The New India Assurance Co. Ltd. Vs Satyanath Hazarika and Others
 National Insurance Co. Ltd. Vs Md. Bandash Ali and Others

Court: Gauhati High Court

Date of Decision: March 8, 1989

Acts Referred: Land Acquisition Act, 1894 â€" Section 18

Citation: (1989) 2 ACC 409 : AIR 1990 Guw 26

Hon'ble Judges: S.N. Phukan, J; S.K. Homchaudhuri, J; S. Haque, J; J. Sangma, J; B.L. Hansaria, J

Bench: Full Bench

Judgement

B.L. Hansaria, J.
This 5-Judge Bench has been constituted to consider whether certain observations made by a 3-Judge Bench of this

Court in Hira Devi v. Bhaba Kanti AIR 1977 Gau 31 needs reconsideration in view of the later pronouncement of this Supreme Court in

Pushpabai Purshottam Udeshi and Others Vs. Ranjit Ginning and Pressing Co. (P) Ltd. and Another, It may be stated that the case of Hira Devi

had to be placed before a Full Bench of 3 Judges because of a reference by a Division Bench which was of the view that there is a difference of

opinion expressed in Assam Corporation v. Binu Rant AIR 1975 Gau 3 and Asha Rant v. The Commonwealth Assurance Company Ltd. MA (F)

4t of 1969 disposed of on 21-2 1974 on the question as to whether an insurer is liable to pay compensation in case of death or bodily injury to a

gratuitous passenger. What is required to be determined by this Bench is whether an insurer can be asked to indemnify an insured who has been

made liable to pay compensation in respect of death or bodily injury to gratuitous passenger.

2. To answer the above question, we shall have to apply our mind mainly to the provisions contained in Section 95 of the Motor Vehicles Act,

1939, hereinafter referred to as the Act. This section finds place in Chapter VIII of the Act dealing with insurance of motor vehicles against third

party risk. The provisions in this Chapter follow closely the recommendations of Motor Vehicles Insurance Committee and have been adopted

from English Law. As accidents have been frequent and as in large number of cases injured persons or the dependents of those killed found it

difficult to realise damages or compensation from the owner or driver who had no means to satisfy their claims, necessity for insurance against third

party risk was keenly felt. This chapter, therefore, makes provision for insurance of the vehicle against third party risk, that is say, its provisions

insure that a third party who suffers on account of the user of the motor vehicles would be able to get damages for injuries suffered and that their

liability to get the damages will not be dependent on the financial condition of the owner or driver of the vehicle whose user led to the causing of the

injury. It was, therefore stated in New Asiatic Insurance Co. Ltd. Vs. Pessumal Dhanamal Aswani and Others, that the provisions of this chapter

have to be construed in such a manner as to ensure the aforesaid object of the enactment.

3. As we would be primarily concerned in answering the aforesaid question with Section 95 of the Act, we may note the relevant provisions of this

section at the outset.

Section 95. Requirement of Policies and Limits of Liability: (1) In order to comply with the requirements of this Chapter a policy of insurance must

be a policy which

(a) xx xx xx xx

(b) Insures a person or classes of persons specified in the policy to the extent specified in Sub-section (2)

(i) Against any liability which may be incurred by him in respect of the death of or bodily injury to any person or damage to any property to a third

party caused by or arising out use of the vehicle in a public place;

(ii) Against death of or bodily injury to any passenger of a public service vehicle caused by or arising out of the use of a vehicle in a public place;

Provided that a policy shall not be required

(i) xx xx xx

(ii) Except where the vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment, to

cover liability in respect of the death of or bodily injuries to persons being carried in or upon entering or mounting or alighting from the vehicle at

the time of the occurrence out of which a claim arises.

4. From a plain reading of the aforesaid provisions, it is clear that under ""act only"" policy, the insurer is liable to indemnify the insured against the

death or bodily injury to any passenger of a public service vehicle caused by or arising out of the use of the vehicle in a public place. The definition

of ""public service"" as given in Section 2(25) of the Act means motor vehicles 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. The expression ""motor cab"" has been defined in Section 2(15) of the Act

to mean any vehicle constructed, adapted, or used to carry not more than 6 passengers excluding the driver for hire or reward. This being the

position, we. Are really required to consider as to what would happen in the case of death or bodily injury to any passenger who is carried in a

vehicle, which is not meant for carrying passengers for hire or reward. The question would mainly arise in case of passengers travelling in a ""motor

car"". The question may also arise incidentally where passenger is carried in any other motor vehicle.

