
(1999) 01 MP CK 0012
In the Madhya Pradesh High Court
Case No : M.A. No. 320 of 1996

United India Insurance Co. Ltd.

APPELLANT

Vs

Parekhia Bai and Others

RESPONDENT

Date of Decision : 22-01-1999

Acts Referred:

Motor Vehicles Act, 1988 — Section 145, 147, 149, 173, 2

Citation : (2001) ACJ 766

Hon'ble Judges : D.M. Dharmadhikari, J

Bench : Single Bench

Advocate : N.S. Ruprah, for the Appellant; K.P. Munshi and Prashant Mishra, for the Respondent

Final Decision : Dismissed

Judgement

D.M. Dharmadhikari, J.—This appeal has been placed before me for decision as conflicting opinions have been expressed by learned S.K. Dubey, J. and S.P. Khare, J. as members constituting the Division Bench.

2. This appeal has been preferred by the insurance company u/s 173 of the Motor Vehicles Act, 1988 (hereinafter referred to as "the Act of 1988" for short). The Fifth Motor Accidents Claims Tribunal, Bilaspur, by award made on 13.12.1995 has granted compensation in the sum of Rs. 1,22,000 with 12 per cent interest from the date of claim to the claimants for the death of deceased Loharmal in motor accident on 6.4.1991.

3. The facts not in dispute are that the vehicle involved in the accident with registration No. 23/B 4809 was mini truck of the make Swaraj Mazda. It was a transport vehicle adapted for use of carriage of goods and was registered as a "light motor vehicle" and was a "transport vehicle" as defined u/s 2(21) and 2(47) respectively under the Act of 1988. The vehicle was insured with the appellant insurance company. As per the terms of the insurance policy, Exh. P/3, there was a compulsory insurance for public risk for which separate premium was

charged. Apart from the public risk, it was insured for risk of one driver and two other persons on the vehicle as cleaner or coolies. Separate premium was charged for the above mentioned number of authorised occupants of the vehicle.

4. On the version of the accident, the owner of the vehicle and one of the unauthorised occupants of the vehicle have been examined. The driver of the vehicle did not enter the witness-box. The version of the accident as given by Ramadhar, AW 2, who was one of the occupants of the vehicle, is as under:

The witness and the deceased along with about 10-20 other persons as members of a marriage party were returning from village Amli Kapa. On the highway they stopped the vehicle in question of which Dhaniram was the driver. The members of the marriage party boarded the vehicle and also loaded their luggage. Deceased Loharmal and three other persons, namely, Jogiram, Mohan and Dilip sat on the rear side of the vehicle called colloquially as "dala". The rear portion of the goods vehicle called "dala" is adapted for use of carrying goods only as there is no seating arrangement for passengers in the "dala". The above mentioned witness occupied seat on the front side near the driver. This witness also admitted that a dumper in which some other members of the marriage party were travelling had broken down. The bride and bridegroom in that dumper were also allowed to occupy the vehicle involved. The vehicle was thus allowed to be occupied by several persons from the marriage party.

When the mini truck on its way to Bilas-pur came near the Krishi Upaj Mandi barrier, the barrier bar was suddenly pulled down. The driver of the truck, therefore, suddenly applied the brakes which gave a violent jerk to the vehicle. The deceased Loharmal along with other persons who were sitting in the "dala" fell down. The deceased sustained injuries and ultimately succumbed to the same. The incident took place at 12.00 in the midnight. The above witness also admitted that the driver was not paid any fare for giving them lift but it was agreed with him that he would be charging fare at the rate of Rs. 5 per passenger for carrying them up to Bilaspur.

5. The above version of the accident is supported by the widow of the deceased, Parekhia Bai, AW 1.

6. The owner of the vehicle is a firm named Diyalal Meghji which is engaged in bidi business. The owner examined their manager Ashok Sharma, NAW 1. He stated that the vehicle was sent for carriage of goods of the firm. He has placed on record a standing written instruction issued to all the drivers engaged on the vehicles of the firm that they would not allow any passengers to travel in the vehicle. It is on the above facts that the owner denied his vicarious liability for the unauthorised act of the driver in giving lift to the passengers against clear instructions of the owner.

