

(1984) 06 KAR CK 0032

In the Karnataka High Court

Case No : Misc. F.A. No's. 1586, 1587, 2114 and 2115 of 1981

Oriental Fire and General Insurance Company Ltd.

APPELLANT

Vs

B. Parvathamma and Others

RESPONDENT

Date of Decision : 21-06-1984

Acts Referred:

Motor Vehicles Act, 1939 — Section 96, 96 (2) (b)
Motor Vehicles Rules, 1963 — Rule 161

Citation : (1985) 1 ACC 111 : (1984) ACJ 680 : AIR 1986 Kar 63 : (1984) ILR (Kar) 492

Hon'ble Judges : S.R. Rajasekhara Murthy, J;G.N. Sabhahit, J

Bench : Division Bench

Advocate : B.V. Acharya and Shivaraj Patil, for the Appellant; M.R. Achar, for the Respondent

Judgement

Sabhahit, J.—These four appeals arise out of the common judgment and awards Dt/- 23-3-1981 made by the Accidents Claims Tribunal, Bellary in M. V. C. Nos. 30 of 1979 and 21 of 1980, awarding compensation to the claimants at Rs. 46,000/- and Rs. 52,000/- respectively.

2. The relevant facts leading up to these appeals are :-

On 19-4-1979 at about 11-15 p.m., a petrol tanker bearing No. MYY 6037 was proceeding from Bellary towards Shirguppa. It was driven by the 3rd respondent, when it was near Halekote, the Petrol tanker hit a tractor with trailer bearing No. MYF 6403, standing on the left side of the road and then swerved towards right and dashed against a tree by the side of the road and stopped. As a result of his accident one Sunkayya who was sitting in the cabin of the tanker was thrown out and he sustained injuries. So also Basayya Setty, who was travelling in the said petrol tanker sustained fatal injuries in the said accident and died. The dependents of Basayya Setty instituted Claim Petition No. MVC No. 30 of 1979 before the Claims Tribunal, Bellary, claiming compensation of Rs. 1,50,000/- and the legal heirs of Sunkayya instituted Claim Petition under S. I 10A before the

Claims Tribunal, Bellary in MVC No. 21/1980 claiming compensation of Rs. 2,90,000/- They claimed compensation from the respondents in each petition, being the owner, driver and insurer of the tanker in question. The claims were resisted by the respondents. They denied their liability. According to the owner and driver, the accident was not the result of rash and negligent driving of the tanker in question. They also contended that compensation claimed in each case was excessive. The insurance Company denied its liability on the ground that the petrol tanker had no permit to carry passengers and hence the policy did not cover the claim. The Tribunal raised the following issues in M. V. C. No. 30/1979.

1. Whether the petitioners prove that deceased Basaiah, aged 42 years, died due to injuries sustained in a motor vehicle accident on 19-4-1979 at 11-15 p.m. on Bellary Siruguppa Road near Halekote?
2. Whether the accident was due to rash and negligent driving of the goods vehicle No. MYY 6037 driven by R. 3?
3. Whether the petitioners are entitled for compensation? If so, what quantum and from whom?
4. Whether the insurer is not liable to indemnify the owner for the death of deceased Basaiah as set out in para 3 of the written statement
5. What order?

The following issues were raised in M. V. C. No. 21/1980.

1. Whether the petitioners prove that deceased Sunkaiah, aged 39 years, died in a motor vehicle accident on 19-4-1979 at 11.15 P.M. on Bellary Siruguppa Road, near Halekote?
2. Whether the accident was due to the rash and negligent driving of the goods vehicle No. MYY 6037 driven by R. 3?
3. Whether the petitioners are entitled for compensation? If so, what quantum and from whom?
4. Whether the insurer is not liable to indemnify the owner for the death of deceased Sunkaiah as set out in para 5 of the written statement of R-2?
5. Whether the petitioners have made out sufficient cause for condonation of delay in the petition?
6. What order?

