

(2001) 08 MAD CK 0133
In the Madras High Court

Goshen Stones Crushers

APPELLANT

Vs

Mrs. Fathimuthu and Others

RESPONDENT

Date of Decision : 13-08-2001

Acts Referred:

Citation : (2002) 1 ACC 700

Hon'ble Judges : A. Subbulakshmy, J

Bench : Single Bench

Judgement

A. Subbulakshmy, J.—Second respondent in M.C.O.P. 36/1987 who is the first respondent in M.C.O.P. 38/1987 is the appellant in both the appeals.

2. On 1.2.1987 the "deceased Khader Mohideen was a passenger in the lorry belonging to the second respondent, driven by the first respondent and in the accident that occurred on 1.2.1987, due to rash and negligent driving of the first respondent, the deceased Khader Mohideen who was travelling in that lorry died. The claimants in M.C.O.P. No. 36/1987 are mother and sister of the deceased Khader Mohideen. Wife of the said Khader Mohideen is the fourth respondent and she filed a separate petition in M.C.O.P. 38/1987 claiming compensation.

3. The second respondent in the petition, owner of the lorry filed counter in M.C.O.P. 36/1987 contending that the deceased Khader Mohideen did not obtain permission of the respondent for travelling in that lorry and so, the second respondent is not liable to pay any compensation. He did not file any counter in M.C.O.P. 38/1987.

4. In both the petitions, the Insurance Company filed counter contending that only the claimants have to establish that they are the legal representatives of the deceased. The Insurance Company further contended that the claims made in the claim petitions are high and there was no negligence on the part of the lorry driver and further the deceased, without permission of the owner of the lorry, of his own accord travelled in the lorry and for that the Insurance Company is not liable to pay any compensation and only the owner of the vehicle is liable to pay

compensation.

5. Both the petitions were heard by the Tribunal and common order was passed awarding compensation of Rs. 40,000/- to the claimants in M.C.O.P. 36/ 1987 and directing respondents 1 and 2 to pay the compensation and both the claimants are equally entitled to the amount and in M.C.O.P. 38/1987, the Tribunal awarded compensation of Rs. 40,000/- directing the owner of the vehicle first respondent to pay the compensation amount. In both the cases, 6% interest was awarded. The petitions were dismissed as against the Insurance Company.

6. Aggrieved against that order/ the lorry owner filed both the appeals and both the appeals are hereby disposed of by a common judgment.

7. Learned Counsel for the appellant submitted that Khader Mohideen was travelling in the lorry at the time of the accident and the lorry was insured with the United India Insurance Company Limited and as per the insurance policy, the Insurance Company is liable to pay compensation.

8. The Tribunal found that the said Khader Mohideen, without paying any fare of his own accord travelling in the lorry and for a person travelling in a lorry without paying any fare, and being a gratuitous passenger, the Insurance Company is not liable to pay any compensation. The Tribunal, on the evidence adduced found that the accident had occurred due to the rash and negligent driving of the lorry driver, but, has held that the Insurance Company is not liable since the deceased travelled in the lorry out of his own will and pleasure. This case falls under the old Act. The learned Counsel for the appellant submitted that even under the old Act the Insurance Company is liable to pay compensation. Section 95(2)(b)(i) and (ii) reads thus:

(2) Subject to the proviso to Sub-section (1), a policy of insurance shall cover any liability incurred in respect of any one accident upto the following limits, namely--

(b) where the vehicle is a vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment,--

(i) in respect of persons other than passengers carried for hire or reward, a limit of fifty thousand rupees in all;

(ii) in respect of passengers, a limit of fifteen thousand rupees for each individual passenger;

9. Ex. R1 is the insurance policy. In Ex. R1 it is stated that use for carrying passengers in the vehicle except employees (other than driver) not exceeding six in numbers coming under the purview of the Workmen's Compensation Act, 1923.

10. Learned Counsel for the respondent/Insurance Company argued that in a goods vehicle, if passengers are being carried, the Insurance Company is not

liable.

11. The deceased did not travel as passenger in the vehicle and he of his own accord without paying any fare travelled in that goods vehicle. Registration Certificate of the lorry Ex. R2 shows that the sitting capacity including the driver is 3 in cabin and so, permission has been granted to take only three passengers including the driver in the lorry. As per the registration certificate Ex. R2, only three persons can travel in that lorry including driver and the other two persons must be working under that lorry owner who become employees under the Workmen's Compensation Act and it is clearly recited in the insurance policy that the Insurance Company is not liable. So, it is not permitted under the registration certificate to carry more than three persons in that lorry. In the case on hand, the deceased was a gratuitous passenger.

