

(2009) 03 MP CK 0011

In the Madhya Pradesh High Court

Case No : Miscellaneous A. No. 757 of 2008

Pradeep Jain

APPELLANT

Vs

Mangilal Bhil and Others

RESPONDENT

Date of Decision : 19-03-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 27
Motor Vehicles Act, 1939 — Section 149(1), 149(2), 66, 66(1), 66(3)
Motor Vehicles Act, 1988 — Section 66(1), 66(3), 96(2)
Penal Code, 1860 (IPC) — Section 279, 304, 337

Citation : (2009) 2 MPJR 163

Hon'ble Judges : N.K. Mody, J

Bench : Single Bench

Judgement

N.K. Mody, J.

This order shall also govern the disposal of MA Nos. 758/2008, 759/2008, 761/2008, 762/2008, 763/2008, 764/2008, 778/2008, 779/ 2008, 780/2008, 782/2008, 807/2008, 810/2008, 811/2008, 812/2008, 820/2008, 821/2008, 822/2008, 833/2008, 834/2008, 835/2008, 839/2008, 848/2008, 2234/ 2008, 2236/2008, 2237/2008, 2238/2008 and Civil Revision Nos. 56/2008, 59/ 2008, 60/2008, 61/2008, 62/2008, 63/2008, 64/2008, 65/2008, 66/2008, 67/2008, 68/2008, 69/2008, 70/2008, 71/2008, 72/2008 and 194/2008 as all the appeals and revisions are arising out of one accident and one award dated 27.11.2007 passed by Additional MACT, Jhabua and in all the cases parties are one and the same except the claimants.

Short facts in all the cases filed by respondent No. 1 are that on 4.6.2006 claimants who are injured and deceased whose legal representatives filed a claim petition were travelling in a bus bearing registration No. MP-45/F/0129 which was owned by appellant, driven by respondent No. 2 and insured with respondent No. 3. It was alleged that the offending bus was being driven by respondent No. 2 which was under the employment of appellant. Further case of

the claimants was that the claimants were travelling in the offending bus which was going from Rajgarh to their village. It was alleged that because of rash and negligent driving of respondent No. 2, at about 3.30 PM the offending bus was turtled down at Datyaghati with the result the offending bus fell down in a ditch and several persons were died while number of persons were injured. It was alleged that all the injured persons were brought to District Hospital, Jhabua where Kuwarsingh, Alu, Richia, Mansingh, Situ alias Chitu and Jagav were declared dead and criminal case was registered against the respondent No. 2 at crime No. 58/2006 under Sections 279, 337 and 304-A IPC. It was alleged that since the accident took place because of rash and negligent driving of respondent No. 2, therefore, claim petition filed by respondent No. 1 be allowed and compensation be awarded holding the respondents No. 2 and 3 and appellant liable for payment of compensation.

The claim petitions were contested by appellant alongwith respondent No. 2 by filing written statement wherein it was not disputed that the offending bus was owned by appellant and driven by respondent No. 2. It was denied that accident occurred because of rash and negligent driving. It was alleged that the offending bus was insured with respondent No. 3, therefore, if any compensation which is found payable, then it is respondent No. 3 who is liable for payment. Respondent No. 3 also filed a separate written statement wherein it was alleged that appellant has not submitted any claim form. It was alleged that at the relevant time the offending bus was carrying 60-70 passengers, while sitting capacity of the offending bus was 52 passengers only. It was alleged that carrying 60-70 passengers was in violation of terms and conditions of the policy. It was alleged that the offending bus was being plied at Datyaghati road without any permit which was also again in violation of terms and conditions of policy and permit, therefore, respondent No. 3/Insurance Company is not liable for payment of compensation. It was prayed that respondent No. 3 be exonerated and the claim petition be dismissed against the respondent No. 3. On the basis of aforesaid pleadings of the parties, learned tribunal framed the issues and recorded the evidence adduced by the parties and allowed the claim petitions filed by respondent No. 1 and other claimants and awarded compensation holding that the offending bus was being plied on Datyaghati road without any permit and also on the ground that 77 persons were travelling in the offending bus which was in violation of terms and conditions of the policy. It was held that the offending bus was insured with the respondent No. 3, therefore, respondent No. 3 shall pay the compensation to the claimants and shall have a right to recover the same from appellant. Being aggrieved by this direction whereby right of recovery was given to respondent No. 3, the present appeal has been filed. Alongwith appeal an application was filed under Order XLI Rule 27 of CPC duly supported with an affidavit alongwith certain documents.