5. To answer the above question, we may at first note the decisions of this Court rendered on the point under examination, which are said to be

four in number. In Mahabir Prasad v. Jeewan Chandra AIR 1972 Gau 88, what has happened was that a truck was hired by about 52 students

both boys and girls for going to a picnic. While on the return journey, the truck turned turtle while negotiating a bend on account of rash and

negligent driving. It was held by a learned single Judge of this Court that the insurer was not liable to indemnify the insured inasmuch as the truck

was not meant, nor was licenced, for carriage of passengers for hire. It was also stated that in terms of the policy itself the insured was not

permitted to use the truck for carriage of passengers so, relying on Section 95(1)(b) of the Act, the insurer was held to be not liable. In Asharani

(MA (F) 41 of 1969 disposed of on 21-2-1974) a Division Bench of this Court held that as the vehicle in question was not one in which

passengers are carried for hire or reward and as the deceased was not carried in the vehicle as passenger for hire or reward, Section 95(1)(b) did

not require to cover such a liability and so it was held that the insurance company could not be made liable for damages.

6. In Para 33 of Assam Corporation v. Binu Rani AIR 1975 Gau 3 a view was however taken by another Division Bench that the words ""Third

Party"" finding place in Section 95 (1) (b) (i) of the Act, would include a gratuitous passenger in a jeep. In coming to the aforesaid conclusion,

definition of the expression ""Third Party Risk"" given a Stroud''s Judicial Dictionary, 3rd Edition, Volume 4 pages 3019-3020 and what was stated

in Digby v. General Accidents 1943 AC 121 were taken note of. Being of this view the entire amount awarded to the claimant was ordered to be

paid by the insurer.

7. Now we come to Hira Devi (supra). In Para 19 of this decision, it was observed that the term ""any person"" finding place in Section 95 (1)(b) (i)

of the Act would not exclude a gratuitous passengers travelling in a car. The Full Bench however, observed that in order to fix the liability on the

insurer, the liability must first be established against the owner of the car. As, however, the Court was not satisfied that liability of the owner had

been established, it did not examine the question whether the liability to the insurer to indemnify the owner in respect of the claim relying to

gratuitous passenger existed or not. It however observed that after liability is fastened on the owner the term of the policy would determine the

matter. It may be pointed out that according to the decision in Hira Devi, the judgments of this Court in Binu Rani was founded on the terms of the

policy inasmuch as the policy referred to the ""death or bodily injury to any person"", as was the case in Hira Devi.

8. We may now advert to Pushpabai Purshottam Udeshi and Others Vs. Ranjit Ginning and Pressing Co. (P) Ltd. and Another, Before we note

the ratio of this decision on the question under examination, it would be useful to reiterate that under the Act an insurer is to indemnify the insured in

those cases where he is made liable to pay compensation. Now the circumstances under which the owner of the vehicle is vicariously liable for the

acts done by his servant have changed during the course of years at one point of time it was thought that the master is liable in such cases only

where the acts of the servants be ""in course of employment"". This conception has since changed and this aspect of the matter has been dealt in

detail in Puspabai which was followed by this Court in State of Assam v. Banti Barua 1978 ACJ 412. For the purpose at hand, we shall assume

that insured is liable to pay compensation for the acts of the driver even where he carries gratuitous passengers and we shall only examine whether

in such a contingency the insurer is liable to indemnify the insured.

9. On this aspect of the question, their Lordships of the Supreme Court in Puspabai referred to Section 95 of the Act, as amended by Act 56 of

1969, and stated that Sections 95 (a) and 95 (b) (i) adopted the provisions of the English Road Traffic Act, 1960 and excluded the liability of the

insurance company regarding the risk to gratuitous passengers When a contention was advanced that the words ""third party"" are wide enough to

cover all persons except the person insured and the insurer the same was negatived by stating that the insurance cover was not available for

gratuitous passengers which was made clear by the proviso to Sub-section which provides that a policy shall not be required:

(ii) Except where the vehicle is a vehicle in which passengers are carried for hire or reward or by reason or in pursuance of a contract of

employment to cover liability in respect of the death or bodily injuries to persons being carried in or upon or entering or mounting or alighting from

the vehicle at the time of the occurrence of the event out of which a claim arises.

It was then stated that a policy of insurance is not required to cover risk to the passengers who are not carried for hire or reward. So, it was held

that the risk to a passenger in a vehicle who is not carried for hire or reward is not required to be insured. It was, however, pointed in Para 21 that

an insurer can always take policies covering risks which are not covered by the requirements of Section 95. As in the case dealt by the Supreme

Court the insurer had insured risk of passengers also by paying additional premium, the insurer was also made liable to the extent of Rs. 15000/-

out of Rs. 27,500/- awarded in favour of the claimant, in view of the fact that the policy had fixed the scale of compensation by limiting the

compensation to Rs. 15000/-.

