

(1977) 08 GUJ CK 0026
In the Gujarat High Court

Case No : First Appeal No's. 544, 545, 546, 557, 583 and 584 of 1973

Jam Shri Staji Digvijaysingji and Others	APPELLANT
Vs	
Daud Taiyab and Others	RESPONDENT

Date of Decision : 22-08-1977

Acts Referred:

Motor Vehicles Act, 1939 — Section 95(1)

Citation : (1978) ACJ 443 : AIR 1978 Guj 153

Hon'ble Judges : J.B. Mehta, C.J;P.D. Desai, J

Bench : Division Bench

Advocate : R.N. Oza, in F.A. Nos. 544, 545, 546 and 584 of 1978 J.R. Nanavati, in F.A. Nos. 588 and 584 of 1973 and D.M. Shah, in F.A. No. 557 of 1978, for the Appellant; R.N. Oza in F.A. Nos. 557 and 583 of 1978, J.R. Nanavati in F.A. Nos. 544, 545, 546 and 557 of 1973, D.M. Shah in F.A. Nos. 544, 545, 546, 583 and 584 of 1973 and D.U. Shah in F.A. Nos. 544 and 583 of 1973, for the Respondent

Judgement

J.B. Mehta, Actg. C.J.

1 to 24 x x x x

25. So far as the other two deceased persons, Sidi Musa and Noormohmad were concerned, they were persons who were merely given lift. They are not shown to be persons carried on the truck G. T. Z. 1959 for hire or reward or by reason of or under any contract of employment. The evidence of Pravinchandra is very categorical that they were merely given lift. So far as Noormohmad was concerned, it was an act of mere social kindness out of sympathy for him and for his ailing buffalo calf. For Sidi Musa also, it was a mere lift given in presence of the owner, Pravinchandra, by the cleaner Abbas, and so, of course, with the consent of Pravinchandra.

26. The question about insurance coverage or such passenger risk is now finally settled by the aforesaid decision of their Lordships in Pushpabai Purshottam Udeshi and Others Vs. Ranjit Ginning and Pressing Co. (P) Ltd. and Another, , their lordships first pointed out that Section 95 of the Motor vehicles Act 1939, as

amended by Act 56 of 1969 was based on the corresponding English Acts the Road Traffic Acts of 1930 and 1960, neither of which required users of motor vehicles to be insured in respect of liability for death or bodily injury to passengers in the vehicle being used except a vehicle in which passengers were earned for hire or reward or by reason of or in pursuance of a contract of employment. In fact, S. 203 (4) of the 1960 Act provided that the policy shall not be required to cover liability in respect of death or bodily injury to persons being carried in or upon, or entering or getting on to or alighting from, the vehicle at the time of the occurrence of the event out of which the claims arise. Their Lordships in terms pointed out that the provisions of the English Acts being explicit the risk to passengers is not covered by the insurance policy and it was these provisions in the English Road Traffic Act 1960, which were introduced by the 1969 amendment of Section 95 of the Indian Motor Vehicles Act. The law as regards general exclusion of passengers was produced from Halsbury's Laws of England, Third Edition, Vol. 22 at page 368. para 755 as under:-

" Subject to certain exceptions a policy is not required to cover liability in respect of the death of, or bodily injury to, the person being carried in or upon, or entering or getting into or alighting from, the vehicle at the time of the occurrence of the event out of which the claim arises.

The subsequent development in England by subsequent statutory changes was not found to be necessary to be referred to where insurance cover for passenger liability was made compulsory, by repealing paragraph (a) and the proviso of S. 208 (4) by the Motor Vehicle passenger Insurance) Act 1971, which was also repealed by the Road Traffic Act, 1972 though under S. 145 of 1972 Act, the coming into force of the provisions of 1971 Act, covering passenger liability was delayed until Dec. 1, 1972.

