
(2000) 07 GUJ CK 0042

In the Gujarat High Court

Case No : First Appeal No's. 1034 and 1036 of 1986

New India Assurance Co. Ltd.

APPELLANT

Vs

Baban Kashinath Pande and Others

RESPONDENT

Date of Decision : 24-07-2000

Acts Referred:

Motor Vehicles Act, 1939 — Section 110B, 2(2), 2(3), 96(2)

Citation : (2002) ACJ 615 : AIR 2000 Guj 318 : (2001) 21 GLH 439

Hon'ble Judges : H.K. Rathod, J;D.C. Srivastava, J

Bench : Division Bench

Advocate : A.M. Kapadia and S.B. Vakil, for the Appellant; Prashant G. Desai and M.K. Purohit for Respondent No. 2, D.R. Bhatt and Vijay H. Patel, for Respondent Nos. 3, 6 and 7, for the Respondent

Final Decision : Dismissed

Judgement

D.C. Srivastava, J.—These two Appeals and Cross Objections are proposed to be disposed of by a common judgment.

2. Brief facts giving rise to these Appeals and Cross Objection are as under :

Luxury Bus bearing Registration No. MNP 3260 left Ahmedabad on 19-12-1982 at about 8.00 p.m. It was carrying 35 passengers for Bombay. At the relevant time the bus was being run by M/s. Punjab Travels. The bus was actually, however, owned by M/s. Bagga Travels. Both these Travel Companies have their offices at Ahmedabad. In the night of 19-12-1982/20-12-1982 at about 2.00 O'clock the driver of the bus lost control between Valsad and Kila Pardi on National High-way No. 8. The bus fell in the ditch and it was turned turtle. It was facing up-side down. Several persons sustained injuries. 5 passengers died and 4 were left with different injuries. The legal representatives of the deceased 5 persons and 4 injured filed different claim petition claiming compensation. It was alleged that the accident occurred due to rash and negligent driving of the bus by the driver.

3. First Appeal No. 1034 of 1986 is arising out of M.A.C. Petition No. 12 of 1983

whereas First Appeal No. 1036 of 1986 is arising out of M.A.C. Petition No. 97 of 1983.

4. The driver of the bus did not file any written statement. The two travel companies also did not file any written statement. It is only the appellant New India Assurance Company which filed written statement and that too at a late stage after the issues were framed. The bus was not owned by M/s. Punjab Travels. It was owned by M/s. Bagga Travels and was insured with the appellant. The statutory defence raised by the appellant before the Tribunal was that the Insurance Company is not liable because the permit was not filed and the bus was plied in breach of statutory conditions of Insurance Policy as well as in breach of Section 96(2)(b)(i)(c) of the Motor Vehicles Act of 1939. The accident in question was not denied by the appellant. It was also pleaded that the bus was plied as "Stage Carriage" and not as "Contract Carriage" whereas the permit was of contract carriage and thus there was breach of the terms of permit as well as Insurance Policy.

5. The Tribunal on this limited controversy raised by the appellant found that the bus was not plied in breach of the terms and conditions of the policy or the permit. The Tribunal also found that the permit was not brought on record. It further found that the Insurance Company is liable in respect of damage to the property to the extent of Rs. 1,50,000/- and there is unlimited liability of Company so far as personal injury to the passengers in the bus is concerned. With these findings the Tribunal awarded compensation of Rs. 2,83,000/- together with 9% p.a. interest in M.A.C. Petition No. 12 of 1983 as against the claim of the claimant amounting to Rs. 3,50,000/-. Likewise as against the claim of Rs. 4 lacs in M.A.C. Petition No. 97 of 1983 the Tribunal awarded compensation of Rs. 2,37,000/- with 9% p.a. interest.

6. The quantum of compensation has not been challenged in these Appeals.

7. We have heard Shri A.M. Kapadia, learned counsel for and on behalf of Shri S.B. Vakil, learned counsel for the appellant and Shri P.G. Desai, learned counsel representing the two travel companies and also Shri D.R. Bhatt for respondent No. 4 and Shri V.H. Patel for respondents No. 6 and 7.

