
(1989) 09 P&H CK 0012

In the Punjab And Haryana At Chandigarh

Case No : First Appeal from Order No. 132 of 1987 and Cross-Objection No. 1-CII of 1988

New India Assurance Co. Ltd.

APPELLANT

Vs

Punjab Government and Others

RESPONDENT

Date of Decision : 06-09-1989

Acts Referred:

Motor Vehicles Act, 1939 — Section 82, 95, 96

Citation : (1990) ACJ 415

Hon'ble Judges : G.R. Majithia, J

Bench : Single Bench

Advocate : L.M. Suri, for the Appellant; K.P. Bhandari, I.B. Bhandari for Respondent Nos. 1 and 2, R.M. Suri, for Respondent Nos. 3 and 4 and H.S. Kamboj, for the Respondent

Final Decision : Dismissed

Judgement

G.R. Majithia, J.—This judgment will dispose of F. A. O. No. 132 of 1987 filed by the New India Assurance Co. Ltd., and Cross-Objection No. 1 C11 of 1988 filed by Pritam Bus Service, respondent No. 3, and Surinder Singh, respondent No. 4.

2. The New India Assurance Co. Ltd. (hereinafter referred to as "the appellant") has challenged the award of the Motor Accidents Claims Tribunal only to the extent to which it has been held liable to pay the amount of compensation. In cross-objection, respondents Nos. 3 and 4 pleaded that it was a case of composite negligence and not contributory negligence and the liability of all the respondents ought to have been joint and several.

3. In order to appreciate the submissions raised by learned counsel for the appellant, it is necessary to submit a few facts stated in the pleadings :

THE FACTS :

4. Avtar Singh, the deceased, was travelling in bus bearing registration No. PAB 7027 owned by Pritam Bus Service, respondent No. 1, and driven by Surinder

Singh, respondent No. 2 on the fateful day May 4, 1985, When the bus reached near Attarsar at a distance of about four miles from Doraha, another bus, bearing registration No. PJG 223, owned by the Punjab Roadways came from behind and hit it. As a result thereof, Avtar Singh, the deceased, fell down from the bus and suffered injuries. He was removed to C. M. C., Ludhiana, where he succumbed to the injuries on the following day. Bus No. PAB 7027 was insured with the appellant. The other bus involved in the accident was owned by the Punjab Roadways and was not insured. The accident occurred due to rash and negligent driving of the drivers of both the vehicles.

5. The deceased was employed as a driver with Messrs. Malwa Transport, T. P. Nagar, Meerut, on a monthly remuneration of Rs. 1,000. The claimants are the widow and minor children of the deceased.

6. The respondents contested the claim of the claimants.

7. The appellant specifically pleaded that its liability was limited to the extent of Rs. 15,000 only.

8. The pleadings of the parties gave rise to the following issues :

1. Whether the death of Avtar Singh took place in an accident involving bus No. PAB 7027 and PJG 223 ?

2. Whether the accident took place on account of rash and negligent driving of Surinder Singh ?

3. What compensation the claimants are entitled to receive and from whom ?

4. Relief.

9. Issue No. 1 was answered in favour of the claimants. Under issue No. 2, it was held that the drivers of both the vehicles involved in the accident were equally responsible for causing the accident as they both were rash and negligent. Under issue No. 3, it was held that the amount of compensation will be paid in equal shares by the owners of the respective vehicles involved in the accident, namely, Pritam Bus Service and Punjab Roadways. Since the bus, bearing No. PAB 7027, was insured with the appellant and the limit of liability under the insurance policy, exhibit R-1, was Rs. 1,50,000, the liability of the owner of the bus, bearing No. PAB 7027, was to be met by the appellant within the limit of Rs. 1,50,000 and the liability of bus No. PAB 7027 was co-extensive with that of the owner.

10. Mr. L.M. Suri, learned counsel for the appellant, raised the following two submissions, namely, (i) the deceased was travelling on the roof of the bus contrary to the provisions of Section 82 of the Motor Vehicle Act (hereinafter referred to as "the 1939 Act"), the insurer is not liable, (ii) the liability of the insurance company is limited to the extent of Rs. 15,000.

11. Before answering the legal submissions raised by learned counsel for the

appellant, a finding has to be recorded with regard to the manner in which the accident took place.

