
(1988) 01 BOM CK 0024
In the Bombay High Court

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

Date of Decision : 20-01-1988

Acts Referred:

Motor Vehicles Act, 1939 — Section 95(2)

Citation : (1988) 2 ACC 435 : (1988) ACJ 494 : (1988) 4 BomCR 625 : (1988) 90 BOMLR 103 : (1988) 64 CompCas 769

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

Bench : Full Bench

Judgement

G.H.Guttal

1. 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, , herein after referred to Nasibdar Suba Fakir Vs. Adhia and Company and Others, , and the view expressed by another Division Bench in United India Insurance Co. Ltd. Vs. Abdul Munaf Majur Hussain Momin and others, . These appeals have been referred to us for the purpose of resolving 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.

3. Respondent No.8, Balasaheb Chavan, was, at about 9 a.m. on July 3, 1978, driving truck NO. BYX 5435 on pandharpur-Miraj road. The deceased, Vithal Nikam, was waiting for a State Transport bus at village Kuchi. Audumber 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 the driver, Balasaheb Abasaheb Chavan, and 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 truck. But due to the negligence of the driver, the truck left the road and dashed against a tree causing the death of Nikam. The Motor Accidents Claims Tribunal, Sangli, in Motor Accidents 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.

4. 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 that the deceased contributed to the negligence and that the owner hand asked him not to take passengers. On these findings, First Appeal No. 960 of 1980, by the driver and the owner was dismissed on November 21, 1984, by the referring judgment. The appeal by the insurance company had been referred to us.

5. We will first set out the ratio of the judgment in United India Insurance Co. Ltd. Vs. Abdul Munaf Majur Hussain Momin and others, . In that case, the truck which was insured as a goods vehicle carried 35 passengers for a hire of rupee 1 each. Six passengers died as a result of rash and negligent driving. The insurance policy did not cover the risk to passengers carried for hire or reward.

6. 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 (P.63 of 58 Comp Cas):

"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 the Full Bench of Gujarat High Court in New India Assurance Co. Ltd. and Another Vs. Nathiben Chatrabhuji and Others, ."

7. 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.

8. Section 95(1)(b)(ii) of the Act was also called in aid of the argument. Section 95 lays down the requirements of policies of 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, persons 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.

9. 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, 1959. 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, or 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.

10. Learned counsel also drew our attention to section 95(2)(b)(i)(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 defenses 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 on the ground that 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 negates the point urged on behalf of the respondents.

11. That brings us to *Nasibdar Suba Fakir Vs. Adhia and Company and Others*, .

In that case, 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 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 the insurance company for the death of or bodily injury to the hirer of a goods vehicle when he is a passenger in the same vehicle" (Nasibdar Suba Fakir Vs. Adhia and Company and Others,). In other words, the injured passenger whose claim fell for consideration was not a stranger who travelled for "hire or reward". Paragraphs 12 and 17 of the judgment bring out the ratio, which may be summarised as under (at pages 462 and 473 of 58 Comp Cas):

(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 a 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.

12. 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 Suba Fakir Vs. Adhia and Company and Others, . For the 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,).

13. It is, thus, clear that Nasibdar Suba Fakir Vs. Adhia and Company and Others, , arose out of facts so distinct from this case. The decision is based on the necessity of the hirer to travel with goods. The decision in Nasibdar Suba Fakir Vs. Adhia and Company and Others, , 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.

14. Learned counsel for the respondents referred to the Supreme Court's decision in Skandia Insurance Co. Ltd. v. Kokilaben Chandravadan [1987] 62 Comp Cas 138 : AIR 1987 SC 1184. This was a case of 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 from- holding a licence. It does not apply to the facts of this case.

15. We, now, summarise our conclusions:

The vehicle in which the deceased, Vithal Nikam, travelled was a goods vehicle. The contract of insurance entered into which the appellant did not cover the carriage of passengers for hire or reward in the vehicle. Vithal Nikam travelled for hire by consent of the driver and the driver 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. Therefore, by virtue of section 95(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. Vs. Abdul Munaf Majur Hussain Momin and others*, . We do not discern any conflict between *United India Insurance Co. Ltd. Vs. Abdul Munaf Majur Hussain Momin and others*, and *Nasibdar Suba Fakir Vs. Adhia and Company and Others*, . They operate in different areas and under different sets of facts.

16. 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 no cover such carriage,, the insurer is not liable for the death of or bodily injury to such a passenger.

17. 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.