8. Since no application u/s 170 of the Motor Vehicles Act was moved before the Tribunal the appellant cannot challenge the quantum of compensation awarded by the Tribunal. Moreover the compensation has not been blindly awarded rather it has been judiciously examined and total claim set-up by the claim in two petitions under consideration was not awarded. Consequently the amount of compensation requires no reconsideration.

9. The contention of Shri Kapadia has been that the Luxury Bus was to be used as Contract Carriage and not as Stage Carriage and since it was used and plied as Stage Carriage the Insurance Company is not liable. He has placed reliance upon Section 96(2)(b)(i)(c) of the Motor Vehicles Act, 1939. Section 96(2)(b) inter-alia provides that....." No sum shall be payable by an insurer under Sub-

section (1) in respect of any judgment unless.....on any of the following grounds, namely -

(b) that there has been a breach of a special condition of the policy being one of the following conditions, namely -

(1) a condition excluding the use of the vehicle;

(c) for a purpose not allowed by the permit under which the vehicle is used, where the vehicle is "a transport vehicle".

Obviously the vehicle in question was a transport vehicle. According to Shri Kapadia it was not used for the purpose allowed by the permit. His contention has been that the permit was issued for plying the bus as Contract Carriage and not as Stage Carriage and consequently there was breach of Section 96(2)(b)(i) (c) of the Motor Vehicles Act, 1939.

10. If the Insurance Company wanted to dislodge the claim of the claimant on the basis of Section 96 it was the duty of the Insurance Company to file the permit pleaded by the Transport Authority. The permit has not been brought on record. Shri Kapadia, however, contended that serious efforts were made before the Tribunal to summon the permit from the Transport Authority of Ahmedabad and the Clerk came from the said office and stated that they have no record. Consequently attempt to summon the permit from the R.T.O. office, Ahmedabad did not bring any result. Summoning the permit from R.T.O. office Ahmedabad was a futile exercise. It was well within the knowledge of the appellant that the permit was not issued by the R.T.O. Ahmedabad rather it was issued by the Secretary, State Transport Authorities, Manipur. In Para : 2 of the written statement of the Insurance Company it is specifically mentioned that the vehicle was registered under the Act on 16-10-1979. The Certificate of registration of the vehicle gives the brief description and class of vehicle as "Tourist Bus". The vehicle is also covered under a permit dated 30-4-1981 issued by the Secretary, State Transport Authority, Manipur, u/s 63(7) of the Act in which the vehicle is described as "Tourist Omni Bus". In view of this recital in Para : 2 of the written statement of the appellant there is no escape from conclusion that the appellant very well knew that the vehicle was registered in Manipur and permit dated 30-4-1981 was issued by the Secretary, State Transport Authority, Manipur. Consequently the appellant should have summoned the permit from Secretary, State Transport Authority, Manipur and not from the R.T.O., Ahmedabad. For this failure of the appellant Shri P.G. Desai has rightly placed reliance upon a Division Bench pronouncement of this Court in United India Fire and General Insurance Co. Ltd. Vs. Hemlata and Others, where the Insurance Company neither produced policy nor permit to examine whether there has been breach of any specified condition of the policy or that the permit disallowed the driver to carry any passenger for hire or reward. On this failure it was held that Insurance Company can not escape its liability. Of course, in the Appeals before us the policy was brought on record, but not the permit. Consequently, it cannot be said

that the permit was issued for plying the vehicle as Contract carriage and that it was plied as State Carriage.

11. Shri P.G. Desai has contended that the permit was shown by M/s. Bagga Travels to the appellant when M/s. Bagga Travels claimed compensation for damage to the bus and as such as the appellant was fully aware that the permit was obtained for plying the bus as Contract carriage. To this Shri Kapadia argued that there is no material on record from the side of the two travel companies that the permit was shown at the time of claiming compensation for damage caused to the bus. It is true that the case was very lightly conducted on behalf of the two travel agencies in the Tribunal inasmuch as even the written statement was not filed and no evidence was led from their side. However, Para : 2 of the written statement of the appellant clearly indicates that it had full knowledge of the number of permit, date of its issue and the Authority of Manipur which had issued the same. Obviously the permit was not filed before the Tribunal by M/s. Bagga Travels. If the appellant was not aware of the contents of permit it could not have pleaded in Para : 2 in the written statement about these details of permit. More over it is not the case of the appellant that the permit was for plying the bus as Stage Carriage and that it was plied as Contract Carriage. On the other hand the contention of the appellant has been that a Contract Carriage was plied as Stage Carriage inasmuch as the whole of the vehicle was not hired either by the individual or by 35 persons or passengers collectively. This, therefore, takes us to the question of determination whether a Contract Carriage was used as State Carriage in violation of the terms of permit as well as the terms and conditions of the Insurance Policy.