27. Thereafter their Lordships pointed out that Ss. 95 (a) and 95 (b) (i) of our Motor Vehicles Act had 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 provided that a policy of insurance must be a policy which insures the person against any liability which may be incurred by him in respect of death or bodily injury to any person or damage to any property of third party caused by or arising not out of the use of the vehicle in a public place. Therefore the plea that the words " third party " and were wide enough to cover all persons except the person and the insurer was in terms negatived as the insurance cover was not available to the passengers. That was in terms made clear by the proviso (ii) to S. 95 (1) 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 occurrence of the event out of which a claim arises"

The final conclusive recorded by their Lordships, therefore, was as under:-

"Therefore it is not required that a policy of insurance should cover risk to the passengers who are not earned 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."

28. Thereafter the question was considered as to the voluntary coverage given by the Insurance Company to the extent of Rs. 15,000/- by covering even such passenger risk which was not required to be covered by the mandatory requirements of S. 95 by charging the extra premium. To that extent the Insurance Company was, therefore held liable because of this special contractual clause by giving a wider coverage. Their Lordships, however, pointed out at page 1747 that even these policy clauses would indicate that what was intended to be covered under clauses 1 and 1 (a) was only the risk required to be covered u/s 95 of the Motor Vehicles Act which restricted the legal liability only to the statutory requirement under S. 95. Therefore, the Act policies satisfying only the requirements of S. 95 would cover passenger risk only in respect of the passengers who were carried for hire or reward or by reason of or in pursuance of a contract of employment. The Act policy would not cover the risk of a passenger carried in a vehicle who was not carried for hire, at reward or by reason of or In pursuance of a contract of employment in view Of this finally concluded Position

29. It is true that the, question in this case had arisen in the context of a private motor car when a person who was given a lift had died in the motor accident and their Lordships had held that such a passenger's risk was not covered under the statutory requirement under S. 95. That fact, however, would not confine the ratio only to such private cars as their Lordships' observations have been made on a historical perspective of the scheme of this third party risk insurance in so far as such passenger risk is concerned, at is why their Lordships were careful to point out that the term "third party" which was of the widest amplitude in S. 95 could not cover all persons except the person insured and the insurer for the simple reason that the insurance cover was not available to the passengers and that fact was made explicit by the proviso (ii) to, S. 95 (1) which made very clear that a policy of insurance was not required to cover risk to the passengers who were not carried for hire or reward or by reason of or in pursuance of a contract of employment.

30. Mr. Oza. invited our attention to the decision in *Sakinabibi v. Gordhanbhai* (1974) 15 GLR 428 where the question had arisen in the context of the owner of the goods who was carried on the truck in question. So far as the ultimate conclusion was rested on the fact that even when the owner or the hirer of the goods was carried, the carriage of such a passenger being for hire or reward, the passenger risk for such a person was required to be compulsorily insured under

S. 95, would be justified even on the basis of the aforesaid settled legal position. The ratio, however, would be affected in so far as the reasoning rests on the basis of the statutory test which has to be fulfilled by the vehicle in question because of the words "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." This Court had interpreted S. 95 (1) second proviso by holding that the limitative condition in this second proviso which required coverage of passenger's risk was not by reference to the passengers but by reference to the vehicle and so it was held that the vehicle must satisfy the test by answering the statutory description and It was not the passenger who was to answer the statutory description. Therefore, it was held that if the vehicle was a vehicle in which passengers were carried for him or reward or by reason of or in pursuance of a contract of employment, such vehicle must have passenger's risk covered by compulsory insurance policy for the third party risk, irrespective of the fact as to what is the class of the passengers who was carried in or upon such vehicle at the time of the occurrence of the event which gave rise to the claim of compensation. The business test or the business flavour was emphasized by relying upon the decisions of the House of Lords in two recent cases in *Albert v. Motor Insurer's Bureau* (1971) 2 ALL ER 1345 and *Motor Vehicles Bureau v. Meanan* (1971) 2 ALL ER 1372 by holding that the legislature had made insurance cover compulsory when the carriage of passengers by a vehicle was as a business proposition or business exigencies or business reasons, the limitative condition was to be satisfied by reference to this statutory test to be fulfilled by the vehicle by looking to the normal character of the vehicle or its normal habitual function. Therefore, it could not be satisfied when passengers were given lift by way of social kindness, or if casual, solitary use was made of the vehicle for carrying a passenger for some small reward whether by way of petrol charges or otherwise.