7. On the above facts, the Claims Tribunal held the driver, owner and insurance company jointly and severally liable for payment of compensation. The Tribunal held that the failure of the driver of the vehicle involved to enter the witness-box

gave justification for the court to apply the principle of *res ipsa loquitur*. The Tribunal, therefore, raised an inference of negligence of the driver.

8. Mr. N.S. Ruprah, learned counsel appearing for the appellant contends that the insurance company is not liable to pay compensation for death of a gratuitous passenger or unauthorised occupant of a vehicle insured as a goods vehicle. His other contention is that as per the terms of the insurance policy, the risk of such an unauthorised passenger on a goods vehicle is not covered.

9. The learned Judges constituting the Division Bench differed on the question of liability of the insurance company. The learned Judge S.P. Khare, J. held that the insurance company cannot deny its liability because the owner did not commit any breach of the conditions of the policy, may be that the driver, against the instructions of the owner, had allowed lift to several persons in the goods vehicle. In his separate order he observed that since the driver "acted in the course of his employment but in an unauthorised manner" there was no breach of the terms of the policy by the insurer and, therefore, the liability of the insurance company does not cease. S.P. Khare, J. placed reliance on the decisions of the Supreme Court in *Skandia Insurance Co. Ltd. v. Kokilaben Chandra-vadan* 1987 ACJ 411 (SC) and *Sohan Lal Passi Vs. P. Sesh Reddy and others*, . S.P. Khare, J. relied on the decision of *B.V. Nagaraju Vs. M/s. Oriental Insurance Co. Ltd.*, Divisional Officer, Hassan, , in support of his view that mere giving lift to a passenger in goods vehicle was not such a fundamental breach of the conditions of the policy by the owner which could be said to have contributed to the accident so as to permit the insurer to avoid its liability.

10. S.K. Dubey, J., in his separate dissenting opinion has held that the insurance company on the admitted facts and terms of the policy was not liable. Dubey, J. distinguished the Supreme Court decisions in the case of *B.V. Nagaraju Vs. M/s. Oriental Insurance Co. Ltd.*, Divisional Officer, Hassan, . In his opinion, the said decision is distinguishable on facts. In that case, the claim was for damage to the vehicle suffered because of a collision by the other vehicle. It is in respect of such claim that the Supreme Court held that carrying one or two passengers more than the permissible number in the goods vehicle was not a contributory cause to the accident so as to justify the insurer of the colliding vehicle to avoid its liability. In the words of S.K. Dubey, J., on the facts of this case it is found that "the insurance company in this case is not liable as a fundamental breach of a policy condition was committed by the driver in the course of employment of the owner".

11. I have heard the arguments addressed by learned counsel Mr. N.S. Ruprah for the insurance company, Mr. K.P. Munshi for the owner of the vehicle and Mr. Prashant Mishra for the claimants.

12. In this appeal, the first question is whether the insurance company under the provisions of the Act of 1988 can avoid its liability in the matter of payment of compensation under an award made jointly against the owner and driver of the

vehicle involved. u/s 149 of the Act of 1988 the insurance company has limited defences as enumerated in Sub-section (2) (a) (i) (a) to (d), (ii) and (iii) and (b). Sub-section (1) of Section 149 provides that an award obtained against any person insured under a policy has to be satisfied by the insurer. One of the defences available to the insurer which could be said to be attracted in this case is to be found in Sub- Section (2) (a) (1) (c) of Section 149 of the Act which reads thus:

149. Duty of insurers to satisfy judgments and awards against persons insured in respect of third party risks.-

xxx xxx xxx (2) No sum shall be payable by an insurer under Sub-section (1) in respect of any judgment or award unless, before the commencement of the proceedings in which the judgment or award is given the insurer had notice through the court or, as the case may be, the Claims Tribunal of the bringing of the proceedings, or in respect of such judgment or award so long as execution is stayed thereon pending an appeal; and an insurer to whom notice of the bringing of any such proceedings is so given shall be entitled to be made a party thereto and to defend the action on any of the following grounds, namely:

(a) that there has been a breach of a specified condition of the policy, being one of the following conditions, namely:

