
(1995) 01 AP CK 0010

In the Andhra Pradesh High Court

Case No : Appeal Against Order No. 788 of 1987

Oriental Fire and General Insurance Company Ltd.

APPELLANT

Vs

Bondili Sitharam Singh and others

RESPONDENT

Date of Decision : 10-01-1995

Acts Referred:

Andhra Pradesh Motor Vehicles Rules, 1964 — Rule 277, 277(3), 277(5)

Andhra Pradesh Motor Vehicles Rules, 1989 — Rule 277(3)

Evidence Act, 1872 — Section 114

Motor Vehicles Act, 1939 — Section 110B, 2(13), 2(23), 92A

Citation : (1995) 1 ACC 540 : (1996) ACJ 242 : AIR 1995 AP 268 : (1995) 1 ALT 696 : (1995) 1 APLJ 232

Hon'ble Judges : S. Paravatha Rao, J

Bench : Single Bench

Advocate : K. Manga Chary, for the Appellant; G. Dharma Rao, for the Respondent

Judgement

1. In this appeal against the order dated 17-3-1987 of the 1st Additional District Judge-cum-1st Additional Motor Accidents Claims Tribunal, Krishna at Machilipatnam in M.V.O.P. No. 100 of 1985, the Insurance Company contends that it is wrongly made liable for payment of the compensation for the death of one Bondili Lalith Kumar Singh in a motor accident involving lorry bearing registration No. ABK 339 on 8-9-1984 near Gudlavalleru in Krishna District.

2. Respondents 1 to 4 herein preferred the said O.P. claiming in all a sum of Rs. 2 lakhs towards compensation for the death of Lalith Kumar Singh. Lalith Kumar Singh was the son of respondents 1 and 2 herein and the brother of respondents 3 and 4 herein. The 5th respondent was the owner of the lorry. The Tribunal held that the accident occurred because of the rash and negligent driving of the lorry by its driver, the 1st respondent in the O.P. He is not impleaded in the present appeal. The Tribunal awarded Rs. 50,000/- in all. The Tribunal held that the said amount was payable by the 5th respondent and the appellant herein (respondents 2 and 3 in the O.P. respectively). The Tribunal found that the

deceased paid Rs. 10/- for himself and for the "goods" that he was carrying and that he travelled in the lorry ABK 339 which met with the accident. The 5th respondent did not prefer any appeal and therefore the order dated 17-3-1987 had become final as against her.

3. How the deceased got into the lorry was described by P.W 4, another person who got into the lorry along with the deceased-dad who escaped without any injuries. P.W. 4 stated that they both stopped the lorry at Gudivada; the deceased was having two gunny bags containing something, an oil tin and a brief case; the lorry driver demanded. Rs.2/- from him and Rs. 10/- from the deceased as he was also having luggage; they both paid the said amount to the lorry driver; the lorry was loaded with red metal; himself and the cleaner got into the body of the lorry containing red metal; the luggage of the deceased was placed on the red metal; the deceased got into the cabin and kept his suit case with him; all this happened around 2-00 a.m. on 8-9-1984. When the lorry reached Gudlavalleru, it dashed against a culvert which was on the left side and then dashed into an electric pole and fell into the drain on the left side of the road. As P. W. 4 fell over the water hyacinth, he was saved. The deceased and the cleaner fell underneath the lorry and died. This happened about 3 a.m. P.W. 4 did not receive "any injury. He went to Gudlavalleru police station, which was nearby, and reported the accident to the police.

4. After discussing the evidence on record, the Tribunal concluded that the deceased was not a gratuitous passenger and that he was carried in the lorry for hire and since it was covered by an insurance policy, the appellant herein and the owner i.e., the 5th respondent herein, were liable to pay the compensation.

5. The learned counsel for the appellant does not seriously question the finding that the deceased was carrying some luggage --rice, oil tin, etc., along with him and that he was accompanying the same. He questions only the finding of the Tribunal on the question of the liability of the insurer to pay the compensation on the facts of the present case. He contends that neither the Act Policy nor the policy in the present case cover a passenger for hire or reward like the deceased. The learned counsel relies on a judgment of the Division Bench of this Court in Oriental Fire and General Insurance Co. Ltd. Vs. M. Bhanumathi and others, wherein the Division Bench, held as follows (at p. 375 of AIR):--

"If passengers travelling in a goods vehicle without payment of any fare taking a free lift are not covered by the compulsory insurance or the Act policy as we may call it, there is no reason why persons who travel by paying fare should be covered by the Act policy. Surely the framers of the Act would not have intended that the liability in respect of persons, who are carried in breach of the conditions of the permit should be borne by the insurance company. If gratuitous passengers are not covered by clause (ii) of the proviso to Section 95(1)(b) a fortiori passengers who are carried on payment of hire or reward are not covered by the Act policy. In fact, u/s 96(2) it is open to the insurance company to disclaim any liability on the ground that there is a condition in the policy that it

will not cover the risk of persons travelling contrary to the conditions of the permit.....