12. Even if we proceed on the arguments raised by Shri Kapadia that the permit was issued for plying the transport vehicle as Contract Carriage it has to be seen whether at the time of accident the vehicle was being plied as Stage Carriage or as Contract Carriage. For this we have to look to the definition clause of the Act to find out what is the requirement of a Contract Carriage and Stage Carriage.

13. Stage Carriage is defined in Section 2 (29) of the Motor Vehicles Act 1939 (for short "the Act") as under :

" "Stage Carriage" means a motor vehicle carrying or adapted to carry more than six persons excluding the driver which carries passengers for hire or reward at separate fares paid by or for individual passengers either for the whole journey or for stages of the journey."

Contract Carriage, on the other hand, is defined u/s 2(3) of the Act, which reads as under :

"Contract Carriage" means a motor vehicle which carries passenger or passengers for hire or reward under a contract expressed or implied for the use of the vehicle as a whole at or for a fixed or agreed rate or sum -

(i) on a time basis whether or not with reference to any route or distance, or;

(ii) from one point to another, and in either case without stopping to pick upon set down along with line of route passengers not included in the contract; includes a motor cab notwithstanding that the passenger may pay separate fares;

14. On the strength of this definition Mr. Kapadia contended that a vehicle cannot be defined as Contract Carriage unless it was used as a whole. His contention has been that from the evidence on record it transpires that no doubt the bus proceeded from Ahmedabad to Bombay and was carrying 35 passengers, but since the passengers paid their fare and purchased tickets from M/s. Punjab Travels it cannot be said that the vehicle was used for carrying passengers for hire or reward under any express or implied contract for use of the vehicle as a whole. It is thus to be seen whether it is necessary that one person should enter into a contract for hiring the vehicle as a whole and then he should collect 35 passengers and then proceed from one place to its destination. This controversy came up before the Apex Court and the Apex Court laid down the test as to what Contract Carriage means in *Shri Roshanlal Gautam Vs. State of Uttar Pradesh and Others*, which was relied upon by Shri Kapadia as well as by Shri Desai. The Apex Court in this case also defined meaning of Contract Carriage and Stage Carriage and also had drawn the distinction between the two. After quoting the definition of contract carriage u/s 2(3) of the Act the Apex Court has laid down that the distinction between the Stage Carriage and the Contract Carriage is that the contract carriage is engaged for the whole of the journey between two points for carriage of a person or persons hiring it but it has not the right to pick up other passengers enroute. The Stage carriage, on the other hand, runs between two points irrespective of any prior contract and it is boarded by passengers enroute who pay the fare for the distance they proposed to travel.

15. Relying upon this pronouncement of the Apex Court, Madras High Court in *N. Krishnasami Chetty and Others Vs. The Licensing Officer, Deputy Transport Commissioner and Secretary, Regional Transport Authority*, has also held that the distinction between the Stage Carriage and the Contract Carriage is that the contract carriage is engaged for the whole of the journey between two points for carriage of a person or persons hiring it but it has not the right to pick up other passengers enroute. The Stage Carriage, on the other hand, runs between two points irrespective of any prior contract and it is branded by passengers enroute who pay the fare for the distance they propose to travel. After quoting the Apex Court view aforesaid the Madras High Court observed that by collection of separate fare from passengers it would not lead to the deduction that the vehicle has been used as a Stage Carriage and not as a contract carriage.

16. Thus, in view of the Apex Court verdict followed by Madras High Court it can be said that a contract carriage is one which is hired under express or implied contract for the use of vehicle as a whole for a sum agreed to be paid and for the journey to be undertaken from one point to another, whereas in stage carriage there is no such express or implied contract and the vehicle can carry more than six passengers excluding the driver for hire or reward on separate fare paid by or

for individual passengers either for the whole journey or for the stages of the Journey.

