

(1996) 10 BOM CK 0015
In the Bombay High Court
Case No : First Appeal No. 435 of 1989

Jagdish Transport Co.

APPELLANT

Vs

Dhavalu Kakdya Tamba and Others

RESPONDENT

Date of Decision : 15-10-1996

Acts Referred:

Motor Vehicles Act, 1988 — Section 96

Citation : (1997) 99 BOMLR 304

Hon'ble Judges : R.M. Lodha, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

R.M. Lodha, J.—This group of 8 appeals arose out of one accident and common questions are involved in all these appeals and therefore all these appeals have been heard together and are disposed by this common judgment.

A truck bearing No. GTG-2769 owned by the present appellant in all the appeals and driven by Anwarmiya Amarmiya Shaikh was going on Bombay Ahmedabad High way on 14.6.1979. It stepped near hotel Charoti. 18 persons with their goods and baggage wanted to go from Vasai to Chariot. The cleaner of the aforesaid truck took all the 18 persons as passengers on hire with their goods @ Rs. 3/- per passenger and Rs. 1.50 from each one of them for goods. Near Katkona village the truck was driven at the fast speed and it went off the road, dashed against guard stones and after uprooting them it fell down. As a result of that 15 persons died on the spot and three persons sustained injuries. The heirs of the deceased as well as the injured filed various claim petitions claiming compensation from the owner of the truck, driver of the truck as well as insurer of the truck. The owner of the truck appellant in all these appeals resisted the claim and set up the defence that driver was specifically ordered not to take any passenger on hire or reward and the act of the driver in allowing the persons on the goods vehicle as passengers on hire or reward was beyond the scope of his employment and the owner of the truck cannot be held liable. The owner and

driver also denied that there was any rash and negligent act by the driver. The insurer resisted the claim by setting up the defence that though the goods truck GTG 2769 was insured with it but it was not covered by a permit to carry any passenger for hire or reward and condition No. 3 of the insurance policy excluded the use of the insured vehicle for carriage of any passenger for hire or reward. According to the insurer, the use of the goods truck at the time of the accident for carriage of passengers on hire or reward was in breach of the specific condition of the policy and, therefore, the insurer had no liability to indemnify the owner. By separate judgments in all the claim cases dated on the same evidence and facts, the Tribunal held the rash and negligent act of the driver of the truck. The tribunal also held that the insured was not liable since the passengers were carried on hire or reward in contravention of the terms of the insurance policy. An award was passed against the present appellants for different quantum.

3. The awards passed by the Motor Accident Claims Tribunal, Thane, on 28.9.1988 holding the appellant owner of the truck liable in the aforesaid claim cases is under challenge in these appeals.

4. Mr. Trivedi, the learned Counsel for the appellant has raised two fold contention in these appeals : (i) that the driver was specifically ordered not to carry passengers for hire or reward in the goods vehicle and the act of the driver in carrying the passengers in the goods vehicle therefore was beyond the scope of employment and, therefore, for the unauthorised act of the driver the owner cannot be held vicariously liable and (ii) that the passengers volunteered themselves to travel in the goods vehicle and if they met with an accident, the owner cannot be held liable.

5. I have considered the contentions raised by the learned Counsel for the appellant and also perused the award and the available material.

6. It is true, that in the written statement filed by the owner, a plea has been set out that the deceased was passenger for hire or reward in the truck without knowledge and consent of the owner and that the owner has specifically ordered the driver not to take any passenger for hire or reward on the said truck and, therefore, by taking the passengers on hire or reward, the driver acted beyond the scope of his employment and the owner cannot be held vicariously liable for any such act of his driver. The parties appear to have led no evidence in the present set of claim cases as regards the said points but they seem to have rest contented with the evidence led in claim case No. 298/82, in which case the appellant, examined Jagdish Bhai, the owner himself. He stated that he had employed two drivers one Anwar Miya and another Daya Bhai. Daya Bhai died in the accident and he did not know who was driving the vehicle at the relevant time. If evidence of Jagdish Bhai is seen it will be clear that he was not aware who was driving the vehicle at the relevant time. The cleaner of the truck Sona Bhai PW-12 was also examined and he deposed that he was working as cleaner on the truck and at the time of accident Daya Bhai was driving the truck. He also deposed that he was working as cleaner on the truck. He further denied in his

cross examination that any written instructions were given prohibiting the passengers in the truck. From the deposition of Jagdish Bhai it is not demolished that Sona Bhai was not the cleaner or his employee or that he was giving false evidence. Anwar Miya was also examined and he also deposed that Daya Bhai was the driver of the truck at the time of incident and Sona Bhai was the cleaner. According to Anwar Miya, the driver Daya Bhai took 18 passengers in the truck while according to cleaner Sona Bhai he permitted the said labourers to board as passengers by charging Rs. 3/- per person and Rs. 1.50 per luggage.