During hearing the claimants examined PW-1 Venkatasubamma, the first claimant in M. V C. No. 21/1980, PW-2, Parvatamma the first claimant in M. V. C. No. 30/79, and PW3 Venkoba Setty who was travelling in the petrol tanker, as an eye-witness. In addition they got marked Ex.P.1 to Ex. P. 15. As against that the respondents examined R. W. 1 the owner of the tanker and got marked two documents R- 1 and R-2, the Insurance Policy and the Certificate issued by the

Artificial Limb Centre. The Tribunal appreciating the evidence on record held that the accident was due to rash and negligent driving of the petrol tanker in question and in that view the Tribunal awarded, as stated above, compensation at Rs. 46,000/- in M. V. C. 30/1979 and at Rs. 52,000/- in M. V. C. No. 21/1980. The Tribunal directed the payment of the compensation awarded to the claimants, by respondents restricting the liability of the Insurance Company to Rs. 10,000/- in each case. The Tribunal also gave directions with regard to the compensation awarded in favour of minors. Aggrieved by the said judgment and awards the owner of the tanker has instituted M. F. A. No. 2114 of 1981 and 2115/1981, whereas the Insurer has instituted M. F. A. Nos. 1586/1981 and 1587/1981.

3. The learned Advocate appearing for the owner-appellant urged before us that the Tribunal was not justified in fixing the liability on the owner, as the owner had clearly instructed the driver not to take any passengers in the tanker. He further submitted that since taking of such passengers would amount to a breach of rule, which is punishable, the owner could not be held vicariously liable for the criminal act of the servant viz., the driver. In that view he submitted that the Tribunal was not justified in awarding compensation against the owner. He also submitted that the compensation awarded in the two cases was on the higher side. He further submitted that if at all the owner was liable to pay compensation, the Insurance Company should have been made liable to indemnify the same.

4. The learned Counsel for the Insurer in the two appeals urged before us that the policy issued did not cover the risk of any passengers being carried in the tanker. There was specific prohibition in the policy excluding the use of the vehicle for hire or reward and since the vehicle was used for reward by carrying fare paying passengers, he submitted that the Insurer was not liable to indemnify the amount decreed against the owner.

5. The learned Counsel for the claimants argued supporting the judgment and awards made by the Tribunal in the two cases. He has also filed cross-objections and he submitted that the compensation amounts awarded in the two cases were on the lower side.

6. The points, therefore, that arise for our consideration in these appeals are: -

1. Whether the Tribunal was justified in holding that the owner of the vehicle was vicariously liable to pay compensation?

2. If so, whether the Insurer is liable to indemnify the owner by paying the amount of compensation awarded?

3. Whether the compensation awarded is just and proper?

Point No. 1:

7. It is no doubt true that the Supreme Court of India in the case of Pushpabai

Purshottam Udeshi and Others Vs. Ranjit Ginning and Pressing Co. (P) Ltd. and Another, , has ruled that the owner would be liable for the acts done by his servant in the course of his employment vicariously but the liability of the owner would not extend to any criminal acts done by the servant. Relying on that decision, this Court in the case of Krishna Ramayya Gouda Vs. C.P.C. Motor Co. and Others, has ruled that by giving lift to a person in a lorry, the lorry driver commits breach of R. 161 of the Karnataka Motor Vehicles Rules and is liable to be punished under S. 112 of the M. V. Act which thus becomes a criminal act and as such the owner would not be liable for any injury sustained by the passenger in the accident. The decision is based on the observation of the Supreme Court in Pushpabai's case, made in para 14 of the Judgment which reads :

"This decision has extended the scope of acting in the course of employment to include an illegal act of asking for and receiving a premium though the receiving of the premium was not authorised. We do not feel called upon to consider whether this extended meaning should be accepted by this Court. It appears Lord Goddard, Chief Justice, had gone further in *Barker v. Levinson* (1950) 66 TLR 717 and stated that "the master is responsible for a criminal act of the servant if the act is done within the general scope of the servant's employment." Lord Justice Denning would not go to this extent and felt relieved to find that in the authorised law Reports (195 1) I KB 342, the passage quoted above was struck out. We respectfully agree with the view of Lord Denning that the passage attributed to Lord Chief Justice Goddard went a bit too far."