17. While quoting the definition of contract carriage u/s 2(3) of the Act we have already taken note of the portion bracketed. The bracketed portion was introduced by the Motor Vehicles (Amendment) Act No. 56 of 1969 vide Section 2 which came into force with effect from 2-3-1970. Consequently if the definition of contract carriage is read in the light of these events it can be said that the use of vehicle has to be taken into consideration and the following points have to be kept in mind for deciding whether the vehicle is used as contract carriage or not.

- (i) Vehicle can be used as contract carriage under permit to that effect;
- (ii) Contract Carriage can be hired by the passengers for hire or reward under express or implied contract for the use of the vehicle as a whole;
- (iii) The vehicle is to be used from one point to another and in either case without stopping or picking up or setting down along the line of route passengers not included in the contract;
- (iv) includes a motor cab notwithstanding that the passengers may pay separate fares.

18. We, therefore, find some force in the contention of Shri Kapadia that the vehicle can be said to be used as contract carriage only when it is hired as a whole, but that is not the end of the matter. The contract to hire a vehicle may be express or implied. Important condition is that such vehicle is to run from one point to another and in any case without stopping to pick up or setting down along the line of route passengers not included in the contract. If, however, the vehicle stops at places along the line of route and picks-up passengers and drops the passengers it will not be said to be a contract carriage. Likewise simply because one passenger or several passengers paid separate fares it cannot be said that the vehicle became a stage carriage. It is not the requirement of the definition of contract carriage u/s 2(3) of the Act that one person should come forward and hire the entire vehicle and they carry the team under his control. It is also possible that 35 passengers may collect at one point and select one person to collect fare from them and enter into express or implied contract for carrying the passengers from one point to another. Thus, the payment of fare by one or two passengers or by all the passengers individually does not change the nature of vehicle from contract carriage to stage carriage. On the other hand, the vehicle can be said to be stage carriage when it carries passengers for the whole journey or for stages of the journey and separate fare is paid by or for individual passengers either for whole journey or stages of journey. Thus, picking up passengers enroute and dropping them enroute for payment of separate fare will necessarily indicate that the vehicle was used and plied as stage carriage.

19. Shri Kapadia has drawn our attention to the evidence on record and pointed out contradictory statements by the passengers. It is, however, admitted fact

that the vehicle was under control of M/s. Punjab Travels. No evidence has come forward as to what was the arrangement between M/s. Punjab Travels and M/s. Bagga Travels under which former had left the vehicle under control of the later. However, the later, namely, M/s. Punjab Travel was plying the bus on the date of the accident. Statement of Kherunnisa on the point of payment of fare by her husband cannot be relied upon because she was not present when the ticket was purchased by her husband nor she had seen the accident. Another witness Isaq stated that he had given Rs. 100/- as fare for the journey from Ahmedabad to Bombay and along with him his neighbour Abbas was also sitting and he has also paid the said fare. He further stated in cross-examination that they had purchased tickets from Punjab Travels and they do not know Bagga Travels. He further stated that he did not pay any money to Bagga Travels. Likewise he stated that the bus was full and it is true that all the passengers had paid their own fare and sat in the bus. Pritiben, another witness has stated nothing on the point. However, one witness Jagdishprasad did not state anything in examination in chief, but during cross-examination Shri J.P. Patel, Advocate, elicited the fact from this witness that for this journey, namely, from Ahmedabad to Bombay, they had gone to the office of Punjab Travels and gave money and after purchasing tickets sat in the bus. Jagdish Prasad travelled along with his father in the bus. He further stated that he had given Rs. 210/- i.e. at the rate of Rs. 105/- per head. He also admitted that he had not engaged the whole bus. He further admitted that no passenger was picked up on the way nor any person got down from the bus after it proceeded from Ahmedabad. Likewise he admitted that there were in all 35 persons and out of all of them one was supposed to collect money who was there main person. If he did not know the name of the main person, it does not shake his credit because he immediately stated that on seeing him he can identify the main person. His statement that the money was given to Punjab Travels and not to Bagga Travels, does not change the nature of the carriage. From these oral statements referred by Mr. Kapadia it transpires that all 35 persons collected and purchased tickets from Punjab Travels. It was not necessary that one consolidated ticket for 35 persons should have been issued by the Punjab Travels. Purchase of ticket by one person individually or collectively would not change the nature of the vehicle as Contract Carriage as defined u/s 2(3) of the Act which specifically permits the passengers to pay separate fare. What is material is that on the way the passengers should not be picked up nor should be dropped by the driver or the conductor. There is positive evidence that no passenger was picked up nor any passenger was dropped on the way from Ahmedabad to Bombay. It will be deemed to be a case of implied contract between all the 35 passengers who hired the whole bus for journey from Ahmedabad to Bombay. Consequently the vehicle was used as contract carriage and not as stage carriage. As such it cannot be said that it was plying in violation of the provisions of Section 96(2)(b)(1)(c) of the Motor Vehicles Act, 1939.