31. While taking this view on the basis of those English decisions, the business test had been emphasized as was the majority view in those decisions. The majority view was founded on the fact that in a penal statute the liability for use of the vehicle without the necessary insurance or the permit could not be fastened on mere fleeting use of the vehicle on some isolated occasion and because the definition of the term "public service vehicle" as pointed out in Lord Donovan's judgment in *Albert's* case at page 1353 under Ss. 117 and 118 (3) of the 1930 Act and the 1960 Act clearly imported the notion of business by the very language of those provisions. The main factor which was relied upon was, as pointed out by Lord Donovan at page 1352, that the Parliament had not provided the necessary insurance by using proper language to indicate the said requirement "when passengers were being carried for hire or reward" but the relevant words having been used by way of adjectival clause governing a vehicle in which passengers were carried for hire or reward, the relevant expression could not be construed as meaning any vehicle in which passengers were in fact being carried for hire or reward at the time of the occurrence of the event giving rise to a claim. The user test which was relied upon in the minority view was not

accepted by as in that decision in proviso (ii) to S. 95 (1) even the word vehicle had been further elaborated by substituting, the expression "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

32. This statutory language of the proviso (ii) in S. 95 (1) is now found by their Lordships to be explicit and the statutory language itself gives the point of time in the very exception which is laid down that a policy shall not be required 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 the claim arises. When the coverage is given by engrafting an exception on the exception by the opening words of this proviso "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, the relevant time contemplated in the exception would have to be borne in mind, also for the purposes of that exception to the exception which gives the positive coverage. It should also be borne in mind that even the "public service vehicle" definition in S. 2 (25) in our Act is any motor vehicle used or adapted to be used for the carriage of passengers for hire or reward and including a motor cab, contract carriage, and stage carriage, which has no notion of business therein, so as to indicate that the vehicle would satisfy this test only when the carriage of passengers was for hire or reward or by way of a business proposition.

33. The interpretation of this definition even in the context of a penal liability was by adopting this user test in the decision in *State of Mysore Vs. Syed Ibrahim*, . There the motor car had on one occasion carried eight passengers collecting fare of Rs. 5/- from each and the question arose in the context of S. 42 (1) read with Section 123 for having used the said car as a transport vehicle without Permit required under S. 42 (1). The definition of "Public service vehicle" in S. 2 (25) was referred to as well as the definition of "transport vehicle" in S. 2 (38) as meaning a public service vehicle or a goods vehicle. At page 1425 their Lordships pointed out that S. 42 (1) no doubt used the words "owner of a transport vehicle" by providing that he shall not use, or permit its use in any place save in accordance with the conditions of a permit granted or counter-signed by the Prescribed authority. But those words did not mean that the sub-section applied only to cases where the motor vehicle in question was registered as a transport vehicle. The Section having been enacted for Control of transport vehicles, it could never be the intention of the Legislature to allow such an anomalous result that a person could use his motor vehicle provided it was not a transport vehicle for carrying passengers for hire or reward without having to take out a Permit for use as a transport vehicle. Therefore, S. 42 (1) was construed in a manner so as to effectuate the object for which it was enacted and it was held to mean that if a person owned a motor vehicle and used it or permitted its use as a transport vehicle, he could do so provided he took out the requisite permit therefor. If he did not take out the permit and used it or permitted its use as "a transport vehicle" he committed an infringement of the sub-section. What was emphasized

by S. 42 (1) was the use of a motor vehicle as a transport vehicle and the necessity of a permit which was required for purposes of exercising control over vehicles used as transport vehicles. Their Lordships in terms relied upon the very wordings of these definitions because the "transport vehicle" meant "a public service vehicle" and "a public service vehicle" meant any motor vehicle either used or adapted to be used for carriage of passengers for hire or reward. Therefore, any motor vehicle used for carriage of passengers for hire or reward was regarded, when so used, as a public service vehicle and therefore a transport vehicle, 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. It must, therefore, follow that even if a motor vehicle was occasionally used for carrying passengers for hire or reward it must be regarded when so used as a public service vehicle and, therefore, a transport vehicle and if it was so used without the necessary permit for such use it would be in breach of S. 42 (1) and the owner who used it or permitted it to be used would be liable to be punished under S. 52 (1) read with Section 123.