Relying on this decision, the learned counsel for the owner of the Tanker argued that since the driver was not authorised under the rules to take any passengers and such an act of the driver becomes an offence, the owner is not liable vicariously to pay the compensation.

8. This submission was repelled by the learned Counsel for the claimants by inviting our attention to a later decision of the Supreme Court in the case of *State Bank of India (Successor to The Imperial Bank of India) Vs. Shyama Devi*, . In para 24 of the Judgment their Lordships have observed : -

"Salmon L.J., speaking in a similar strain (at page 599) emphasised that the fact that the thief's employment on board presented him with the opportunity to steal does not suffice to make the ship owners liable. The conclusion drawn was --

"For an employer, to be liable, however, it is not enough that the employment merely afforded the servant or agent an opportunity of committing the crime."

"It must be shown that the damage complained of was caused by any wrongful act of his servant or agent done within the scope or course of the servant's or agent's employment even if the wrongful act amounted to a crime. For this proposition, Salmon L.J. referred to *Lloyd v. Grace, Smith & Co.* (1912 A C 716)."

In para 25 of the Judgment their Lordships have observed thus : -

"In *United Africa Company Ltd. v. Saka Owoade* (1955 AC 130), the Privy Council

laid down that a master is liable for his servant's fraud perpetrated in the course of master's business, whether the fraud was for the master's benefit or not, if it was committed by servant in the course of his employment. There is no difference in the liability of a master for wrongs whether for fraud or any other wrong committed by a servant in the course of his employment, and it is a question of fact in each case whether it was committed in the course of the employment. "

Proceeding further their Lordships have laid down in para 26 of the Judgment thus : -

"In that case, the appellant-company, general merchants, had expressly committed to servants of the respondent, a transport contractor, at his request, goods for carriage by road, and the servants stole the goods, and the evidence established that conversion took place in the course of their employment. The respondent was held liable to the appellants for the value of the goods. The rule in *Lloyd v. Grace Smith & Co.*, (ibid) was applied."

Applying the law as stated above their Lordships observed that the first of the principles which govern the vicarious liability of an employer for the loss caused to a customer through the misdemeanour or negligence of an employee, is that the employer is not liable for the act of the servant if the cause of the loss or damages arose without the actual fault or neglect of his agents or servants in the course of their employment. Their Lordships further made it clear that the master is liable for his servant's fraud perpetrated in the course of master's business, whether the fraud was for the master's benefit or not, if it was committed by the servant in the course of his employment. There is no difference in the liability of a master for wrong whether for fraud or any other wrong committed by a servant in the course of his employment, and it is a question of fact in each case whether it was committed in the course of the employment.

9. Thus, it becomes clear that their Lordships of the Supreme Court in the above case have laid down that if the act is committed by the servant in the course of his employment, whether it is misdemeanour fraud or any other criminal act, the master is vicariously liable for payment of compensation. This decision is rendered by a Bench consisting of three judges of whom one was present in Pushpabai's case also. The judgment in *Pushpabai Purshottam Udeshi and Others Vs. Ranjit Ginning and Pressing Co. (P) Ltd. and Another*, was delivered on 25-3-1977. whereas the judgment in the *State Bank of India (Successor to The Imperial Bank of India) Vs. Shyama Devi*, was delivered on 5-5-1978 much later. The Bench in Pushpabai's case consisted of two judges, whereas the Bench in the *State Bank of India* case consisted of 3 judges. Therefore, it is obvious that the Ruling given in the later case prevails and it is obvious that even if the act committed by servant in the course of his employment amounts to a criminal act, the master would be held liable vicariously. This ruling of the Supreme Court was not brought to the notice of this court when *Krishna Ramayya Gouda Vs. C.P.C. Motor Co. and Others*, was decided and hence the ruling rendered in that case is

rendered per incuriam and it is to be confined to the facts of that case only.