12. AW-2, Surinder Singh, was travelling with the deceased on the roof of the bus, bearing No. PAB 7027. He stated that the conductor of the bus told them to sit on the roof of the bus as the bus was overcrowded. They along with 10 to 12 other passengers sat on the roof of the bus. He was cross-examined at length but nothing was elicited in his cross-examination to discredit his sworn testimony. The crux of his evidence is that he and the deceased were travelling on the roof of the bus on the asking of the conductor. The presence of this witness was impliedly admitted by RW-1, Surinder Singh, driver of bus No. PAB 7027. He admitted in his statement that the deceased was travelling in the bus along with another person. The statement of AW-2 receives corroboration from the evidence of RW-1. The version given by AW-2 appears to be natural and worthy of credence. The deceased fell down from the bus on sudden application of the brakes by the driver. It was hit from behind and the impact accelerated the accident. The driver of the bus owned by Punjab Roadways did not maintain sufficient distance from bus No. PAB 7027 and was closest its heels. When the driver of the bus in front suddenly applied the brakes, it was hit from behind by bus No. PJG 223. The drivers of both vehicles were equally responsible in causing the accident and both were rash and negligent in driving their respective vehicles. If they had applied a restraint on themselves, the accident could have been averted.

13. Learned counsel for the appellant submits that Section 82 of the 1939 Act forbids a person in charge of a vehicle to carry any person on the running board or otherwise than within the body of the vehicle. The deceased was travelling on the roof of the vehicle in contravention of the statutory provisions and the insurance company is not liable. In support of his submission, he relied upon *New India Assurance Co. Ltd. v. Samundri Roadways Co. (P.) Ltd.* [1985] ACJ 239. In that case, compensation was awarded to the heirs of the deceased passenger who was sitting on the roof of the bus. But on appeal in this court, it was urged that since the owner of the bus violated one of the terms of the insurance policy, the insurance company could not be held liable to pay compensation to the heirs of the deceased who was held to be travelling on the roof of the bus. The learned judge observed thus (at page 242) :

"If the conductor of the bus allowed Bagga Singh, deceased, to travel on the roof of the bus, it was against the statutory provisions of the Act. Apart from that, Clause (2) of the insurance agreement under the caption "Endorsement No. IMT 16", clearly provides that the insured shall take reasonable precautions to prevent accidents and shall comply with all statutory obligations. It is obvious that by permitting Bagga Singh, deceased, to travel on the roof of the bus, its conductor not only did not take reasonable precautions to prevent the accident, but he also failed to comply with the requisite statutory obligations as laid down in the traffic regulations. Since the owner of the bus violated one of the terms of

the insurance policy, the insurance company could not be held to be liable to pay damages in the case of Bagga Singh, deceased. No other contention has been raised in the appeals filed on behalf of the owner of the bus."

14. The learned judge arrived at the above conclusion relying upon Clause (2) of the insurance agreement which enjoined upon the insured to take all reasonable precautions to prevent the accident and also on the provisions of Section 82 of the 1939 Act. Sitting singly, I am bound by this judgment and if I had to take a different view, the matter has to be referred to a larger Bench but it is not necessary in the instant case because of an authoritative decision rendered by the apex court in *Skandia Insurance Co. Ltd. Vs. Kokilaben Chandravadan and Others*, . The provisions of Section 96(2) of the 1939 Act were not brought to the notice of the learned judge dealing with the above case. Section 96(2) deals with the defences which are available to the insurer and the insurer can defend the action for compensation against the insured on any of the grounds mentioned in Sub-section (2) of Section 96. Section 82 of the 1939 Act does not furnish a ground to the insurer to defend the claim against the insured. If Section 82 had furnished a ground of defence to the insured, it would have been so mentioned in Sub-section (2) of Section 96 of the 1939 Act. It is a well-settled rule of construction that all the provisions in a statute have to be construed harmoniously and in a manner when all the provisions could be given effect to. Section 82 only enjoins upon the person in charge of the vehicle as to the manner in which it has to be driven but it is not an immunity clause for the insurer.