Learned counsel for appellant submits that learned tribunal committed error in giving right of recovery to respondent No. 3. It is submitted that findigns recorded on issue No. 3 is misconceived and perverse. It is submitted that

Section 66 (1) of the Motor Vehicles Act, 1988 (which shall be referred hereinafter as "Act") deals with the necessity for permit according to which no owner of a motor vehicle shall use or permit to use of the vehicle as a transport vehicle in any public place whether or not such vehicle is actually carrying any passengers or goods save in accordance with the conditions of a permit granted by prescribed authority authorizing him the use of the vehicle in that place and as per proviso to sub-clause (m) subsection (3) of Section 66 of the Act "any transport vehicle which, owing to flood, earthquake or any other natural calamity, obstruction on road, or unforeseen circumstances, is required to be diverted through any other route, whether within or outside the State, with a view to enabling it to reach its destination the condition of sub section (1) shall not apply. It is submitted that alongwith an application appellant has filed number of documents to show that in the route for which permit was given to the appellant of the passenger bus bearing registration No. MP-45/F/0129, there was an obstruction because of sudden break-down, therefore, it cannot be said that the offending bus was without permit. Learned counsel for the appellant submits that learned tribunal committed error in giving right of recovery to respondent No. 3, while this defence was not available to the respondent No. 3. Learned counsel submits that the limited defence which can be available to the respondent No. 3/ insurance company to avoid its liability is u/s 149 (2) of the Act. For this contention reliance is placed on a decision in the matter of National Insurance Co. Ltd., Chandigarh Vs. Nicolletta Rohtagi and Others, wherein Hon''ble Apex Court has held that an insurer cannot avoid its liability on any other ground except it is mentioned in sub-section (2) of section 149 of the Act. Further reliance is placed on a decision in the matter of British India General Insurance Co. Ltd. vs. Captain Itbar Singh 1958 65 ACJ 1 wherein the Hon''ble Apex Court while dealing with a case of Motor Vehicles Act, 1939 held that the defences open to an insurer which are only those enumerated in Section 96 (2). Learned counsel further submits that Section 96 (2) of the Motor Vehicles Act, 1939 is equivalent to Section 149 (2) of the Act. Further reliance is placed on a decision in the matter of United India Insurance Company Limited, Bangalore Vs. Chandamma and Others, wherein a Divisional Bench of Karnataka High Court while considering the defences available to the insurance company held that insurance company is liable to indemnify the insurance owner of a "contract carriage" against any liability incurred by him on account of death or bodily injured to third party caused by use of the vehicle if the vehicle is used by him as a "stage carriage" in a public place in breach of the condition of its permit.

Learned counsel for appellant submits that the offending vehicle was carrying passengers on hire and reward and was also having the permit. It is submitted that even if the vehicle was not being plied at the relevant time on the route specified in the permit but it was within the territorial jurisdiction of the same route, therefore, insurance company is not entitled to avoid its liability. For this contention reliance is placed on a decision in the matter of New India Assurance Co. Ltd. Vs. Ram Kali and Others, wherein Divisional Bench of Punjab and

Haryana High Court has held that vehicle was having necessary permit to ply within territorial area and the contention of insurance company was that the vehicle did not hold the requisite permit to ply on road, it was held that-the contention of insurance company is not acceptable and insurer is liable. Reliance is also placed on a decision in the matter of RK College vs. Ramchand MACD 2007 (2) Raj 856 wherein in a case of violation of condition of permit, Rajasthan High Court has considered the differences between terms of permit and breach of policy and held that since accident occurred on a nationalized route and the vehicle could not have been plied on a nationalized route or any part thereof, as per the terms of the permit, therefore, probable defence available to insurance company is not of breach of the terms of permit but of violation of some specified condition of the insurance policy, therefore, insurance company is liable to satisfy the amount of compensation. Reliance is also placed on a decision in the matter of National Insurance Co. Ltd. Vs. Chandra Bisht and Others, wherein a Divisional Bench of Uttranchal High Court in a case of breach of condition of permit has held that only those grounds enumerated under clause (a) of sub section (2) of section 149 are to be raised by insurer as ground of appeal.

Learned counsel for appellant further submits that the offending bus was being driven by respondent No. 2 driver of appellant on a diverted route because of obstruction on the road and in the circumstance neither respondent No. 3 can be exonerated nor a right of recovery can be given to it. For this contention reliance is placed on a decision in the matter of P. Krishnan Vs. United India Insurance Co. Ltd., wherein the insurance company disputed its liability on the ground that bus was taken through a diverted route not covered by the permit and it met with an accident, High Court of Karnataka held that if due to breach in the road or some other obstruction, the bus cannot be taken through the route prescribed in the permit and an accident occurs on the diverted route, the insured is not responsible and he has to be indemnified. Reliance is placed on a decision in the matter of National Insurance Company Vs. T. Elumalai and another, wherein in a case of violation of condition of permit relating to the geographical limits within which the vehicle could ply Madras High Court has held that insurer is not entitled to take a defence which is not specified in section 96 (2) of the Act, 1939. It was further held that these provisions have to be construed strictly. It is not the breach of any condition of the policy of insurance, that would provide the insurer a defence u/s 96 (2) of the Act. It was further held that section 9 (2) of the Act does not include violation of the terms of the permit relating to plying in certain geographical areas.