It is true that no condition can be imposed contrary to the statute. But clause (ii) of the proviso to Section 95(1)(b) does not contemplate any such liability and hence a condition to that effect cannot be said to be void."

In so holding, the Division Bench disagreed with the views of M. Jagannadha Rao, J., (as he then was) in *Oriental Fire & General Insurance Co. Ltd. v. Matta Chandra Rao* 1987 ACJ 174 that passengers carried in a goods vehicle who died or were injured due to the accident were covered by the Act Policy and that the insurance company would be liable and that a condition in the policy that the insurance company would not cover the liability of persons carried in the vehicle for hire or reward contrary to the conditions of the permit would not be valid. However, I have to observe, with respect, that the view of M. Jagannadha Rao, J., were obiter because the two policemen who were given a lift by the goods vehicle in that case were found to be gratuitous passengers and the learned Judge held that the insurance company was not . liable. That question was in fact concluded by the decision of a Division Bench of this Court in *The Premier Insurance Co. Ltd., Vijayawada Vs. Vaddeswarapu Siromanamma and Others*, wherein it was held tha't gratuitous passengers would not be covered by Act Policy. As observed by the Division Bench in *Oriental Fire and General Insurance Co. Ltd. Vs. M. Bhanumathi and others*, , the question whether passengers who were carried for hire or reward contrary to the conditions of the permit and contrary to the policy were covered by the Act Policy did not directly arise in *Siromanamma's* case. The Division Bench in *Bhanumathi's* case agreed with the decision of B. P. Jeevan Reddy, J., (as he then was) in *New India Assurance Co. Ltd. v. Shaik Jaffer* 1982 ACT 344 : AIR 1982 A P 309 In the case also passengers were carried in a lorry on payment of charges. Jeevan Reddy, J., held that as they were travelling contrary to the specific conditions of the policy and also the permit, the Insurance Company would not be liable to pay compensation. The Division Bench also held finally as follows *Oriental Fire and General Insurance Co. Ltd. Vs. M. Bhanumathi and others*, :-

"The deceased were carried in the vehicle on payment of charges and hence they were carried for hire or reward. The vehicle was not covered by a permit to carry passengers for hire or reward. The Rules prohibit carriage of persons for hire or reward in a lorry. The vehicles were, therefore, used for a purpose not allowed by the permit under which they were used. Consequently the insurer is not liable for the tortious act of the owner of the vehicle by virtue of Section 96(2)(b)(i)(c) of the Motor Vehicles Act. We are in agreement with the view taken by the Full Bench of the Bombay High Court in *Oriental Fire and General Insurance Co. Vs. Hirabai Vithal Nikam and Others*, and the decision of the learned single Judge in *New India Assurance Company Ltd. Vs. Shaik Jaffar and Others*, .

We are, therefore, of the view that where passengers are carried for hire or reward in a lorry which is a goods vehicle, the insurer is not liable for death of or

bodily injury to such a passenger. Accordingly, we allow the Letters Patent Appeals and set aside the impugned orders as against the insurance company."

I may note here that a Full Bench of the Orissa High Court in *New India Assurance Company Ltd. Vs. Kanchan Bewa and Others*, held, agreeing with the view of a Full Bench of Karnataka High Court in *National Insurance Company Ltd.*, and disagreeing with the view of a Full Bench of Rajasthan High Court in *Smt. Santra Bai and Vs. Prahlad and Others*, etc. etc., that "proviso (ii) to Section 95(l)(b) did not apply to the passengers carried for hire or reward in a goods vehicle and it is restricted to such passengers "carried in a public service vehicle".

6. The learned counsel for respondents 1, 3 and 4 contends that the said decision itself makes it clear that under sub-rule (3) of Rule 277 of the Andhra Pradesh Motor Vehicles Rules, 1964 (hereinafter referred to as "the Rules") "person connected to the conveyance of the goods" can travel in a goods vehicle. He also refers to sub-rule (5), of the said Rule which provides as follows:--

"Nothing in this rule shall be deemed to authorise the carriage of any person for hire or reward on any goods vehicle, unless there is in force in respect of the vehicle a permit authorising the use of the vehicle for such purpose, and save in accordance with the provisions of such permit."