15. The apex court resolved the conflicting views expressed by the various High Courts with regard to the exclusion clause. Conflicting views had been expressed by the Andhra Pradesh and Gujarat High Courts on the one side and the Assam, Madhya Pradesh and Orissa High Courts on the other. The dispute arose before the apex court under the following circumstances (at page 141) :

"The accident took place when the driver of the truck had gone for bringing snacks from the opposite shop leaving the engine running with the ignition key in the ignition lock and handed over control of the truck to the cleaner. He was grossly negligent in leaving the engine of the truck in the control of the cleaner. This being the immediate cause of the accident, the owner of the truck, viz., the insured was held vicariously liable along with the driver and the cleaner."

16. On behalf of the insurance company, it was contended that since there was an exclusion clause, the insurance company would not be liable in case at the point of time when the accident occurred, the person who had been driving the vehicle was not a duly licensed person to drive the vehicle. It was immaterial that the insured had engaged a licensed driver and had entrusted the vehicle for being driven to a licensed driver. Once it was established that the accident occurred when an unlicensed person was at the wheels, the insurance company would be excluded from the liability. The validity of this argument was tested in the light of the provisions contained in Sections 96(1), 96(2)(b)(ii) and 84 of the

1939 Act and it was held thus (at pages 146 to 149) :

"Section 96(2)(b)(ii) extends immunity to the insurance company if a breach is committed of the condition excluding driving by a named person or persons or by any person who is not duly licensed, or by any person who has been disqualified from holding or obtaining a driving licence during the period of disqualification. The expression "breach" is of great significance. The dictionary meaning of "breach" is "infringement or violation of a promise or obligation" see Collins English Dictionary. It is, therefore, abundantly clear that the insurer will have to establish that the insured is guilty of an infringement or violation of a promise that a person who is duly licensed will have to be in charge of the vehicle. The very concept of infringement or violation of the promise that the expression "breach" carries within itself induces an inference that the violation or infringement on the part of the promisor must be a wilful infringement or violation. If the insured is not at all at fault and has not done anything he should not have done or is not amiss in any respect, how can it be conscientiously posited that he has committed a breach ? It is only when the insured himself places the vehicle in charge of a person who does not hold a driving licence, that it can be said that he is "guilty" of the breach of the promise that the vehicle will be driven by a licensed driver. It must be established by the insurance company that the breach was on the part of the insured and that it was the insured who was guilty of violating the promise or infringement of the contract. Unless the insured is at fault and is guilty of a breach, the insurer cannot escape from the obligation to indemnify the insured and successfully contend that he is exonerated having regard to the fact that the promisor (the insured) committed a breach of his promise. Not when some mishap occurs by some mischance. When the insured has done everything within his power inasmuch as he has engaged a licensed driver and has placed the vehicle in charge of a licensed driver, with the express or implied mandate to drive it himself, it cannot be said that the insured is guilty of any breach. And it is only in case of a breach or a violation of the promise on the part of the insured that the insurer can hide under the umbrella of the exclusion clause. In a way the question is as to whether the promise made by the insured is an absolute promise or whether he is exculpated on the basis of some legal doctrine. The discussion made in paragraph 239 of Breach of Contract by Carter (1984 edition) under the head "Proof of breach", gives an inkling of this dimension of the matter.

"Exculpation of a promisor. Given a presumption of absoluteness of obligation, a promisor who is alleged to have failed to perform must either prove performance or establish some positive excuse for any failure on his part. In other words, he must find exculpation from what is presumed to be a breach of contract, either in the contract itself or in some external rule of law. There are five grounds for exculpation ; construction of the contract ; the doctrine of frustration ; the existence of an implied term ; the presence of an exclusion clause ; and the application of a statutory rule or provision. These will be considered later." In the present case, even if the promise were to be treated as an absolute promise, the

grounds for exculpation can be found from Section 84 of the Act which reads thus :

"84. Stationary vehicles.-- No person driving or in charge of a motor vehicle shall cause or allow the vehicle to remain stationary in any public place, unless there is in the driver's seat a person duly licensed to drive the vehicle or unless the mechanism has been stopped and a brake or brakes applied or such other measures taken as to ensure that the vehicle cannot accidentally be put in motion in the absence of the driver."

