
(1976) 04 CAL CK 0023
In the Calcutta High Court
Case No : A.F.O.O. No. 79 of 1967

Indian Mutual General Insurance Society Ltd.	APPELLANT
Vs	
Manzoor Ashan and Others	RESPONDENT

Date of Decision : 09-04-1976

Acts Referred:

Motor Vehicles Act, 1939 — Section 95, 95(1)

Citation : (1977) ACJ 85 : AIR 1977 Cal 34

Hon'ble Judges : T.K. Basu, J; M.N. Roy, J

Bench : Division Bench

Advocate : Sunil Krishna Dutta, for the Appellant; Rabin Mitra and Kamalesh Banerjee, for the Respondent

Final Decision : Allowed

Judgement

T.K. Basu, J.—This is an appeal from an order of the learned Judge, Motor Vehicle Accident Claim Cases Tribunal, Burdwan dated the 31st August 1966. The petitioners before the Tribunal were the sons, daughters and the widow of one Mohammad Ahsan who had died in an accident on the 11th January, 1966. The case of the petitioners was that the truck No. BRN 4761 was being driven rashly and negligently as a result of which it met with an accident near Rani Bundh on the Grand Trunk Road as a result of which the said Mohammad Ahsan received severe injuries. He was removed to Rani Bundh Primary Health Centre and he died on the same date. It was the case of the petitioners that the deceased was a contractor by occupation and his monthly earnings came to about Rs. 500 which was the only source of maintenance for his family. The petitioners claimed Rs. 30,000 by way of compensation before the Tribunal,

2. The owner of the truck did not appear or contest the claim. The claim was however contested by the appellant with whom the truck was insured. The learned Tribunal rightly held that since the owner of the truck did not contest the claim, the evidence on the question of rash and negligent driving was necessarily ex parte and the Insurance Company was not entitled to challenge that evidence.

3. The only question that the appellant before us could and did agitate before the Tribunal was that it was not liable under the policy of insurance for the claim on behalf of the deceased. The learned Tribunal however came to the conclusion that the petitioners were to get a sum of Rs. 12,000 as compensation and the appellant was to pay the amount

4. It is against this order that the appellant Insurance Company has come before us on appeal.

5. Mr. Sunil Krishna Dutt, the learned advocate on behalf of the appellant contended that the Insurance Company was not liable to the deceased or his heirs for the accident resulting in the death of the deceased. This contention was based on the provisions of Section 95 of the Motor Vehicles Act 1939 (IV of 1939) (hereinafter referred to as the Act). Section 95. in so far as it is material for our purpose, is in the following terms :--

"95. (1)

(b)

Provided that a policy shall not be required-

(i)

(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 : or....."

6. According to Mr. Dutta Proviso (ii) of Section 95 (1) (b) exonerates the appellant from any liability in respect of the accident or the death of the deceased in the present case. It is clear from a reading of the Proviso (ii) to Section 95 (1) (b) of the Act but it deals with the cases where the Insurance Company shall not be liable on the policy. Proviso (ii) however engrafts an exception to this exemption from liability. The first part of the Proviso (ii) speaks of a vehicle in which passengers are carried for hire or reward. This would obviously refer to passenger transport or what is otherwise known as stage carriages where passengers are carried from place to place for a consideration. The truck in the instant case clearly did not answer to that description. The next part of the Proviso speaks of a vehicle in which passengers are carried "by reason of or in pursuance of a contract of employment". If the deceased was being carried as a passenger by reason of or in pursuance of "a contract of employment" the appellant Insurance Company would clearly be liable for the accident.

7. Mr. Rabin Mitra, the learned advocate appearing on behalf of the respondents, who are the heirs of the deceased, contended that the deceased was being carried on the vehicle under a contract of employment and as such the Insurance

Company was liable. Mr. Mitra contended that the deceased had hired the truck for the purpose of carrying timber for a sum of Rs. 70. This according to Mr. Mitra amounted to a "contract of employment" within the meaning of Proviso (ii) to Section 95 (1) (b) of the Act.

8. That the deceased was a hirer in respect of the vehicle in question cannot possibly be disputed and indeed was not disputed. This is clear from the evidence of witness No. 5. on behalf of the petitioner before the Tribunal. It may be mentioned that witness No. 6 was the sister's husband of the deceased. The material portion of his evidence is as follows :--

"On the morning of the day of accident we went to Gorpara to hire a truck, I accompanied him. He hired the truck for carrying wood to Khatra to a timber depot. Truck No. BRN 4761 was hired for Rs. 70. He boarded the truck there and I returned home".

9. It is thus clearly established that the deceased was a hirer from the owner of the truck. The question therefore which arises for consideration in the present appeal is whether a hirer can be said to be under "a contract of employment" within the meaning of Proviso (ii) to Section 95 (1) (b) of the Act, in order to make the appellant liable on the Insurance Policy.