10. The learned Counsel for the claimants further pointed out that a mere breach of a rule though it may be a statutory offence cannot be described as a criminal act on the part of the servant, as the essence of a criminal act is that it consists of moral turpitude. Moral turpitude is there in fraud or in embezzlement, and not in a breach of a rule under the M. V. Act, which says that the goods vehicle shall not carry more than 6 passengers. Therefore, though the breach may constitute a statutory offence, it cannot strictly be described as a criminal act. There is force in the submission so made by the learned counsel. Hence, we are persuaded to hold that the act of the Driver of the tanker in the instant case of giving lift to two passengers is an act which he has done in the course of his employment as laid down by Lord Denning in *Young v. Edward Box and Co., Ltd.* (1951) 1 TLR 789 at page 793. Hence, the owner is liable vicariously to pay compensation.

Point No. 2 :

11. The next question that arises for consideration is whether the Insurance Company is liable to pay compensation. The learned Counsel for the owner invited our attention to a Division Bench decision of this court in the case of *Channappa Chanavirappa Katti and Another Vs. Laxman Bhimappa Bajantri and Others*, . Therein the owner of the goods who was travelling in the goods vehicle died due to the rash and negligent driving of the vehicle by the driver in the course of his employment under the owner of the vehicle. Their Lordships held that the driver was acting within his authority at the time of the accident in carrying the owner of the goods along with the goods in the vehicle as permitted under R. 101 of the Karnataka M.V. Rules and in the circumstances, the owner of the vehicle was vicariously liable for compensation. Their Lordships interpreting S. 95(t)(c) (i) and second proviso to S. 95(l)(b) held that the Insurance Company was liable for compensation that was payable by the owner in the case of the fare paying passenger and in that case the owner of the goods. Their Lordships observed :

"From the exception contained in the second part of the second proviso to S. 95(l)(b) it follows that passengers mentioned in that part are excluded from the coverage of compulsory insurance contemplated in Chap. VIII of the Act, by enacting a further exception in the first part of the proviso to the exception contained in the second part thereof, the Legislature imposes a duty on the insured to take out a policy of compulsory insurance in respect of the vehicle so as to provide insurance against any liability to passengers carried for hire or reward or by reason of or in pursuance of a contract of employment, incurred by the person using the vehicle. Therefore, passengers carried for hire or reward or by reason of or in pursuance of a contract of employment falling under the class of passengers within the meaning of the exception contained in the first part of the proviso are restored to the status of "any person" found in S. 95(t)

(b)(i). Thus, if a passenger carried for hire or reward or by reason of or in pursuance of a contract of employment in a vehicle which is compulsorily insured, dies or suffers bodily injury by the use of the insured vehicle making the insured liable in damages, it must necessarily be construed as a liability which requires to be reimbursed by the insurer by reason of the policy of compulsory insurance taken in respect of the insured vehicle by the insured."

This decision is followed by this court in the case of T.M. Renukappa Vs. Fahmida and Others, , equivalent to 1980 Acc CJ 86. The ruling is further reiterated in Nagappaiah and etc. Vs. Bhaskara and Others, and in United India Insurance Co., Ltd. v. Gangamma AIR 1982 Kar 261. The learned Counsel further pointed out that the said ruling in Channappa Chanavirappa Katti and Another Vs. Laxman Bhimappa Bajantri and Others, is relied upon by a Division Bench of the Bombay High Court in Nasibdar Suba Fakir Vs. Adhia and Company and Others, , as well as by the High Court of Orissa in Oriental Fire and General Insurance Company Ltd. and etc. Vs. Smt. Narayanibai and Others, . Relying on these decisions, the learned Counsel submitted that since in the instant case the passengers carried in the tanker were fare paying passengers the Insurance Company has to indemnify the owner by paying the compensation.

12. The learned Counsel for the Insurer, however, pointed out that in all those cases it was a question of the hirer of the truck travelling in the truck along with his goods and the owner is permitted under R. 161 of the Karnataka Motor Vehicles Rules to travel in the goods vehicle. R. 161 reads : --

"Carriage of Persons in Goods Vehicle.