(i) a condition excluding the use of the vehicle

xxx xxx xxx

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

13. On the facts of this case, it cannot be held that the owner of the vehicle is guilty of any breach because, without knowledge or connivance of the owner, the driver on the highway, on a request made by the deceased and other persons of the marriage party, gave unauthorised lift to the passengers in goods vehicle. As has been held by the Apex Court in the case of Skandia Insurance Co. Ltd. 1987 ACJ 411 (SC) and in Sohan Lal Passi Vs. P. Sesh Reddy and others, , the insurer can avoid its liability on the terms of the policy under Sub-section (2) of Section 149 only where the insured has committed breach of the conditions of the policy. In the instant case, the owner or insured was not guilty of any breach of the conditions of the policy and, therefore, the insurer cannot avoid its liability. As would be discussed in the later part of this judgment, on the facts found, even the owner could not have been held vicariously liable for the act of his servant, i.e., the driver in doing a wholly unauthorised act of giving lift to the passengers outside course of his duties for which he was employed. S.P. Khare, J. was, therefore, right in holding that as the insured did not commit any breach of the terms of the policy, the insurer cannot avoid its liability.

14. The other question raised by the appellant insurance company is about the extent of coverage of the risk of such an unauthorised gratuitous passenger.

Learned counsel for the appellant contended that the vehicle was insured as a vehicle adapted for use to transport goods only. The permitted occupants on the vehicle were three in number, the driver and two other persons engaged as cleaner or coolie. The insurance company is not liable for any injury or death caused to any other unauthorised occupants of the goods vehicle.

15. The above contention of the counsel for the appellant insurance company would require examination of the relevant provisions containing the scheme of insurance in the repealed Act of 1939 and the Act of 1988. u/s 95 of the repealed Act of 1939, "separate insurance limits were provided for driver, employees of the owner and passengers on the vehicle. u/s 147 of the new Act of 1988, however, such a distinction has purposely been removed. The scheme of the Act of 1988 came up for examination in detail before a Division Bench of this court in M.A. No. 1221 of 1996; decided on 11.8.1997; to which S.K. Dubey, J. was also a party along with Dipak Misra, J. In the opinion of the Division Bench as expressed by Dipak Misra, J., under the provisions of the Act of 1988, the insured is also covered for the risk of death of even an unauthorised occupant on the vehicle carried without hire or reward.

15-A. In the course of arguments, the learned counsel for the appellant contended that an unauthorised occupant in a vehicle insured is not a "third party" within the meaning of the Act whose risk is covered. The words "third party" for the purpose of Chapter XI in Section 145(g) have not been fully defined. What the definition states is that "third party includes the Government". u/s 147(1)(b)(i), compulsory insurance is required for use of a vehicle to cover liability incurred by the insured in respect of the death of or bodily injury to any person, including owner of the goods or his authorised representative carried in the vehicle or damage to any property of a third party caused by or arising out of the use of the vehicle in a public place. The provision of Section 147(1)(b)(i) as distinguished from the scheme and provision of the old Act of 1939 would make it very clear that liability of the insurer against death of an unauthorised occupant of a vehicle is also covered by the provision and the insurer is not absolved of its liability if an award has been passed against the insured. For the above view I seek support from the Division Bench decision of this court in the case of Oriental Insurance Co. Ltd. Vs. Smt. Radharani and Others, .

16. Before concluding my opinion, it would be necessary to examine in some detail the aspect of the case on which the two learned Judges differed, i.e., with regard to inter se liability of the owner and driver in the matter of such an accident. In the present case, a joint award was passed against the driver, owner and insurance company. The owner has taken a specific plea that it is not vicariously liable because the driver acted in a wholly unauthorised manner and contrary to his instructions. The Tribunal yet passed an award against the owner. The owner has not preferred any appeal and the award as against the owner has become final. The insurance company alone has come up in appeal and, as has been mentioned above, its defences are limited by the specific provisions

contained in Section 149(2) of the Act of 1988. As has been held above, the breach of the conditions of the policy having not been committed by the owner, the insurance company has no defence based on the terms of the policy. It is, however, necessary to clarify that had the owner preferred appeal against the award denying its vicarious liability, it would have been possible for this court to absolve the insured of its liability and consequently the insurer. It is only when the insured is liable that the insurer becomes liable to satisfy the award of compensation in terms of Section 149(1) of the Act. This clarification is necessary as the two learned Judges have differed on this vital aspect of the case. The plea that the owner is not vicariously liable for the acts of his servant is a defence available only to the owner of the vehicle and such defence is not available to the insurance company.