Mr. Manish Jain, learned counsel for appellant submits that to carry more passengers is not amounting to violation of terms of permit. For this contention reliance was placed on a decision in the matter of National Insurance Co. Ltd. vs. Anjana Shyam, 2007 ACJ 1585 wherein offending bus was overloaded and carrying at least 90 passengers at the time of accident, Himachal Pradesh High Court held that since the bus was being used for a purpose authorized by permit, therefore, insurance company can not be exonerated. Against the judgment of

Himachal Pradesh High Court Insurance Company filed SLP before Hon"ble Apex Court which is reported in ACJ 2007 (IV) 2129 wherein it was held that in terms of Section 149, the duty of Insurance company is only to satisfy judgments and awards against persons insured in respect of third party risk, to satisfy 42 awards in descending order starting from the Highest of the awards.

So far as over-loading is concerned, learned counsel also placed reliance on a decision in the matter of New India Assurance Co. Ltd. Vs. Ratibai and Others, wherein the contention was that the jeep was overloaded, Divisional Bench of this court held that unless over loading itself is a cause of accident, it does not constitute substantial breach on the part of the owner. It was further held that there is no evidence that owner had knowledge of carrying more persons than permitted under the policy. Further reliance is placed on a decision in the matter of Smt. Shanubai vs. Deenu passed in MA No. 2182/2007 decided on 8.2.2008 wherein after following the decision in the matter of Ratibai (supra) the direction given by learned tribunal to recover the amount from the owner was set-aside holding that there is nothing on record to show that accident occurred because of carrying 60-70 passengers in the offending bus.

On the strength of aforesaid position of law, learned counsel submits that condition imposed by learned tribunal whereby right of recovery was given to respondent No. 3 be set-aside. In alternative, learned counsel for appellant submits that the application filed by appellant under Order XLI Rule 27 of CPC alongwith certain documents be allowed and the case be remanded back to the learned tribunal for deciding the matter afresh.

Mr. S.V. Dandwate, learned counsel for respondent No. 3 submits that appellant was prosecuted by RTA, Jhabua wherein vide order dated 22.6.2006 appellant was penalized for violation of Section 66 of the Act and penalty of Rs. 75,000/- was imposed against which an appeal was filed by appellant before STAT, Gwalior which was also dismissed. It is submitted that the written statement was filed by appellant before learned tribunal wherein it was not the case of appellant that the offending bus was being driven on a diverted route because of obstruction over the route for which the permit was granted. It is submitted that appellant was well represented by a counsel and no evidence was adduced by the appellant for which documents has been filed under Order XLI Rule 27 of CPC. It is submitted that in the cross-examination also appellant did not raise any question in defence that the offending bus was driven on a diverted route because of obstruction. It is submitted that in the evidence of 38 eye-witnesses it has come on record that the offending bus was over loaded as it was carrying 70-80 passengers and all the passengers were boarded from Rajgarh and going to their respective villages. It is submitted that it has come in evidence that offending bus was plied on the same route on daily basis. It is submitted that in the facts and circumstances of the case application filed by appellant under Order XLI Rule 27 of CPC cannot be allowed specially in absence of any pleadings in the written statement. It is submitted that objection raised by respondent No. 3 that

offending bus was carrying more passengers than its capacity and was having no permit when accident took place as it has within the ambit of Section 149 (ii) of the Act. It is submitted that respondent No. 3 is having the defences. It is also submitted that it is wrong to say that insurance company has not raised the defence that offending vehicle was being plied on a route which was not covered under the permit. Learned counsel placed reliance on a decision in the matter of National Insurance Co. Ltd. Vs. Challa Bharathamma and Others, wherein Autorickshaw met with accident resulting in death of two persons and third sustained injuries and insured had not obtained permit to ply the vehicle, Hon"ble Apex Court had an occasion to consider the defences available to insurance company and it was observed that insurance company is liable, however, insurance company was directed to deposit the amount and recover the same from the insured by initiating proceedings before executing Court and it need not file a separate suit.

