

(1988) 01 BOM CK 0036
In the Bombay High Court
Case No : First Appeal No. 526 of 1980

Oriental Fire and General Insurance Co.	APPELLANT
Vs	
Hirabai Vithal Nikam and Others	RESPONDENT

Date of Decision : 29-01-1988

Acts Referred:

Bombay Motor Vehicles Taxation Rules, 1959 — Rule 118
Motor Vehicles Act, 1939 — Section 2(23), 2(25), 2(29), 95, 95(1)

Citation : AIR 1988 Bom 199

Hon'ble Judges : P.B. Sawant, J;G.H. Guttal, J;B.G. Kolse-Patil, J

Bench : Full Bench

Advocate : V.H. Gumaste and Mhamane, for the Appellant; S.S. Pandit, Atmaram Nadkarni and Bhimrao Naik, for the Respondent

Final Decision : Allowed

Judgement

Guttal, J.—The Division Bench consisting of Dharmadhikari and Vaze, JJ. during the hearing of this appeal came to the conclusion that there is a conflict between the Judgment in Nasibdar Suba Fakir Vs. Adhia and Company and Others, , hereinafter referred to Nasibdar's case, and the view expressed by another Division Bench in United India Insurance Co. Ltd. v. Abdul Munaf Majur Hussain Momin First Appeal No. 1012 of 1980 decided by Sawant and Tated JJ on 17th August 1984. These appeals have been referred to us for the purpose of revolving the conflict. We formulate the question arising for determination as under : --

"Where, a passenger is carried in a goods vehicle for hire or reward and the terms of the contract of insurance do not provide for such carriage, is the insurer liable for the death or bodily injury to such passenger?"

2. This appeal and, therefore, the question formulated by us arises out of these facts.

The Respondent No. 8 Balasaheb Chavan was, at about 9 a.m. on 3rd July 1978,

driving Truck No. BYX 5435 on Pandharpur Miraj Road. The deceased Vithal Nikam was waiting for a State Transport bus at village Kuchi. Audumbar Mahadev Raichure, the brother of the owner of the Truck, was also sitting with the driver in the Truck. Vithal Nikam -- the deceased boarded the truck at the request of driver Balasahab Abasuhab Chavan one of the brother of the owner. It was agreed that Vithal Nikam should pay hire charges for carrying him in the vehicle. The amount was agreed to be equal to the fare for the journey by the State Transport bus. Nikam travelled in the bus. But due to the negligence of the driver, the bus left the road and dashed against a tree causing the death of Nikam. The Motor Accidents Claims Tribunal Sangli, in Motor Accident Claim No. 3 of 1979, awarded compensation of Rs. 75,000/-. The driver and the owner filed F. A. No. 960 of 1980. This appeal is by the insurer.

3. Certain findings of fact recorded by the Division Bench consisting of Dharmadhikari and Vaze JJ need to be borne in mind. It was the owner's brother who asked the deceased to board the Truck and the deceased was a passenger for hire. The driver caused the ! death by rash and negligent driving. They rejected the case of the driver that the deceased contributed to the negligence and that the owner had asked him not to take passengers. On these findings, the first Appeal No. 960/1980 by the driver and the owner was dismissed on 21/11/1984 by the referring judgment. The appeal by the Insurance Company has been referred to us. :

| ft. We will first set out the ratio of the Judgment in United India Insurance Co. Ltd. F. A. No. 1012 of 1980, Sawant and Tated JJ. decided on 17th August 1984. In that case the Truck which was insured as a goods vehicle carried 35 passengers for hire of rupee 1/- each. Six passengers died as a result of the rash and negligent driving. The insurance policy did not cover the risk to the passengers carried for hire or reward.

Sawant and Tated JJ. after considering the terms of the contract of Insurance and in view of the decision of the Supreme Court in Pushpabai Purshottam Udeshi and Others Vs. Ranjit Ginning and Pressing Co. (P) Ltd. and Another, held that the passengers for hire or reward did not fall in the category of third party and that a specific condition in the policy excluded the use of the Truck for carriage of passengers for hire or reward. Consequently, it was held : --

Under Section 96(2)(b)(i)(c) of the Motor Vehicles Act, 1939 the appellant Insurance Company, therefore, had a valid defence to the claim. Further the said Section says that if the conditions specified in the policy is that the insured vehicle will not be used for a purpose not allowed by the permit under which the vehicle is used, where the vehicle is a transport vehicle, no sum shall be payable.

by the insurer in respect of the liability arising out of the accident. This is also the view expressed by Full Bench of Gujarat High Court in New India Assurance Co. Ltd. and Another Vs. Nathiben Chatrabhuji and Others, ".

5. But, learned counsel for the respondents drew our attention to certain

provisions of the Motor Vehicles Act in support of his submission that under the provisions of the law, the insurance covers the risk to the life of a passenger for hire or reward. "Public carrier" (Section 2(23)) has been defined as "an owner of a transport vehicle who transports or undertakes to transport goods, for another person for hire, or reward.....and includes any person..... engaged in the business of carrying the goods of persons associated with that person".

We fail to see how the use of the words "any person" means that a stranger who enters the vehicle for hire is covered by this definition.