(1) Subject to the provisions of this rule no person shall be carried in a goods vehicle.

Provided that the owner or hirer or bona fide employee of the owner or hirer of the vehicle may be carried in a goods vehicle, the total number of persons so carried in a light transport goods vehicle not being more than 3 and in other goods vehicle not being more than 7 including the Driver."

Thus, he pointed out that the fare paying passenger referred to in S. 95 of the M. V. Act, whose risk is covered in the compulsory policy shall be confined to the passenger contemplated under R. 161 and that the goods vehicle cannot be converted into a public service vehicle, by allowing risk to any or all fare paying passengers that may be carried in a goods vehicle. He invited our attention to the definition of a public service vehicle in S. 2(25) of the M. V. Act, which reads :-

" "Public Service Vehicle" means any motor vehicle used or adapted to be used for the carriage of passengers for hire or reward, and includes a motor cab, contract carriage and stage carriage;"

Goods vehicle is defined under S. 2(8) of the M. V. Act, which reads: -

" "Goods vehicle" means any motor vehicle constructed or adapted for use for the carriage of goods, or any motor vehicle not so constructed or adapted when used for the carriage of goods solely or in addition to passengers;"

He submitted that the above "in addition to passengers" would refer necessarily to passengers contemplated under R. 161 of the Karnataka M. V. Rules and not to passengers who go from place to place, and who have nothing to do with carriage of goods. Having submitted so he invited our attention to the prohibition contained in the policy which inter alia reads thus :-

"The policy does not cover

1).....

2).....

3) Use for the conveyance of passengers for hire or reward."

The vehicle is insured as a goods vehicle permitted to carry 10 tonnes of goods. It is no doubt true that as defined in S. 2(8) of the M. V. Act, goods vehicles are also permitted to carry certain persons under R. 161 of the Karnataka M. V. Rules. That way the compulsory policy has to cover even those persons contemplated under R. 161 of the Karnataka M. V. Rules, which include fare paying passengers like the owner of the goods that are carried in the vehicle. But that would not mean that the risk to any passenger carried in the goods vehicle against the permit and rules is also covered by the insurer. If that is so, it would do away with the distinction between the permits of a goods vehicle and a public service vehicle. In fact S. 96 of the M. V. Act speaks of the non-liability of the insurer for breach of specific conditions in the policy. The conditions mentioned in S. 96(2)(b) inter alia are as under

"(i) a condition excluding the use of the vehicle : -

(a) for hire or rewards, where the vehicle is on the date of the contract of insurance a vehicle not covered by a permit to ply for hire or reward, or".

Hence the prohibition contained in the policy is one of the prohibitions contained in the Act itself and hence it is a valid condition. Further condition (c) of that sub-section reads : -

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

In the instant case the vehicle is permitted to run as a goods vehicle and not as a public service vehicle. Therefore, conditions enable the Insurance Company not to cover the risk of fare paying passengers in general in the vehicle, apart from the passengers contemplated under R. 161 of the Karnataka Motor Vehicles Rules. We are constrained to hold that there is force in the submission so made and we accept it, as otherwise as stated above, the very distinction between a goods vehicle and a public service vehicle would be obliterated, though the M. V.

Act speaks of the different types of vehicles and permits and enables the insurer to introduce conditions in the policy in that behalf. The rulings quoted above would also stress the same point of view as in all those cases the person involved was the hirer of the goods travelling in the truck with his goods. That being so, we hold that the Insurance Company is not liable to cover the compensation with regard to the death of fare paying passengers in the truck, they being merely passengers who want to go from one place to another and have nothing to do with the business of "transport of goods". Hence we hold that on the facts of the case the Insurance Company is not liable to pay the compensation, as the deceased were mere passengers going from place to place, having nothing to do with the goods carried in the Truck.