34. Therefore even in the context of penal liability in our country this user test is applied and a motor vehicle occasionally used for carrying passengers for hire or reward is regarded when so used as a public service vehicle. Even when by the amendment by Act No. 56 of 1969 with effect from March 2, 1970 S. 95 (1) (b) (ii) had been introduced by providing for insurance policy which insures the person or classes of persons specified in the policy to the extent specified in sub-section (2) against the death of or bodily injury to any passenger of a public service vehicle caused by or arising out of the use of the vehicle in a public place it would show the legislative intention that in this proviso which by an exception to an exception covers the passenger risk when passengers are carried for hire or reward, it is the user test which was clearly intended. Passenger of a public service vehicle would clearly satisfy this test. Even the relevant words "where the vehicle is a vehicle" in this relevant exception (ii) in the proviso are not ignored in this construction. The positive coverage is given by this exception "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" and, therefore, the vehicle would satisfy the user test once the passengers fulfil this necessary condition of being carried for hire or reward or by reason of or in pursuance of a contract of employment on this particular occasion at the time of the occurrence of the event out of which the claim arises.

35. The view which is now taken clearly fits in with the entire scheme of the Act as interpreted in our country as aforesaid. A passenger who is carried for hire or reward or by reason of or in pursuance of a contract of employment must have his safe carriage implied in that consideration. That is why the Legislature, even while providing for the exception of the general passenger risk in S. 95 (1), has given this positive coverage making insurance compulsory when such a passenger is carried for hire or reward or by reason of or in pursuance of a contract of employment. That is why under S. 96 (2) (b), Q (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. This statutory defence emphasizes the user test and not the business test being kept in view and, therefore, the Insurance Company when the vehicle on the date of the insurance is not covered by a permit to Ply for hire or reward, Is given a right to right this statutory defence provided a special term by way of a condition in the policy is introduced excluding the user of the vehicle for hire or reward if that vehicle was not on the date of the contract of insurance a vehicle covered by a permit to ply for hire or reward. Such condition excluding such use is permitted by the Legislature enabling the Insurance Company even to escape liability because under our law the owner making such occasional use would be required to be covered by the insurance policy. But if he committed a breach of the condition with his Insurance Company, the Insurance Company would not have to in demnify.

36.. In view of them considerations it is clear that after the legal position is now settled by the Supreme Court, we can no longer fail back on the aforesaid business test which was adopted by us in the aforesaid decision and relying upon that business test which the vehicle must satisfy we had contemplated its further extension as was done in England that if the vehicle satisfied this statutory business test it was immaterial whether on that particular occasion who was carried, a passenger for hire or reward or even a person carried free of charge. If the relevant test which is now evolved for the passenger risk is that the passenger must be one carried for hire or reward or by reason of or in pursuance of a contract of employment, which would automatically fulfil the condition laid down in the exception that the vehicle is a vehicle in winch passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment on that particular occasion at the time of the occurrence of the event out of which the claim arises, it is obvious that the risk of such a passenger who was given a free lift and who was not carried for any hire or reward or by reason of or in pursuance of a contract of employment would not be required to be covered in view of the aforesaid settled legal position. This being ultimately a contract of indemnity, if the policy of insurance is not compulsory, the Insurance Company could not be held liable when it is not statutorily bound to cover this passenger risk of free passengers and when voluntarily it has not given any extra coverage as had happened in the case before their Lordships. Therefore the Tribunal was right in holding that the passenger risk was not covered In respect of these two persons, Sidi Musa and Noormohamed and, therefore, the Insurance Company, opponent No. 5, would not be liable to satisfy the award against the owner and the driver, opponents Nos. 1 and 3 in those two casas.

37. xx xx xx xx

38. Order accordingly.