7. The tribunal considered the evidence and particularly the deposition of Sona Bhai, Jagdish Bhai and Anwar Miya in the judgment delivered in M.A.C. No. 298 of 1982 and the copy of the said judgment has been shown by Mr. Kudroli. I am in agreement with the finding recorded by the Tribunal in judgment of MAC No. 298/82 that from the evidence of Sona bhai (cleaner) and Anwar Miya (driver) it was clearly established that those passengers were taken in the truck for hire or reward and that there was no instructions to the driver by the Owner for not taking passengers in the truck. Jagdish Bhai the owner of the truck in his cross examination admitted that he had not given any written instructions to the driver for not taking passengers in the truck. There was no reliable evidence placed on record to establish that there was board put in the truck that passengers should not be taken in the truck for hire or reward. The deposition of driver Anwar Miya that they take passengers in the truck while traveling negatives the evidence of Jagdish Bhai, owner of the truck that the drivers were specifically instructed not to take passengers in the truck. Evidence of owner of the truck PW-2 Jagdish Bhai cannot be therefore believed that there were specific instructions to the truck drivers not to take passengers in the truck and the said evidence has been rightly disbelieved by the trial Court in the main case M.C.A. No. 298 of 1982. I am informed by Mr. Kudroli, the learned Counsel for insurer that no appeal came to be filed challenging the award by tribunal in MAC No. 298 of 1982.

8. The owner of the truck therefore failed to establish that the truck drives were specifically instructed not to take passengers in the truck. In this view of the matter, it cannot be said that the owner was not liable. Though there is no evidence on this aspect in the claim cases from which the present set of appeals has arisen, yet I have considered this aspect on the basis of evidence led in MAC 298/82 as urged by learned counsel. The first contention raised by the learned Counsel for the appellant is, therefore, negatived.

9. The second contention raised by the learned Counsel for the appellants that the passengers volunteered themselves to travel in the truck and, therefore, the owner of the truck cannot be held liable is without any substance and merit. The passengers were travelling in the truck on payment of hire for themselves as well as the luggage. If the truck in which they were travelling met with an accident, it cannot be said that the owner of the truck was not liable.

10. The learned Counsel for the appellant rightly did not challenge the finding recorded by the Motor Accident claims Tribunal absolving the liability of the

insurer since the passengers were carried in goods carrier or hire or reward and the terms of contract of insurance did not provide for such carriage and the insurance company was not liable for the death or bodily injury to such passengers. The Full Bench of this Court in *Oriental Fire and General Insurance Co. Ltd. Vs. Hirabai Vithal Nikam and others*, .

We now, summarise our conclusions:

The vehicle in which the deceased Vithal Nikam travelled was a goods vehicle. The contract of insurance entered into with the appellant did not cover the carriage of passengers for hire or reward in this vehicle. Vithal Nikam travelled for hire by consent of the driver and the brother of the owner. The vehicle was not covered by a permit to ply for hire or reward. The vehicle was, therefore, used for a purpose not allowed by the permit under which it was used. Consequently, therefore, by virtue of Section 96(2)(b)(i)(c) of the Motor Vehicles Act the insurer is not liable for the tortuous act of the owner of the vehicle. We are in agreement with the view propounded by Sawant and Tated JJ. in *United India Insurance Co. Ltd. Vs. Abdul Munaf Majur Hussain Momin and others*, , we do not discern any conflict between *United India Insurance Co. Ltd. v. Abdul Munaf Maiur Hussain Momin* (supra) decided by Sawant and Tated JJ. on 17th August, 1984 and *Nasibdar Suba Fakir Vs. Adhia and Company and Others*, , They operate in different areas and in different sets of facts.

In our opinion, therefore, where a passenger is carried in a goods vehicle for hire or reward and the terms of the contract of insurance do not cover such carriage, the insurer is not liable for the death or bodily injury to such a passenger.

11. All the appeals therefore, have no merit and are liable to be dismissed and dismissed accordingly with no order as to costs.