17. S.P. Khare, J. in his separate opinion observed that the driver "acted in the course of his employment but in an unauthorised manner" and, therefore, the owner of the vehicle is liable. S.K. Dubey, J. in his dissenting opinion, however, opined that "the insurance company would not be liable as a fundamental breach was committed by the driver in the course of employment of the owner". For the purpose of this appeal-which has been preferred only by the insurance company, it is not necessary in the absence of an appeal by the owner of the vehicle to decide whether the owner was vicariously liable for the act of the driver or not, but I purposely express my opinion on the same because the two learned Judges differed only on this aspect of the case. The opinion expressed by me for resolving the conflict between the opinions of the two learned Judges may not create any misunderstanding or impression that in case of accident of this nature it is not possible at all for the insurer and the insured to avoid the liability on the plea that the driver acted in a wholly unauthorised manner and contrary to the instructions of the owner. As has been held by me above, it would have been possible for this court to take a different view in favour of the insurer, had the insured also preferred an appeal separately or jointly with the insurer.

18. On the question of vicarious liability, the law is that normally the owner of the vehicle is vicariously liable for negligence of his driver. It is not in every case that the owner or master would be liable for the negligence of the driver as his servant. It is only where the servant committed some wrongful act in the course of his employment that the master becomes liable. [See Commentary on Tort by Ratanlal & Dhirajlal, 23rd Edn., 1997, edited by Justice G.P. Singh, pp. 136-139].

18-A. On the highway, it is a matter of common knowledge and experience that persons standing on the road many times signal the passing vehicles to stop and request for lift. For injury to or death of such gratuitous or hired passengers compensation cannot be claimed from the owner of the vehicle who has no control over the acts of the driver or his servants who are employed on the vehicle. As has been held in *Twine v. Bean's Express Ltd.* (1946) 1 All ER 202:

the duty owed by the owner of a vehicle to persons injured by the negligence of his driver is limited to those who can reasonably be anticipated as being possible

subjects of injury. A driver having express orders not to take any passenger, will be acting outside the scope of his authority if he gives lift to any person contrary to the orders. Clerk & Lindsell on Torts, in 16th Edn., paras 3-18 at page 211 and Friedman on Torts, 1st Edn. 1996, p. 61, have taken note of the decisions reported in *Twine v. Bean's Express Ltd.* (supra) and *Con-way v. George Wimpey & Co. Ltd.* (1951) All ER 363. In *Twine v. Bean's Express Ltd.*, the Court of Appeal held that the employer was not liable to a hitchhiker who had been given a lift by their employee contrary to express prohibition. The better reason for this decision must be that giving the lift was "an act of a class which the driver was not employed to perform at all".

19. In the instant case, the act of the driver of giving free ride was outside the course of the driver's employment. It was given for his, not for the employer's purpose as the former desired to collect some fare from them. The driver was not doing what he was authorised to do. When he gave lifts which he was not permitted to do he was not merely acting in an unauthorised manner but was acting outside the performance of his duty as a driver.

20. It is on the above aspect of the vicarious liability of the owner that I do not agree with the observations of S.P. Khare, J. In his opinion, the driver "acted in the course of his employment but in an unauthorised manner". In my considered opinion, the act of the driver was some independent act not connected with the act for which he was authorised, i.e., to carry the goods of the owner and, therefore, the driver cannot be said to have acted in the course of his employment but has gone outside of it. I rely on the following passage of Salmond and Heuston in their book on "Law of Torts":

A master is not responsible for the wrongful act done by his servant unless it is done in the course of his employment. It is deemed to be so done if it is either (1) a wrongful act authorised by the master or (2) a wrongful and unauthorised mode of doing some act authorised by the master... In other words, a master is responsible not merely for what he authorises his servant to do, but also for the way in which he does it. If a servant does negligently that which he was authorised to do carefully, or if he does fraudulently that which he was authorised to do honestly, or if he does mistakenly that which he was authorised to do correctly, his master will answer for that negligence, fraud or mistake. On the other hand, if the unauthorised and wrongful act of the servant is not so connected with the authorised act as to be a mode of doing it, but is an independent act, the master is not responsible; for in such a case the servant is not acting in the course of his employment, but has gone outside of it.