12. The learned Counsel for the appellant submitted that the deceased was travelling in that lorry and died in the accident that had occurred while he was travelling in that lorry and the Insurance Company is liable. He further pointed out that only when there is breach of contract, the Insurance Company will not be liable and when the insured is at fault and is guilty of a breach, the Insurance Company is liable. He relies upon the decision in *Skandia Insurance Co. Ltd. v. Kokilaben Chandravadan I* (1987) ACC 413 (SC) : 1987 ACJ 411, wherein it has been held by the Supreme Court that:

Unless the insured is at fault and is guilty of a breach the insurer cannot escape from the obligation to indemnify the insured. The insured placed the vehicle in charge of a licensed driver, with express or implied mandate to drive himself, it cannot be said that the insured is guilty of any breach.

He also relied upon the decision in *Kanniappa Nadar Vs. Jayapandi and others*, wherein it has been held that when the driver of the vehicle allowed the owner of goods to travel in vehicle along with goods and when there is no evidence that owner either authorised or permitted owner of goods to travel in vehicle or driver was authorised to carry owner of goods along with goods, the claimants were entitled to recover compensation from owner of vehicle and Insurance Company who are jointly and severally liable. The Counsel for the appellant also relies upon the decision in *Divisional Manager, United India Insurance Company Limited Vs. Dulasi Ammal and Others*, wherein this Court has held that in the case of driver of the vehicle allowing the owner of the goods to travel in the vehicle along with the goods and when the claimants have established their case by oral evidence and when there is no contra evidence by Insurance Company that owner of the vehicle either permitted or authorised owner of the goods or agent to travel along with the goods, the claimants are entitled to compensation. The Counsel also cited the decision in *United India Insurance Company Ltd, Branch Office, Dharmapuri Vs. A. Govindan and another*, wherein it has been held by this Court that when the claimants established that the lorry was taken with consent of the owner and 60 persons travelled with consent of the owner and the lorry capsized due to negligence of the driver and not due to more number of

passengers, the Insurance Company is liable and breach of carrying humans in goods vehicle more than permitted numbers cannot be fundamental breach so as to offer ground to insurer to deny indemnification.

13. The Counsel for the respondent/Insurance Company relies upon the decision in *Smt. Mallawwa Etc. Vs. The Oriental Insurance Co. Ltd. and Others*, and submitted that the case being one under the old Act, only the provisions of the old Act will apply and by applying them, the Insurance Company cannot be held liable for carrying gratuitous passengers in a lorry and the Insurance Company is absolved of its liability.

14. The decision reported in *United India Insurance Company Ltd, Branch Office, Dharmapuri Vs. A. Govindan and another*, relates to the period under the new Act and the accident occurred after the amendment i.e., on 8.12.1989 and that decision is not helpful to the appellant since it is the case falling under the old Act. The decision reported in *Kanniappa Nadar Vs. Jayapandi and others*, relates to the period under the old Act. In this decision it has been held that the driver of the vehicle allowed the owner of the goods to travel along with the goods and there is no evidence that the owner either authorised or permitted the owner of the goods to travel in the vehicle or the driver was authorised to carry the owner of the goods along with the goods. In the decision reported in *Divisional Manager, United India Insurance Company Limited Vs. Dulasi Ammal and Others*, the driver of the vehicle allowed the owner of the goods to travel along with the goods and so, the claimants were held entitled to compensation. In both the cases cited above, i.e *Divisional Manager, United India Insurance Company Limited Vs. Dulasi Ammal and Others*, and *Kanniappa Nadar Vs. Jayapandi and others*, the owner of the goods was allowed to travel in the vehicle along with the goods and so, it was held that the Insurance Company is also liable to pay compensation. The case on hand is not like that. The deceased was travelling in the lorry as a gratuitous passenger. He was neither owner of the goods nor in any way connected with the goods. The Tribunal found that without paying any fare for the lorry, the deceased travelled in the lorry as a gratuitous passenger out of his own accord travelled in the lorry and for taking a gratuitous passenger in the lorry, the Insurance Company cannot be held liable. While arriving at such a conclusion, the Tribunal relied upon the decision in 1985 ACJ 765, wherein it has been held that in case of gratuitous passenger going on jolly ride of his own accord, the Insurance Company is not responsible. So, it has been established by facts that the deceased was only a gratuitous passenger in the lorry and he is not connected with the goods and he travelled in the lorry of his own accord. It has been observed by the Apex Court in the decision reported in *Smt. Mallawwa Etc. Vs. The Oriental Insurance Co. Ltd. and Others*, that:

What is important to be noted is that the legislature, after providing generally in Clause (b) of Sub-section (1) in wide terms so as to include "any person" and every motor "vehicle" within its sweep, carved out a certain exception by adding a proviso, to that clause. By proviso (ii), it restricted the generality of the main

provision by confining the requirement to cases where "the vehicle is a vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment". In the absence of the proviso, the main provision would have included all classes of vehicles including goods vehicle and all passengers whether carried for hire or reward or by reason of or in pursuance of a contract of employment or otherwise. That is the reason why there is a reference to different classes of vehicles in proviso (i). It refers to "vehicle", "public service vehicle" and "goods vehicle". The words "any person" in the main provision would have included the employee of the person insured, and therefore, an exception was made by enacting proviso (i) so as to restrict liability of the insurer in respect of his employees. Both those exceptions were made as the legislature did not want to widen the liability of the insurer and the insured by making it more than what it was under the English Act, upon which Section 95 was based...