On the basis of aforesaid submissions, learned counsel for respondent No. 3 submits that the appeal filed by appellant has no merits and the same be dismissed. Learned counsel submits that Chapter V of the Act deals with control of transport vehicle, Section 66 deals with necessity for permit, Section 68 deals with transport authorities, sub-section (3) (ca) of Section 68 lays down that the STAT and RTA has to effect to any directions issued u/s 67 and the State Transport Authority shall, subject to such directions and save as otherwise provided by or under this Act, exercise and discharge throughout the State the powers mentioned in that section. By an amendment which came in force with effect from 14.11.1996 whereby sub-section (ca) was inserted, according to which State Transport Authority and RTA, shall formulate routes for plying stage carriage. Section 70 deals with the application for stage carriage permit, according to which an application for permit in respect of a stage carriage shall be filed which shall contains the particulars mentioned in this section. Apart from this, particulars in the said application, the route or routes, or area or areas to which the application relates has to be mentioned by applicant who intends to obtain the permit. Section 72 deals with grant of stage carriage permit. As per sub-section (1) of section 72 of the Act any application made to RTA u/s 70 for grant of stage carriage permit shall be decided by the concerned RTA by granting or refusing the permit. As per proviso sub-section (1) section 72, no permit shall be granted in respect to any route or area which has not been specified in the application. As per sub-section (2) of section 72, the RTA, if it decides to grant a stage carriage permit, may grant the permit for a stage carriage of a specified description, subject to any rule that may be made under this Act, attach to the permit any one or more and as per sub-clause (i), sub section (2) section 72, the vehicles shall be used only in a specified area, or on a specified route or routes.

In the matter of RK College vs. Ramchand and others 2007 (2) Raj. 856 reliance is placed by the Hon"ble Single Judge on a decision of Divisional Bench in the matter of National Insurance Company Limited vs. Smt. Mohini Bai and others MACD 2006 1 Raj 665 wherein Division Bench has observed as under:

On plain reading of S. 149(2)(a)(i)(c), it is obvious that the term "purpose" therein refers to the purpose for the vehicle is to be used. This is apparent from the words "a condition excluding the use of the vehicle" in clause (i) of which sub-clause (c) is part. The purpose is sub-clause (c) refers to the use of the vehicle and where the vehicle is used for carrying passengers, merely because the number of passengers was more than specified in the permit, it cannot be said that there was any violation of the purpose, that is to say, the vehicle was being used for a purpose other than allowed under the permit. The purpose refers to the permit, that is allowed by the permit. Unless there is some major deviation from the purpose in the matter of use, it cannot be said that there was breach of condition of policy.

The facts of the case are that a bus met with an accident in which 16 persons lost their lives and 48 persons sustained injuries. While the defence of the Insurance Company was that the vehicle in question had sitting capacity of only 38 passengers besides driver and a conductor and thus 40 persons could travel in the bus. Under contract of insurance, the owner of the vehicle had paid premium for 3rd party risk @ Rs. 110/- per passenger and Rs. 30/-each for driver and conductor totalling 40 passengers. While total persons who sustained injuries and died were 64. Thus the facts of the Mohinibai's (supra) case are quite distinguishable.

So far as the case of RK College is concerned, the vehicle met with an accident on a route not covered under the permit and for awarding compensation Single Judge of Rajasthan High Court has observed that law laid down in the matter of National Insurance Co. Ltd. Vs. Challa Bharathamma and Others, is not applicable on the ground that it was a case of no permit at all.

There is one more case which throws light on the issue involved. In the matter of Oriental Insurance Company Limited Vs. Banto Devi and Others, wherein the vehicle was over loaded and was driven out side Delhi area for which it was not carrying requisite permit, Hon. Justice Viney Mittal, the then Judge of Punjab & Harayana High Court and at present Judge of this Court, has held that simply because the bus in question has been approved for plying within the area of Delhi and it was being driven out side Delhi, would not be a ground to absolve Insurance Company of its liability. While deciding this appeal, judgment reported in the matter of National Insurance Co. Ltd. Vs. Challa Bharathamma and Others, was not placed before His Lordship and, therefore, the same was not taken into consideration. The Judgment delivered by Hon"ble Apex Court in the case of Challa Bharathamma (Supra) cannot be over looked only on the ground that it was a case of no permit at all to ply the vehicle because in para 12 of its decision Hon. Court has observed that a person without permit to ply a vehicle cannot be placed at a better pedestal vis-a-vis one who has a permit but has violated any condition thereof. Hon"ble Court has further held that plying of a vehicle without a permit is an infraction, therefore, in terms of Section 149(2) defence is available to the injured on that aspect.

Apart from this, in the matter of Ram Sujan Tiwari Vs. Sita Gupta and Others, wherein vehicle was being driven on a route for which permit was not granted when it turned turtle resulting into the death of a passenger, Division Bench of this Court has held that since vehicle was being driven on the route for which the permit was not granted, hence contravened the conditions of the permit. In such circumstance, the Insurance Company cannot be held liable to pay compensation. It was further observed that the Tribunal has rightly exonerated the Insurance Company from its liability of payment.

Since the offending vehicle was not being driven on the route for which the permit was given, therefore, in the opinion of this Court, learned tribunal committed no error in giving right of recovery to the Insurance Company.

In view of this, appeals/revisions filed by the appellant/petitioner have no merits and stand dismissed. A copy of this order be placed in the records of connected matter. C.C. as per rules.