21. The authoritative work of Charles-worth & Percy on Negligence, 8th Edn., has also summed up the subject lucidly on the basis of decided accident cases. See the following passage of the book at 9-95, page 706:

Passenger on vehicle with consent of servant who is acting outside the scope of his employment: If a servant of a carrier, without his master's authority and

acting outside the scope of his employment, allows a person to become a passenger in the vehicle, the master is under no liability to him, in respect of any damage, which was suffered in an accident, caused by a servant's negligence. This is because the person is a passenger, whose presence is unforeseeable. Where the defendant contracted to carry the plaintiff's goods in a cart and sent his servant with the cart, and the plaintiff, with the servant's permission but without authority of the master, rode in the cart, which broke down, it was held that the plaintiff could not recover damages.

22. It is also necessary to refer to the decision of the Apex Court on the subject to which reference has been made by S.P. Khare, J. The case of Skandia Insurance Co. Ltd. 1987 ACJ 411 (SC), is distinguishable on facts. In that case, the licensed driver's negligence was in leaving the vehicle with its engine running and the ignition key in the ignition lock giving a chance to the cleaner to interfere with the vehicle resulting in the accident. The Apex Court held that the owner of the vehicle on the above facts could not be said to have committed breach of the conditions of the policy of insurance as the owner had handed over the vehicle to the licensed driver and the licensed driver left it unattended to be interfered with by the cleaner. It is on those facts that it is held that the defence set up by the insurance company of alleged breach of the conditions of policy by the owner was not available to the insurer.

23. In Sohan Lal Passi Vs. P. Sesh Reddy and others, , the distinguishable facts may be noticed. In that case, the owner had authorised the driver to drive the vehicle but the driver allowed the cleaner/ conductor who was also the employee of the appellant to drive the vehicle and that was the cause of the accident. The cleaner/ conductor was driving the vehicle with the knowledge and consent of the driver. It was being driven for the business of the appellant, i.e., to carry the passengers in a bus. It is on these facts that the Supreme Court held that "as the initial act of the employee was expressly authorised and lawful, the employer would be responsible for the manner in which the employees, i.e., the driver and the cleaner/conductor executed their authority. It was, therefore, held that it was improper mode or manner of execution of the authority of the master by the servant, hence the master cannot escape liability so far as third parties are concerned on a plea that he had not actually authorised the particular manner in which the act was done.

24. The facts of the present case are, however, totally distinguishable from those found in the cases of Skandia Insurance Co. Ltd. 1987 ACJ 411 (SC) and Sohan Lal Passi Vs. P. Sesh Reddy and others, . In the instant case, the driver acted against the written instructions of the owner by carrying the deceased in goods vehicle and allowing him to sit in the "dala" meant only for carriage of goods. The deceased demanded a lift and was not an occupant of the vehicle on the authority of the owner. In my considered opinion, when a lift is demanded from the driver of a vehicle and the driver agrees to give such a lift, on charging some fare or gratuitously such passenger is an unauthorised occupant of the vehicle

and he takes the hazard of travelling in the vehicle for which the owner cannot be held vicariously liable and hence the insurer would be absolved of his liability. The driver in giving the lift to a bystander on the highway may have acted in the course of his employment but he did some act totally unconnected with the job for which he was employed. It was totally an unauthorised act of the driver and the owner could not have foreseen the same or avoided it.

25. For the reasons aforesaid, had an appeal against the award been preferred also by the owner of the vehicle, it was possible for this court to hold that as the owner is not vicariously liable, the insurance company as insurer is also not liable. Here, the appeal preferred is only by the insurance company having limited defences. The defence based on absence of vicarious liability of the owner being not available to the insurer, it is not possible for this court to absolve the insurer of its liability.

26. Consequently, respectfully agreeing with the conclusion of S.P. Khare, J., but for different reasons as elaborately discussed by me above, I also hold that the appeal preferred by the insurance company deserves to be dismissed.

27. Let the record of this case be now placed before the Division Bench of S.K. Dubey & S.P. Khare, JJ. for making a formal order of the court.