10. After the decision in Puspabai there is no scope to argue that under an ""act only"" policy the insurer is liable to indemnify the insured for the

compensation payable by the latter in case of death or bodily injury to the passenger who is not carried for hire or reward. Of course, a particular

policy may travel beyond the limit of Section 95 and cover cases of gratuitous passengers also.

11. The decision in Puspabai has been followed in Jam Shri Staji Digvijaysingji and Others Vs. Daud Taiyab and Others, ; Ambaben and Others

Vs. Usmanbhai Amirmiya Shaikh and Others, ; The Premier Insurance Co. Ltd., Vijayawada Vs. Vaddeswarapu Siromanamma and Others, ; and

Oriental Fire and General Insurance Co. Ltd. Vs. Shivana Gouda and Others,

12. We are not required to examine in the present reference as to whether and to what extent the owner of the vehicle would be liable for picking

up of passengers on way or give them lift in prohibition of statutory rules. We are therefore not dealing with what was stated in this connection in

The Premier Insurance Co. Ltd., Madras Vs. Gokar Ranfaraju and Others, and Jiwan Dass Roshan Lal Vs. Karnail Singh and Others, which were

also brought to our notice by Shri Talukdar appearing for the insurer. We may only repeat that the law in this connection has changed a lot to

which reference has been made in Pushpa Bai by referring to development of English law on this aspect.

13. The decision in Guru Govekar Vs. Miss Filomena F. Lobo and Others, to which our attention has been drawn by Shri Das deals with an

entirely different question and is not relevant to answer the point under reference, inasmuch as this decision has dealt with the liability of the insurer

when third party suffers injury in public place on account of negligence of the mechanic engaged by a repairer in whose custody the vehicle has

been left.

14. We now come to another important related question. The same is what would happen if the insurer travels beyond an ""act only"" policy. There

is no doubt that it is open to an insurer to take policy covering higher risk, or risks beyond what is required by the Act. This is what has been Laid

down in National Insurance Co. Ltd., New Delhi Vs. Jugal Kishore and Others, In this case the effect of taking out a comprehensive policy has

also been dealt with. It has been stated that a comprehensive insurance of the vehicle and payment of higher premium on this score do not mean

that the limit of the liability with regard to third party risks become unlimited or higher than the statutory limit fixed u/s 95(2) of the Act. For this

purpose a specific agreement has to be arrived at between the owner and the Insurance company and separate premium has to be paid on the

amount of liability undertaken by the insurance company in this behalf. While on the subject of terms of the specific policy, we may say that as per

the decision in Jugal Kishore, it is the duty of the insurance company to file the copy of the policy before the Tribunal or even before the High

Court to satisfy that the liability of the insurers is not in excess of the statutory liability. The decision in Jugal Kishore bas been followed by this

Court in National Transport v. Saraswati Nag (MA (F) 57 of 1978 disposed of on 12-4-88).

15. A very important decision bearing on the question under reference bas been brought to our notice by Shri G. Choudhuri. The decision is of

Orissa High Court Oriental Fire and General Insurance Co. Ltd. v. Sanatan Pradhan 1988 (2) TAC 43, wherein the learned Judge referred to

instructions of the Tariff Advisory Committee, a statutory Body, issued on 13-3 1978 requiring the Insurance Companies to mandatory

incorporate a clause in the insurance contract reading ""death of or bodily injury to any person including occupants carried in the motor car

provided that such occupants are not carried for hire or reward"" bringing the above instruction into force with effect from 25th March, 1977. In

this connection reference was also made to Sagar Chand v. Santosh Gupta 1985 ACJ 585 (Delhi). As in the Orissa decision, the accident bad

taken place in 1982 after the aforesaid instruction, the learned Chief Justice who spoke for the Court had no difficulty in holding that the insurer

was liable for the injuries sustained by gratuitous passenger of a private insured vehicle by observing that by fiction of law the wider liability will be

deemed to have been included in the insurance cover. This observation was made because reference to the Delhi case shows that the instruction of

the Tariff Advisory Committee (the full text of which we could not obtain despite best efforts) had stated that ""all existing policies should be

deemed to incorporate this amendment automatically"". Shri Choudhuri would not however like us to confine the benefit of the aforesaid instruction

to the accidents, which had taken place on or after 25th March 1977. He contends that the aforesaid instruction having been issued by a statutory

body in the interest of the travelling public must be regarding as a piece of beneficial provision and must be given retrospective effect. To persuade

us to do so, the learned Counsel referred to a recent decision of this Court in New India Assurance Co. v. Ramesh Kalit MA (F) 33/87 disposed