Section 95(1)(c)(ii) of the Act was also called in aid of the argument. Section 95 lays down the requirements of policies of the insurance and the limits of liability of the insurer. After laying down the contents of an insurance policy in Sub-section (1), a proviso is engrafted which excepts certain liabilities from the policy; for example the policy shall not be required to cover liability in respect of the death of or bodily injury to person being carried in the vehicle -

(a) if such person is carried for hire or reward pursuant to a contract of employment, and (b) the vehicle is a vehicle in which passengers are carried for hire or reward.

According to learned counsel, the words passengers are carried for hire or reward"

imply that the insurance policy must cover persons carried for hire or reward. The submission ignores the effect of the most crucial words "the vehicle is a vehicle in which passengers are carried for hire or reward". The proviso is intended to take out of Sub-section (1) those vehicles which are lawfully used for carrying passengers for hire or reward. The exception applies to passenger vehicles and not to a transport vehicle or a goods vehicle. By their very nature and definition goods vehicles are not permitted to carry passengers for hire or reward except to the extent provided by Rule 118 of the Bombay Motor Vehicles Rules 1939. This distinction in the permitted use of vehicles would be clear if one bears in mind the differential meaning of the expression "public service vehicle" and "stage carriage" used in the Act. Section 2(25) and Section 2(29). The legislature, aware of this distinction, has deliberately chosen not to include in Section 95(1) the liability in respect of the death of and bodily injury to the passengers who may be lawfully carried in passenger vehicles. We do not agree that the words "except where the vehicle is a vehicle in which passengers are carried for hire or reward" occurring in the beginning of Clause (ii) of the proviso to Sub-section (1) of Section 95 apply to goods vehicles. They apply to vehicles which are permitted to carry passengers for hire or reward.

6. Learned counsel also drew our attention to Section 96(2)(b)(c) of the Act. Section 96(1) makes the insurer liable to pay the amounts due under decrees. Sub-section (2) creates exceptions to such liability and lays down the defences available to the insurer to an action for compensation. u/s 96(2)(b) the insurer may defend an action on the ground that in the case of a transport vehicle there

has been breach of a condition that the vehicle shall not be used for a purpose not allowed by the permit under which the vehicle is used. The vehicle with which this appeal is concerned is a goods vehicle, and admittedly it is not permitted to carry passengers for hire or reward. In our opinion, the reference to this provision is irrelevant and does not assist the respondents. The very provision relied upon negatives the point urged on behalf of the respondents.

7. That brings us to *Nasibdar Suba Fakir Vs. Adhia and Company and Others*, . In that case the claimant was not a stranger who boarded the Truck for hire or reward. The claimant was the hirer of the motor vehicle -- a goods vehicle. He was travelling in the Truck for the purpose of picking up his own goods -- scrap -- from Thane. The Truck was, for this purpose, being driven from Bombay to Thane. The driver was an employee of the hirer. The hirer-claimant was sitting by the side of the driver. The Truck collided with another Truck coming from Thane. In the accident, the hirer was injured and his leg had to be amputated. Dharmadhikari and Sharad Manohar JJ. were, therefore, called upon to determine the question of "the liability of (he Insurance Company for the death or bodily injury to the hirer of a goods vehicle when he is a passenger in the same vehicle". In other words, the injured passenger whose claim fell for consideration was not a stranger who travelled for "hire or reward". Paras 12 and 17 of the Judgment bring out the ratio, which may be summarised as under : --

(a) where a person hires a goods vehicle, it is legitimate and necessary for him to accompany the goods and travel in the vehicle for the purpose of supervising the transport of his goods.

(b) the consideration paid by such hirer for transport of his goods, being composite consideration, his presence in the vehicle is a part of the contract for which he has paid the consideration.

(c) such hirer is deemed to be a passenger within the meaning of Section 95(1) (ii) of the Motor Vehicles Act and therefore the insurer is liable for the tortious act of the owner of the vehicle.

8. By the very necessity of the contract of hire of the vehicle, the hirer, who is the owner of the goods to be transported, has to travel in the vehicle, to supervise the transport. The consideration paid by the hirer of the vehicle being composite included consideration for the incidental transport of the hirer -- *Nasibdar Suba Fakir Vs. Adhia and Company and Others*, . -- who accompanied the goods. This is the rationale of *Nasibdar's* case. For these reasons they held : --

"..... hence the tortious liability of the owner towards him must be covered by the insurance policy" (*Nasibdar Suba Fakir Vs. Adhia and Company and Others*,).

9. It is, thus, clear that *Nasibdar's* case arose out of facts so distinct from this case. The decision is based on the necessity of the hirer to travel with the goods.

The decision in Nasibdar's case operates in a sphere, different from the case of a stranger travelling for hire or reward. It has no application to the facts out of which this appeal arises.

10. Learned counsel for the respondents referred to the Supreme Court's decision in *Skandia Insurance Co. Ltd. v. Kokilaben Chandravadan*. AIR 1987 SC 1184. This was a case of the breach of a condition excluding driving by a named person or persons or by any person who is not fully licensed to drive, or by a person disqualified for holding licence. It does not apply to the facts of this case."''

11. 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 tortious 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. v. Abdul Munaf Majur Hussain Momin*, First Appeal No. 1012 of 1980 decided by Sawant and Tated JJ on 17th August 1984. We do not discern any conflict between the *United India Insurance Co. Ltd.* (supra) 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.

12. Accordingly, we allow this appeal and set aside the decree of the learned Member of the Motor Accidents Claims Tribunal, Sangli, in Motor Accidents Claim No. 3 of 1979 against the appellant insurance company. There will be no order as to costs.