17. In view of this provision apart from the implied mandate to the licensed driver not to place an unlicensed person in charge of the vehicle, there is also a statutory obligation on the said person not to leave the vehicle unattended and not to place it in charge of an unlicensed driver. What is prohibited by law must be treated as a mandate to the employee and should be considered sufficient in the eye of law for excusing non-compliance with the conditions. It cannot, therefore, in any case be considered as a breach on the part of the insured. To construe the provision differently would be to rewrite the provision by engrafting a rider to the effect that in the event of the motor vehicle happening to be driven by an unlicensed person, regardless of the circumstances in which such a contingency occurs, the insurer will not be liable under the contract of insurance. It needs to be emphasised that it is not the contract of insurance which is being interpreted. It is the statutory provision defining the conditions of exemption which is being interpreted. These must, therefore, be interpreted in the spirit in which the same have been enacted accompanied by an anxiety to ensure that the protection is not nullified by the backward looking interpretation which serves to defeat the provision rather than to fulfil its life-aim. To do otherwise would amount to nullifying the benevolent provision by reading it with a non-benevolent eye and with a mind not tuned to the purpose and philosophy of the legislation without being informed of the true goals sought to be achieved. What the Legislature has given, the court cannot deprive of by way of an exercise in interpretation when the view which renders the provision potent is equally plausible as the one which renders the provision impotent. In fact, it appears that the former view is more plausible apart from the fact that it is more desirable. When the option is between opting for a view which will relieve the distress and misery of the victims of accidents or their dependants on the one hand and the equally plausible view which will reduce the profitability of the insurer in regard to the occupational hazards undertaken by him by way of business activity, there is hardly any choice. The court cannot but opt for the former view. Even if one were to make a strictly doctrinaire approach, the very same conclusion would emerge in obeisance to the doctrine of "reading down" the exclusion clause in the light of the "main purpose" of the provision so that the "exclusion clause" does not cross swords with the "main purpose" highlighted earlier. The effort must be to harmonize the two instead of allowing the exclusion clause to snipe successfully at the main purpose. This theory which needs no support is supported by, *Carter's Breach of Contract*, vide paragraph

251. To quote :

"Notwithstanding the general ability of contracting parties to agree to exclusion clauses which operate to define obligations there exists a rule, usually referred to as the "main purpose rule", which may limit the application of wide exclusion clauses defining a promisor's contractual obligations."

18. For example, in *Glynn v. Margetson and Co.* [1893] AC 351, Lord Halsbury L.C. stated ;

"It seems to me that in construing this document, which is a contract of carriage between the parties, one must in the first instance look at the whole instrument and not at one part of it only. Looking at the whole instrument, and seeing what one must regard ... as its main purpose, one must reject words, indeed whole provisions, if they are inconsistent with what one assumes to be the main purpose of the contract"

19. Although this rule played a role in the development of the doctrine of fundamental breach, the continued validity of the rule was acknowledged when the doctrine was rejected by the House of Lords in *Suisse Atlantique Societe d'Armement Maritime S.A. v. N.V. Rotterdamsche Kolen Centrale* [1967] 1 AC 361 and 430 (HL). Accordingly, wide exclusion clauses will be read down to the extent to which they are inconsistent with the main purpose or object of the contract".

20. The apex court ultimately held that Section 96(2)(b)(ii) of the 1939 Act extends immunity to the insurance company if the insured commits a breach of a specified condition of the insurance policy being any one of the conditions mentioned in Sub-section (2)(a)(i)(a) to (d).

21. In the instant case, there is no alteration much less any proof that the insured committed any breach of a specified condition of the insurance policy entitling the insurer to invoke the exclusion clause. The ratio of the judgment in *Samundri Roadways*" case [1985] ACJ 239 (P & H) was not approved by the apex court since the apex court contrary to it expressly observed that the immunity clause will be attracted if the insurer proved a breach of a specified condition of the policy. The first submission of learned counsel is without any substance. There is no breach of any specified condition of the policy in the present case.

22. The second submission of learned counsel was that the liability of the insurance company was to the extent of Rs. 15,000 only. This argument has also no force. The total liability of the insurance company is Rs. 1,50,000. Admittedly, one passenger received injuries which proved fatal. The insurance company is liable to the extent to which it is Shown in the certificate of insurance, exhibit R-1.

23. For the reasons aforementioned, no fault can be found with the judgment of the learned Tribunal. The appeal and the cross-objections are dismissed. However, no order as to costs.