
(2006) 02 MP CK 0049

In the Madhya Pradesh High Court

Case No : Miscellaneous Appeal No. 1184 of 2002

Manager, The Oriental Insurance Company Ltd.

APPELLANT

Vs

Mantola and Others

RESPONDENT

Date of Decision : 27-02-2006

Acts Referred:

Motor Vehicles Act, 1988 — Section 123, 123(2), 166, 173
Penal Code, 1860 (IPC) — Section 279, 304A, 337

Citation : (2006) 3 MPLJ 329

Hon'ble Judges : Subhada R. Waghmare, J; Dipak Misra, J

Bench : Division Bench

Advocate : R.K. Samaiya and Shailendra Samaiya, for the Appellant; R.S. Patel, for the Respondent

Judgement

Dipak Misra, J.

In this appeal preferred u/s 173 of the Motor Vehicles Act, 1988 (for brevity "the Act") the insurer, namely, Oriental Insurance Company Limited, has called in question the legal propriety of the award dated 11-4-2002 passed by the Motor Accidents Claims Tribunal, Tikamgarh (in short "the Tribunal") in Claim Case No. 26/99.

The facts in a nut shell are that the respondent Nos. 1 and 2 initiated an action u/s 166 of the Act on the foundation that on 13-2-1999 their son, Jagdish, aged about 15 years was travelling in a bus bearing Registration No. MP.15-D/5695 from Maharajganj to Chhatarpur. The young boy, Jagdish, was sitting on the roof of the bus and about 8.00 p.m. while he was on roof top of the bus it dashed against a Mango tree as a result of which he fell down and sustained serious injuries. He was carried to Chhatarpur Hospital and thereafter to the Gwalior where he breathed his last on 16-2-1999. As the driver of the bus was driving in a rash and negligent manner, a Crime No. 24/99 was instituted against him for the offences punishable under Sections 279, 337 and 304A of the Indian Penal Code (for short "the IPC"). It was contended in the petition that the deceased

was studying in VIIIth class and was also engaged in making baskets from bamboos. As setforth he was earning Rs. 2,000/- per month. It was also pleaded that the claimants had spent quite a sum for bringing their son from Chhatarpur to Gwalior and in administering treatment to him. The claimants on various heads putforth a claim of Rs. 8,50,000/-.

The respondent Nos. 3 and 4 (non-applicant Nos. 1 and 2 in the claim petition) disputed rash and negligent driving by the driver and pleaded false involvement of the vehicle in question. It was also contended that Jagdish was quite young and hence, was not engaged in any work.

The appellant-Oriental Insurance Co. Ltd. (non-applicant No. 3 before the Tribunal) refuted the claim and also pleaded that the deceased was not engaged in any work and hence, the stand taken with regard to income is not sustainable. In addition, it was contended that there was breach of policy and, therefore, the insurer was not liable to indemnify the owner.

The Tribunal framed number of issues and came to hold that due to rash and negligent driving of the vehicle in question the deceased sustained serious injuries which led to his death; that the driver had conducted himself in rash and negligent manner by making the deceased sit on the roof of the bus; that the vehicle was insured with the appellant-Insurance Company; that the owner of the vehicle had not committed any breach of the policy; and that the claimants were entitled to Rs. 1,36,473/- towards compensation.

We have heard Mr. R.K. Samaiya and Mr. Shailendra Samaiya, learned Counsel for the insurer-appellant and Mr. R.S. Patel, B.S. Thakur and R.S. Lodhi for respondent Nos. 1 and 2, the claimants before the Court below.

It is submitted by Mr. Samaiya, learned Counsel for the appellant that the Tribunal has grossly erred by saddling the liability on the insurer inasmuch as there has been breach of the insurance policy as the driver had permitted the deceased to travel on the roof top of the bus which is not permissible as per the permit and further such a person would not be covered under the policy.

Mr. R.S. Patel, learned Counsel for the respondent Nos. 1 and 2-claimants, supported the award passed by the Tribunal. It is his alternative submission that even if the finding is accepted the same would be in the realm of contributory negligence and would not tantamount to breach of policy condition to ensure in total exoneration of the Insurance Company.

To appreciate the rival submissions raised at the Bar it is thought appropriate to refer to certain decisions in the field. In the case of Rural Transport Service Vs. Bezlum Bibi and Others, , the Division Bench while dealing with the case of a passenger travelling on the roof of the bus got a strike by an over-hanging branch of tree and fell down on the ground sustaining multiple injuries and died on the following day, came to hold that the deceased died in the accident which resulted from the rash and negligent act of the driver and conductor of the bus.

Their Lordships expressed the view that inviting the passenger to travel precariously on the top of an overcrowded bus is itself rash and negligent act and that apart when passengers were being made to travel on the roof of a greater amount of care and caution on the part of the driver is called for. Their Lordships further referred to the concept of contributory negligence which relates to application of maxim "*In pari delicto potior est conditio defendentis*", which means both parties are equally to blame and neither can hold other liable and proceeded to state that the Courts in India are not to follow the English rule of contributory negligence blindly. Their Lordships laid down the principle that the Courts in India have applied the principle of contributory negligence would only mitigate the liability to the extent of negligence that can be attributed but would not debar the claim altogether. It is worthwhile to produce Paragraph 15 of the decision:

15. This is the reason why Courts in India have applied the principles underlying the Law Reform (Contributory Negligence) Act, 1945, in holding that contributory negligence would only mitigate the liability to the extent of negligence that can be attributed but would not debar the claim altogether. Reference may be made to *State v. Lal Man Badriprasad* AIR 1954 V P 17, *Sindhu Mohanty and Another Vs. Gourkrushna Mohanty and Another*, , *Yoginder Paul Chowdhury v. Durga Das Punj* 1972 Acc 483 (Delhi) and *Punjab State v. Jaswant Kaur* 1973 Acc 213 (Punj.). Judicial decisions on the point are uniform and our attention had not been drawn to any decision taking the contrary view. Hence, we must hold that the Tribunal was right in apportioning the liability on its finding as to the deceased being guilty of contributory negligence.