13. The Tribunal has made the Insurance Company liable to pay Rs. 10,000/- in each case on the strength of the endorsement 14 (a) issued with the Policy. That endorsement clearly states :-

"Legal liability to Non-Fare Paying Passengers other than Statutory Liability except the Fatal Accidents Act, 1855 : -

In consideration of the payment of an additional premium of Rs. 37.50 and notwithstanding anything to the contrary contained in Section 111(b) and (c) it is hereby understood and agreed that the company will indemnify the Insured against his legal liability other than liability under Statute (except the Fatal Accidents Act, 1855) in respect of death of or bodily injury to : -

1) Any employee of the within named insured who is not a Workman within the meaning of the Workmen's Compensation Act, 1923 and subsequent amendments to that Act prior to the date of this endorsement and not being carried for hire or reward.

2) Any other person not being carried for hire or reward."

Thus, it becomes clear that the endorsement covers only an employee and any other person who is a non-fare paying passenger. This would obviously mean the persons contemplated under R. 161 of the Karnataka Motor Vehicles Rules or R. 118 of the Bombay Motor Vehicles Rules are only covered. Therefore, it is obvious that the Tribunal was not justified in fixing the liability to the extent of Rs. 10,000/- on the Insurance Company for the death of the fare paying passengers in the instant case. That has to be set aside.

Point No. 3

14. That takes us to the question whether the quantum of compensation awarded in each case is on the higher side. We were taken through the reasoning of the learned Member of the Tribunal in each case. In the first case MVC No. 30/1979 the deceased Basavaiah Shetty was about 42 years. He maintained a rice mill and he was about to start another rice mill. On an average he was earning Rs. 25,000/annually. According to the widow he was spending Rs. 20,000/- for the maintenance of the family. He was an Income Tax assessee.

Assessment order is at Ex P. 6. The family also owned lands and the deceased was looking after its management. The family owns houses as could be seen from Exs. P. 7 to P. 11. After the death of Basavaiah it is in evidence that his eldest son is managing the rice Mill and family lands. Thus, it is clear that though Basavaiah is no more the family rice mill is being run by the eldest son and the family lands are also managed by him. In these circumstances, the Tribunal has rightly held that the entire benefit from the rice mill is not lost, nor the entire income from the lands. All that is lost is the service of Basavaiah as an experienced person to run the rice Mill and an experienced cultivator. In that view the Tribunal has quantified the loss of dependency at Rs. 300/- per month and the total loss of dependency is taken at Rs. 36,000/-. To this the Tribunal has added Rs. 5000/- towards loss of the estate of the deceased and Rs.3,000/- towards loss of consortium and Rs. 2,000/- towards other expenses. In all it has fixed the total compensation at Rs. 46,000/- by adopting the multiplier method. Thus, it cannot be said to be on the higher side by any stretch of inference. We have no reasons to interfere and we affirm the same.

Adverting to the next case viz., MVC 21/1980 the deceased was Sunkaiah. He was about 39 years. He was getting income of Rs. 800/- according to the claimants, from the partnership business. He was a partner in the Vijaya Trading Company, dealing in rice. He was also getting, according to the claimants, income from hiring the tractor and was also cultivating lands. The Tribunal has taken into consideration his services and has taken the loss of dependency at Rs. 350/- per month and quantifying the same by the Multiplier method it has arrived at Rs. 42,000/- as loss of dependency. To that the Tribunal has added Rs. 5,000/- towards loss to the estate of the deceased, Rs. 3,000/- towards loss of consortium and Rs. 2,000/- incidental and other expenses. Together the Tribunal has held that Rs. 52,000/- is the total compensation. It cannot be said that the calculation so arrived at by the Tribunal is on the higher side. We are of the considered view that the compensation awarded is just and proper. Cross-objections are liable to be dismissed.

15. In the result for reasons discussed above, M. F. As. 1586 and 1587 of 1981 are partly allowed, as indicated above. The liability fixed on the Insurance Company in each case is hereby set aside. No costs of these appeals. The compensation awarded along with interest and cost shall be paid by the owner and driver of the tanker in question, jointly and severally.

16. M.F.As Nos. 2114 and 2115 of 1981 are dismissed.

17. Cross-objections are also dismissed. No costs.

18. Order accordingly.