He submits that in the present case, the permit was not filed by the owner. The husband of the owner was examined as R.W. 1. The owner herself was not examined. Though in the examination-in-chief R.W. 1 stated that to his knowledge nobody died in the accident, in the cross-examination he admitted that he noticed the dead bodies of the cleaner and another man and that both of them died in the accident. He also stated in the cross-examination that he did not know personally where the deceased boarded the lorry, how he boarded and with whose permission he boarded and how the accident took place. In his examination-in-chief he stated that there was no permit or policy, to carry passengers in the lorry. In his cross-examination he further stated:--

"I have a lorry permit and I can file the" same if time is given. I will file it along with the policy copy".

But the permit was not filed. On this evidence the Tribunal observed as follows:--

"When the petitioner's counsel cross-examined R.W.1, he has stated that he has got a lorry permit and he can file the same if time is given. He stated so on 23-9-1986 when he was " examined as a witness before this Tribunal. The Insurance Company also, when they issued Insurance Policy (Ex. B1) to the second respondent must have necessarily verified the permit to the lorry and other things. Therefore, non-production of the permit by the second respondent and non-production of the permit particulars by the third respondent clearly show that if they produce the particulars, it will go against their case. Hence, an adverse inference has to be drawn for non-production of the permit."

I am not inclined to agree with this finding of the Tribunal. Such an inference can be drawn only if the owner of the vehicle was required to produce the permit. The owner was represented by counsel. He could have been asked in writing to produce the permit. The record does not show, that he was so asked. Therefore no adverse inference can be drawn. No question was put to R.W. 1 in his cross-examination to elicit Whether the permit authorised the use of the vehicle in question for the carriage of persons for hire or reward. The question is not whether the goods-vehicle was having a permit; the question is whether the permit-authorised the carriage of persons for hire or reward. It is not normal for a motor vehicle adapted for use for the carriage of goods to be authorised to carry passengers for hire or reward. Therefore, on the facts and circumstances of the present case, it cannot be inferred or assumed that the lorry in question was authorised to carry passengers for hire or reward.

7. But the learned counsel for the appellant contends that the lorry was already engaged to carry red granite and that the deceased had nothing to do with the goods that were being carried by the lorry. Therefore the deceased must be treated as a passenger travelling in the lorry for hire. The mere fact that he was having some luggage or goods with him would not make any difference. The learned counsel contends that the policy covering the lorry did not provide for passengers. He drew my attention to the policy (Ex. B-I) and particularly to the provision under the heading "limitations as to use" which is as follows :--

"Use only under a Public Carrier's permit within the meaning of the Motor Vehicles Act, 1939.

The Policy does not cover:

- (1) Use for organised 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.
- (3) Use for carrying passengers in the vehicle except employees (other than the driver) not exceeding six in number coming under the purview of the W.C. Act, 1923."

"Public Carrier" is defined in sub-section (23) of Section 2 of the Act as follows :--

"(23). "public carrier" means an owner of a transport vehicle who transports or undertakes to transport goods, or any class of goods, for another person at any time and in any public place for hire or reward, whether in pursuance of the terms of a contract or agreement or otherwise, and includes any person, body, association or company engaged in the business of carrying the goods of persons associated with that person, body, association or company for the purpose of having their goods transported."

From this also it follows that the permit of the lorry in question did not authorise the carriage of any passengers for hire or reward.

8. The premium paid under Ex. BI Policy included Rs. 36/- "for L.L. to authorised non-fare paying passengers as per END IMT. 14(b). IMT 14(b) is as follows:--

"Legal liability to Authorised Non-fare paying Passengers who are not employees of the Insured;--

In consideration of the payment of an additional premium as stated in the Schedule and notwithstanding anything to the contrary contained in Section II-1(c) it is hereby understood and agreed that the Company will indemnify the insured against his legal liability other than liability under statute (except Fatal Accidents Act, 1855) in respect of death of or bodily injury to any person not being an employee of the insured nor carried for hire or reward "provided the person is":

(a) The Owner or Representative of the Owner of the goods

(b) The Charterer or Representative of the Charterer of the Truck

(c) Any person directly connected with the journey in one form or another whilst being carried in or upon or entering or mounting or alighting from the Motor Vehicle but such indemnity is limited to the sum as mentioned in the schedule in respect of any one such person and subject to the aforesaid limit in respect of any one person to the sum as mentioned in the schedule in respect of any number of claims in connection with any one such Vehicle arising out of one cause.