In this regard we may refer with profit to the decision rendered in the case of *Vijay Singh Vs. Haryana Roadways and another*, wherein the learned Single Judge posed a question whether travelling on the roof of the bus does it, per se, constitutes contributory negligence on the part of such passenger if due to the negligence on the part of the bus driver the injury is caused to him and answered the said question as under:

6. There is a duty of care that rests upon the driver of a bus towards all persons travelling on it which covers not only those in it, but extends also to passengers travelling on the roof of it, even though it may not have been permissible in law for them to be there. Breach of any rule or instruction prohibiting travel on the roof of a bus cannot be construed as a licence to the bus driver to drive the bus without due regard to the care and safety of all passengers including those on the roof. Rather, when there are passengers on the roof, extra caution is imperative. These observations are, of course, not to be taken as approving or permitting travel on the roof of a bus. It is clearly incumbent upon the authorities concerned to ensure that travel on the roof of a bus is not only banned, but does not in fact take place as a risk of serious injury is so obviously inherent in such travel.

7, Seen in this light, no contributory negligence can be fastened upon a

passenger travelling on the roof of a bus, who sustains injuries on account of the negligent driving of the bus driver, merely on the ground that he had been travelling on the roof of the bus and not inside it. In this view of the matter, the finding of contributory negligence recorded against the claimant cannot be sustained and is thus set aside.

In the case of Sri Inja Venkatrao Vs. Smt. Sundara Barik and Another, , a Single Judge of the High Court of Orissa, while dealing with the factum of contributory negligence pertaining to a passenger travelling on the roof top of a bus who was hit by a branch of a tree and sustained injury held as under:

8. Mr. Routray submitted that driver cannot be held to be negligent when deceased was moving on the top of the bus. It is true that passengers are not to travel on roof of the bus, When the driver found passengers on the roof of the bus, he ought not to have driven the vehicle until passengers got down. In such circumstances, driver was negligent in driving the bus which resulted in the fatal injuries to the deceased.

Moving on the roof top of the bus is stated to be a contributory negligence. When conductor and driver allowed persons to take their seats on roof top of the bus taking into consideration status of the deceased, I am not inclined to hold that he had contributory negligence on that account. On account of negligence of the driver, owner is vicariously liable to pay the compensation.

In this context, we may also profitably refer to the decision rendered in the case of Gali Krishna Murthy Vs. General Manager, APSRTC, Musheerabad, Hyd., , wherein it has been ruled in Paragraph 4 as under :-

4. It appears that the learned Chairman of the Tribunal below has lost sight of the provisions of Section 123 of the Motor Vehicles Act, 1988, which came into force w.e.f. 1-7-1989. Sub-section (2) of Section 123 expressly prohibits that no person shall travel on the running board or on the top or on the bonnet of a motor vehicle. The plea of the petitioner that on the instructions of the conductor of the bus, he travelled on the top of the bus is unsustainable in the absence of any admission by the conductor, who was examined as R. W. 1, particularly in view of the express prohibition by the statute. Therefore, for the foregoing reasons, I am of the considered view that the petitioner himself has contributed in the occurrence of the accident to the extent of 25 per cent and 75 per cent negligence is attributable to the driver of the bus R.W. 2, inasmuch as he was aware that some passengers are travelling on the top of the bus.

After so holding the learned Single Judge determined the contributory negligence at 25%.

In the case of Oriental Insurance Co. Ltd., Ranchi Vs. Jashmani Kongari and Another, a similar question arose and the learned Single Judge of High Court of Jharkhand placing reliance on Section 123(2) of Motor Vehicles Act came to hold as under:

1...On perusal of Exh. 3, it was found that a premium of Rs. 2,310 was paid for 21 passengers against third party risk. It is submitted that when it was found that due to rash and negligent driving the deceased fell down from the roof of the bus, there was contributory negligence on the part of the deceased also, when negligently he had taken risk of travelling on roof of the bus. He took this and, therefore, he definitely contributed to negligence. It is further submitted that deceased was aged about 45 years and, therefore, multiplier of 15, which was used by the Tribunal, was not the appropriate multiplier, rather it should have been maximum 12. I find force in the aforesaid submissions. In my view, the deceased had also contributed at least to the extent of 25 per cent in the accident by travelling on the roof of the bus on his own accord....

In view of the aforesaid pronouncement of law it is quite clear that two views have been stated, viz., (i) if a person is allowed to travel on the roof top that would tantamount to rash and negligent act on the part of the owner and the driver and hence, the owner is vicariously liable and, therefore, the Insurance Company should indemnify the owner; (ii) that in view of the statutory provision a passenger is not supposed to sit on the roof top, but if he is allowed to sit on the roof top he also contributes to the occurrence of the accident. In our considered opinion, the second view that a person travels on the roof top contributes to the accident is correct and we are in respectful agreement with the same keeping in view the statutory provision engrafted u/s 123 of the Motor Vehicles Act. Once we have accepted that such a passenger would be liable for contributory negligence we are disposed to state that such contributory negligence should be determined at 25%. Thus, the amount of compensation granted by the Tribunal would be reduced by 25%. Thus, the amount of compensation would stand reduced to Rs. 1,02,354.75 P. which is rounded of up to Rs. 1,02,360/-.

Consequently, the appeal is allowed in part. There shall be no order as to costs.