enacting that it can defend the action on the ground that there has been a breach of a specified condition of the policy being one of the following conditions, namely, a condition excluding the vendors of the vehicle for hire. or reward, where the vehicle is on the date of the contract of insurance a vehicle not covered by a permit to ply for hire or reward."

13. We are, therefore, unable to accept any of the submissions made by Mr. Shah in support of his case that the insurance company is liable to satisfy the award in the instant case.

X X X X X x x 14. Appeal partly allowed.