Sections 95(a) and 95(b) of the Motor Vehicles Act adopted the provisions of the English Road Traffic Act, 1960 and excluded the liability of the Insurance Company regarding the risk to the passengers. Section 95 provides that a policy of insurance must be a policy which insures the persons against any liability which may be incurred by Kim in respect of death or bodily injury to any person or damage to any property of a third party caused by or arising out of the use of the vehicle in a public place. The plea that the words "third party" are wide enough to cover all persons except the person and the insurer is negated as the insurance cover is not available to the passengers made clear by the proviso to the sub-section which provides that a policy shall not be required:

(ii) except where the vehicle is a vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment, to cover liability in respect of the death of or bodily injury to persons being carried in or upon or entering or mounting or alighting from the vehicle at the time of the occurrence of the event out of which a claim arises.

Again turning back to proviso (ii), we find that it in clear terms restricted the scope of the main provision by confining its application to that vehicle which is "a vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment". In the first instance, the vehicle had to be a vehicle of that class in which passengers were carried. If that was not the intention of the legislature, it would not have used the phraseology "the vehicle is a vehicle in which passengers are carried" and would have simply provided that "except where passengers are carried for hire or reward..". So also the compulsory coverage was not intended for all passengers and, therefore, it was provided that "passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment". Thus, the confinement of the operation of the main provision was in respect of vehicles and also passengers. And that was consistent with the English law on which Section 95 was based...

Being concerned with a beneficial legislation like the one at hand, we would have

normally preferred liberal interpretation, but the question is whether, without any extra premium having been paid, the owner of a goods vehicle can claim indemnification from the insurer just because once in an year the goods vehicle had carried a passenger for hire or reward along with the goods. This would perhaps robe the third proviso dealing with coverage of contractual liability lame.

Thus, to find out whether an insurer would be liable to indemnify an owner of a goods vehicle in a case of the present nature, the mere fact that the passenger was carried for hire or reward .would not be enough; it shall have to be found out as to whether he was the owner of the goods, or an employee of such an owner, and then whether there were more than six persons in all in the goods vehicle and whether the goods vehicle was being habitually used to carry passengers. The position would thus become very uncertain and would vary from case to case. Production of such result would not be conducive to the" advancement of the object sought to be achieved by requiring a compulsory insurance policy.

There is another aspect of the matter which had led us to differ from the Full Bench decision of the Rajasthan High Court. The same is what finds place in Sub-section (2) of Section 95. That sub-section specifies the limits of liability and Clause (a) deals with goods vehicle; and insofar as the person travelling in goods vehicle is concerned, it has confined the liability to the employees only. This is an indicator, and almost a sure indicator, of the fact that the legislature did not have in mind carrying of either the hirer of the vehicle or his employee in the goods vehicle, otherwise, Clause (a) would have provided a limit of liability regarding such persons also.

The Apex Court has held after analysing all the aspect that:

It is not required that a policy of insurance should cover risk to passengers who are not carried for hire or reward. As u/s 95 the risk to a passenger in a vehicle who is not carried for hire or reward is not required to be insured the. plea of the Counsel for the Insurance Company will have to be accepted and the Insurance Company held not liable under the requirements of the Motor Vehicles Act.

What was held in that case is, with respect, consistent with our interpretation of Section 95 as it stood before and after its amendment by Act 56 of 1969.

The 1939 Act is now replaced by the 1988 Act. Section 147 which corresponds to the old Section 95 has been substantially altered by the legislature. Therefore, the above interpretation of Section 95 of the 1939 Act will govern the cases which have arisen under the 1939 Act.

15. So, the Supreme Court held in the decision reported in Smt. Mallawwa Etc. Vs. The Oriental Insurance Co. Ltd. and Others, that interpretation of provisions of Section 95 will govern the cases which have arisen under the 1939 Act. So, following the decision of the Supreme Court, I hold that the provisions of Section 95 of the Act will apply for this case and the deceased being gratuitous

passenger at his own responsibility travelled in the vehicle and for the death of the gratuitous passenger involved in the lorry accident, the Insurance Company is not liable to pay compensation. The order passed by the Tribunal directing the owner of the vehicle to pay compensation is perfectly justified. I find no infirmity in the order passed by the Tribunal.

In the result, the appeal fails and is dismissed. No costs.