20. The next contention of Shri Kapadia has been that the vehicle was plied in breach of the terms of Insurance Policy. The Xerox Copy of Insurance Policy was

shown to us, but it was not legible. However, from Para : 2 of the written statement of the Insurance Company - appellant it can be said that the policy was issued and the limitation as to use was subject to condition to which the insurer issued the said policy -- viz.

"use only under a contract carriage permit within the meaning of the Motor Vehicles Act, 1939. The policy does not cover -

(1) Use for organized racing, pace making, reliability trial or speed testing;

(2) Use whilst drawing a trailer except the towing other than for reward of any one disabled mechanically propelled vehicle.

21. There was no violation of Clauses (1) and (2) of the terms of policy, likewise there was no violation that the vehicle was not used under a contract carriage permit. For this the onus lay upon the Insurance Company to obtain and file copy of permit to disclose that it was not used under a contract carriage permit. The Tribunal has observed that no person will contravene the liability under the Motor Vehicles Act. Even if this view is erroneous it can be said that even according to the appellant the vehicle was to be used as contract carriage and since it was so used it cannot be said that there was breach of terms and conditions of the Policy. Consequently, the Insurance Company cannot escape liability and it is liable to compensate for the loss of property to the extent of Rs. 1,50,000/- and for personal property to the extent of Rs. 1,50,000/- and for personal injury to the passengers to an unlimited extent. The view taken by the Tribunal, therefore, does not appear to be incorrect. We, therefore, do not find any merit in these two Appeals which are liable to be dismissed.

22. Coming to the cross-objections the liability of Punjab Travels has been disputed. Even from cross-objection it appears that the bus was under the complete control of Punjab Travels on the date of the accident no matter it was owned by M/s. Bagga Travels. No defence evidence has come on record regarding employer of the driver who was driving the bus. However, since there is no evidence regarding internal arrangement between M/s. Bagga Travels and M/s. Punjab Travels under which the bus was handed over to M/s. Punjab Travels it can be said that the driver could have been employed by Punjab Travels. If the accident took place due to rash and negligent driving of the bus by the driver which is established, the driver is liable to pay the compensation. Under the law of Torts the master of the driver will be vicariously liable on the principle of vicarious liability of master and servant. In that view of the matter M/s. Punjab Travels cannot escape liability to pay compensation. Likewise M/s. Bagga Travels being the owner of the bus cannot escape liability to pay the compensation. The Bus owned by M/s. Bagga Travels was insured with the appellant. The appellant is, therefore, liable to indemnify the owner, namely, M/s. Bagga Travels in case the claimants proceed to recover compensation from the owner. In this way ultimate liability rests upon the Insurance Company to meet the liability under the Award and to pay the compensation to the claimants. So

far as liability of the Insurance Company to reimburse M/s. Punjab Travels is concerned we find that since there is no privity of contract between the Insurance Company appellant and M/s. Punjab Travels, the Insurance Company is not liable to reimburse M/s. Punjab Travels. In this view of the matter the Tribunal has rightly ordered that all the opponents are jointly and severally liable for the principal amount together with cost and interest.

23. In view of the above observations, we do not find any merit in the two Appeals as well as in the cross-objections. Consequently, First Appeal Nos. 1034 of 1996 and 1036 of 1996 along with Cross-Objections are hereby dismissed with no order as to costs.