of on 29-7-88, wherein the learned single Judge held that the provision contained in Section 92-A of the Act has retrospective effect inasmuch as

the same is a social beneficial piece of legislation made with a view to protect the general public from the grave risk which they face while on the

road. Before we express our views on this aspect of the case, we may state that we are in respectful agreement with the stand taken by the Delhi

and Orissa High Courts relating to coverage of gratuitous passengers after the aforesaid instructions were issued by the Tariff Advisory Committee

made effective from 25th March, 1977. It has indeed been brought to our notice by Shri A.K. Choudhuri that in recent private car comprehensive

policies a provision has been made for compensation arising out of accidents to unnamed passengers other than the insured and his paid driver or

cleaner for which some additional premium is charged.

16. On the question of retrospective effect to be given to the aforesaid instruction of the Tariff Advisory Committee, we have given our considered

thought. The relevant instruction having stated that ""all existing policies should be deemed to incorporate this amendment automatically"", and the

decision having been brought into force with effect from 25th March, 1977, on which date the judgment of the Supreme Court in Puspa Bat''s case

was rendered, we are of the view that the instruction shall apply to all those proceedings pending before any adjudicatory forum since 25th March,

1977 though the accident might have taken place before that date and the concerned policy not including such a risk might have been taken out

before 25th March, 1977. This was the opinion expressed in Sagar Chand''s case (supra). We are taking this view for these reasons:

(1) The limited retrospective effect given to the instruction from 25th March, 1977, on which date Puspabai''s case was decided by the Supreme

Court, indicates that the Tariff Advisory Committee wanted to modify the rigour of ratio of the aforesaid decision by ordering deeming insertion of

the above clause in every policy.

(2) In Craies on Statute Law, 7th Edition, it has been stated at page 396 under the heading ""Statute virtually retrospective"" That ""sometimes a

statute although not intended to be retrospective, will in effect have a retrospective operation. For instance, if two persons enter into a contract and

afterwards a statute is passed, which, as Cock burn, C.J. said in Duke of Devon shire v. Borrow ""engrafts an enactment upon existing contracts

and thus operates so as to produce a result which is something quite different from the original intention of the contracting parties, such a statute

has, in effect, retrospective operation"". In the present case the relevant instruction of the Tariff Advisory Committee has definitely engrafted a

statutory provision upon existing contracts whose effect is that by fiction of law a clause stating ""death or bodily injury to any person including

occupants carried in the motor car provided that such occupants are not carried for hire of reward"" became a part of the policy itself.

(3) In this connection we have noted the observations made in Skandia Insurance Co. Ltd. v. Kokilaben AIR 1987 SC 1184, wherein it has been

stated that when the option is between opting for a view which will relieve the distress and misery of the victims of accidents or their dependents on

the one hand and the equally plausible view which will reduce the profitability of the insurer in regard to the occupational hazard undertaken by him

by way of business activity, there is hardly any choice. The Court cannot but opt for the former view.

(4) We have also considered two decisions of the Apex Court, one in Bhag Singh and Others Vs. Union Territory of Chandigarh through the land

acquisition collector, Chandigarh, and the other in Bharat Singh Vs. Management of New Delhi Tuberculosis center, New Delhi and Others, In

both these decisions though the legislature or the concerned delegated authority had given effect to the amendments from a particular date, the

Apex court held respectively that the provisions would apply to award pending before any forum on the appointed date, or to awards passed even

prior to the appointed date. The decision in Bhag Singh further held that the appeal against the award u/s 18 of the Land Acquisition Act, 1894

would be treated as a continuation of the proceedings initiated before the Reference Court. Applying the same logic we would say that appeal

pending against the award of Motor Accidents claims Tribunal before the appellate Courts on or after 25th March 1977 would be a continuation

of the proceedings initiated before the Tribunal.

17. We are therefore of the view that the statutory instruction of the Tariff Advisory Committee noted above would apply to all those cases which

are pending before the claims Tribunal or before the appellate authorities since 25th March, 1977.

18. In the result, we answer the question referred to this Bench by stating that an insurer would be liable to indemnify the insured in respect of

compensation awarded against him for the death or bodily injury to a gratuitous passenger in all those cases which are pending before the claims

Tribunal or appellate authorities since 25th March, 1977. In other cases the insurer would be liable in cases of the present nature if the particular

policy covered the risk, and it shall be the burden of the insurer to satisfy by producing the policy that such a risk was not covered by the policy, if

that was its case before the claims Tribunal.

S. Haque, J.

19. I agree.

S.N. Phukan, J.

20. I agree.

J. Sangma, J.

21. I agree.

S.K. Homchaudhuri, J.

22. I agree.