10. Mr. Dutta, the learned advocate appearing on behalf of the appellant placed strong reliance in this connection on a Full Bench decision of the Punjab High Court in the case of Oriental Fire and General Insurance Co. Ltd. Vs. Smt. Gurdev Kaur and Others, . The facts of that case were somewhat similar to the facts of the present case. In the case before the Punjab High Court, a goods truck which was insured, was hired by some persons for carrying their goods. The truck was driven by an employee of the truck owner. The owners of the goods were also sitting in the truck when it met with an accident, as a result of which some of them died. The dependents of the deceased were awarded compensation by the Tribunal. On an appeal by the Insurance Company, it was held that the deceased persons as hirers-cum-owners of the goods did not come under Clause (ii) of the Proviso to Section 95 (1) (b) and as such the Insurance Company was not liable on the policy. Dealing with the expression "contract of employment" in that proviso, Mehar Singh C. J. observed as follows :

"The words in Clause (ii) of the Proviso to Clause (b) of Sub-section (1) of Section 95 are "carried for hire or reward or are carried by reason of or in pursuance of a contract of employment" go with the word "passengers" and not with the word "vehicle". If those words were to be read with the word "vehicle" the reading of this clause of the Proviso does not make correct grammatical sense or any other sense. This is one consideration which negatives completely the second argument that in this case there was "a contract of employment" of the truck or the motor vehicle of Benarsi Das or that there was "a contract of employment" of Benarasi Das as a carrier. Then it has not been shown by reference to any judicial opinion that the expression "a contract of employment"

can have reference to a contract of carriage of goods whether in relation to the carriage itself or the owner of such carriage. The normal and the ordinary meaning and scope of the expression "a contract of employment" points to a person being employed to do something or to carry out something for another person. It has the element of rendition of some service in one shape or another for the employer. So it cannot refer to the hiring of a goods carried as a contract of employment or to the owner of such a carrier as the person with whom a contract of employment has been made."

11. This according to Mr. Dutta is a clear authority for the proposition that a hirer of a vehicle is not a person who enters into "a contract of employment" with the owner of the vehicle and as such the Insurance Company is not liable.

12. Mr. Mitra, the learned Advocate on behalf of the respondents sought to rely on a decision of a Division Bench of this Court in the case of *Hukum Chand Insurance Co. Ltd v. Subashini Roy*, reported in (1970) 74 Cal WN 879. In that case, it was held that in an action for compensation in respect of the accident involving the death or fatal injury of a person arising out of using a motor vehicle all possible defences are not open to the insurer. The Insurer is not entitled to avoid his liability except on the grounds specified in Section 96 (2) of the Act. There can possibly be no dispute with the proposition laid down in the above judgment of this Court. Where the liability is otherwise covered by the policy, the Insurer is confined to the defences laid down in Section 96 (2) of the Act. But this does not and cannot possibly preclude the Insurance Company from disputing the very basis of its liability under the policy. In such a case, it seems to us that Section 96 (2) of the Act does not come into the picture at all.

13. We are fortified in this view by the above-mentioned decision of the Full Bench of the Punjab High Court in the *Oriental Fire and General Insurance Co. Ltd. Vs. Smt. Gurdev Kaur and Others*, . While dealing with this question, the Court observed as follows :--

"Sub-section (2) of Section 96 refers to a sum payable by an insurer under Sub-section (1) of that section and Subsection (6) of that section debars any other defence than those mentioned in Sub-section (2). But this only happens when the judgment is in respect of liability as is required to be covered by a policy under Clause (b) of Sub-section (1) of Section 95, Where no liability is required to be covered by that provision, it is obviously open to the insurer to prove that in a particular case the liability is not required to be covered by that provision, and, when the insurer shows that, it has no liability to pay to the person who is entitled to the benefit of the decree and judgment of the Tribunal. In such a case the question of the other defences under Sub-section (2) of Section 96 never arises."

14. We may mention that this particular question of whether the Insurer challenge its liability did not come up before the Division Bench of this Court in the case mentioned above and was not dealt with.

15. Mr. Mitra, learned advocate on behalf of the respondents referred to a decision of the Bombay High Court in the case of Abdulkadar Ebrahim Sura and Another Vs. Kashinath Moreshwar Chandani and Others, . This case only deals with the mode of assessment of the damages and does not appear to have any relevance to the issue before us. Indeed Mr. Dutta for the appellant did not raise any contention on the quantum of damages awarded by the learned Tribunal.

16. Reference is also made by Mr. Mitra to a decision of the Madras High Court in the case of The Vanguard Insurance Co. Ltd., Madras Vs. Chinnammal and Others, . In that case it was held by Alagiriswami. J. that the expression "a contract of employment" occurring in Proviso (ii) of Section 95 (1) (b) would cover not only such persons as were under a contract of employment with the owner of the vehicle but also persons who are on the vehicle in pursuance of a contract of employment with the owner of the goods carried in it. This decision also, in our view, is of no assistance to the respondents as it does not directly deal with the question whether a hirer comes within the expression "a contract of employment". With respect, we are inclined to agree with and follow the decision of the Full Bench of the Punjab High Court and hold that the deceased being a hirer was not under "a contract of employment" within the meaning of Proviso (ii) to Section 95 (1) (b) of the Act and as such the appellant was not liable on the policy in respect of his accidental death.

17. Unfortunate as the result is, the findings of the learned Tribunal must be held to be erroneous in law and must be set aside.

18. In the result, the appeal succeeds and is allowed. The order of the learned Tribunal is set aside. The claim of the respondents petitioners before the Tribunal is dismissed. There will be no order as to costs of this appeal.

M.N. Roy, J.

19. I agree.