Subject otherwise to the terms exceptions, conditions and limitations of this policy."

In this connection, it has also to be noticed that Rule 277 of the Rules deals with carriage of persons in goods vehicles. Sub-rule (3) of Rule 2-77 which was introduced under G.O.Ms. No. 357 (Tr-A) dated 8-7-1983 provides that "no person other than a person connected to the conveyance of goods shall travel in a goods vehicle". The expression "goods" is defined under sub-section (13) of Section 2 of the Motor Vehicles Act, 1939 (hereinafter referred to as "the Act") as follows:--

"'goods' include live-stock, and anything "other than equipment ordinarily used with the vehicle" carried by a vehicle except living persons, but does not include luggage or personal effects carried in a motor car or in a trailer attached to a motor car or the personal luggage of passengers travelling in the vehicle."

"Luggage" means "baggage belonging to a traveller or passenger" and "baggage" means "the collection of property in packages that a traveller takes with him on a journey; luggage". (Shorter Oxford English Dictionary). I am of the view that the articles that were being carried by the deceased i.e., rice, oil etc., would be personal baggage or luggage and therefore, they do not fall within the meaning of the expression "goods" as defined under the Act. The deceased therefore cannot be said to be "connected to the conveyance of goods". The

"goods" that was being conveyed by the lorry was red metal and the deceased had nothing to do with it. The deceased is therefore not covered by IMT 14(b) of Ex. BI policy. It cannot be said also that he was being carried without "hire or reward". The clear finding of the Tribunal is that deceased was being carried for hire or reward. On this ground also it has to be held that the deceased was not covered by Ex. BI policy.

9. In the circumstances, therefore, it has to be held that the deceased was being carried by the lorry ABK 339 at the time of the accident in violation of sub-rules (3) and (5) of Rule 277 of the Rules. He was also not covered by Ex. BI policy.

10. The learned counsel for the 1st respondent seeks to rely on the judgment of a learned single Judge of this Court in *New India Assurance Co. Ltd. Vs. Abdul Sammad Chellappa and Others*, . But in that case it was found that the injured-claimant was travelling in the lorry along with the utensils after paying Rs. 200/- as hire for carrying them and also their utensils, at the time of the accident. It cannot be said that the utensils that were being carried by the lorry on hire were "personal luggage" of the claimant in that case. It was further observed in that case that the Insurance Company "did not choose to file the policy to show that transporting the owner of the goods in the lorry was prohibited by the policy". In that connection, the learned single Judge observed as follows:--

"Rule 277 (3) of the Rules which was introduced in the year 1983 provides that no person other than a person connected with the conveyance of goods shall travel in a goods vehicle. The above sub-clause (3) carves out an exception for Rule 277(5) of the Rules which specifies that no person shall be carried for hire or reward in a goods vehicle unless the vehicle is covered by a permit authorising the use of the vehicle for such purpose and in accordance with the provisions of such permit. Thus, the prohibition against a passenger being carried for hire or reward in a goods vehicle is subject to the exception of passengers connected with the conveyance of goods. It, therefore, follows that the Rules applicable to our State provide for the owner of the goods being carried in the goods vehicle for hire. As I observed already, the policy has not been filed by the insurance company to show that the policy provides for a different type of stipulation."

In the present case, however, Ex. BI Insurance Policy clearly stipulates that fare paying passengers would not be covered. Having found that the deceased was travelling for hire or reward along with his luggage, the Tribunal therefore erred in holding that the deceased was covered by Ex. BI Policy.

11. For the reasons stated above, this appeal has to be allowed as against respondents 1, 3 and 4 and it is accordingly allowed without costs. It is dismissed as against respondent No. 2 for the following reasons :--

On 22-12-1993 the matter was posted for taking steps for substituted service in respect of the 2nd respondent and this Court directed as follows:--

"Time for compliance one month from today, finally. In default the appeal stands

dismissed as against R2. No further extension of time will be granted."

Thereafter, affidavit for substituted service of notice of appeal on the 2nd respondent was filed on 20-1-1994 and on 1-2-1994 substituted service was ordered "on payment of necessary batta". As necessary batta was not paid, the matter was posted for orders before the Deputy Registrar on 19-7-1994, 21-8-1994 and 27-9-1994. As there was no representation, the matter was posted before me for orders. I refused to give further time and informed the learned counsel for the appellant that the matter would have to be argued finally making it clear that it would be dismissed as "against respondent No. 2. Incidentally that covers the no fault liability u/s 92A. See K. Ramulu v. Shaik Khaja, 1991 ACC CJ 359.

12. Order accordingly.