(1985) 12 BOM CK 0029

Bombay High Court

Case No: First Appeal No''s. 51 and 52 of 1985

Raghunath Eknath Hivale		APPELLANT
	Vs	
Shardabai Karbhari Kale and Others etc.		RESPONDENT

Date of Decision: Dec. 3, 1985

Acts Referred:

- Central Motor Vehicles Rules, 1989 - Rule 118
- Motor Vehicles Act, 1939 - Section 96

Citation: AIR 1986 Bom 386 : (1986) 1 BomCR 474 : (1985) 87 BOMLR 657 : (1986) MhLj 170

Hon'ble Judges: Sawant, J; Kosle-Patel, J

Bench: Division Bench

Advocate: C.J. Sawant and Rajendra Sawant, for the Appellant; H.A. Solkar and D.M. Butani, for the Respondent

Judgement

Sawant, J.
These are two appeals filed by the owner of a truck which is a goods vehicle against the decisions of the Accidents Claims Tribunal, Ahmednagar, making him liable to pay compensation to the claimants under the Motor Vehicles Act, 1939.

2. The relevant facts leading to both the appeals are as follows:-

The accident in question took place at about 9-30 a.m. on the 28th July, 1982 near Chandnapuri Shivar on Sangamner-pune Road. The truck in question bearing motor vehicle No.MWA 548 owned and driven by the Appellant Raghunath. At the relevant time it was loaded with 700 baskets full of tomatoes. Along with tomato baskets, the truck was also carrying 15 to 16 owners thereof. Some of them were sittingg gin the receptacle of the truck and two of them were sittinggg by the side of the driver. As the truck proceeded after crossing a corner, according to the Appellant, a jeep car came from the front and on the wrong side of the road. He therefore tried to avert a collision, with the result that he took the truck to the extreme side of the road on his

side. However about 2 to 3 persons were walking at that time on the left hand side of the road from which side the truck was proceeding ahead. As a result of the Appellant''s attempt to avert the collision with the jeep, the truck went into the nearby agricultural field and turned turtle. Two of the persons who were walking came under the truck and died on the spot. The heirs and legal representatives of the two deceased thereafter filed the present claims for compensation before the Tribunal. The claims were resisted by the Appellant as well as by the New India Assurance Company Limited with which the truck was insured during the relevant period. The Appellant resisted the claims on various counts including the ground that since the truck was insured the insurance company alone was liable to pay the compensation. The insurance company on the other hand took the stand that since at the relevant time the truck was also carrying passengers for which purpose admittedly the truck had no permit, the company had no liability to pay the compensation and it was the owner and the driver of the truck who were liable to pay the same. It is not necessary to refer to the other defences raised by the Appellant-owner of the truck and the insurance company who is liable to pay the compensation.

3. The Tribunal on the basis of the pleadings and the evidence on record came to the conclusion that the negligence was proved and it was only the owner of the vehicle who was also the driver at the relevant time, who was liable to pay the compensation amount of Rs. 25,000/- in each case. The Tribunal exonerated the insurance company from the liability to pay the compensation on the ground that the truck was carrying more than seven persons as passengers which is prohibited under Rule 118 of the Motor Vehicles Rules, 1959 (hereinafter referred to as the Rules). However, the Tribunal in the operative part of the order, also stated as follows: "The question of liability of the Insurance Company to make initial payment u/s 96 of the Motor Vehicles Act, 1939, however, is kept open." We will deal with this observation at the proper time. Suffice it to say at this stage that since the Tribunal allowed the claims in both the claim applications against the Appellant-owner-driver has preferred these two appeals.

4. As stated earlier, the only point which is argued before us by the Appellant as well as the Respondent-Insurance Company is whether on the admitted facts of the case, the insurance company can be absolved of its liability to pau compensation under the Act.

5. There is no dispute that the truck had a permit to ply for hire for carrying goods. At the relevant time, the truck was carrying 700 baskets full of tomatoes and along with these goods, it was also carrying about 15 to 16 owners of the said baskets. It was, while the vehicle was in the process of carrying the goods and its owners, that the accident in question occured. The claimants before us are the heirs and legal representatives of the two victims who were admittedly the pedestrians on the road. Hence we are concerned in this case with the liability towards the third party.

6. Chapter VII of the Act deals with "Insurance of Motor Vehicles against third party risks." We are concerned here with sections 94 to 96 of the said Chapter. Section 94 states that no person shall use a vehicle in a public place unless he takes out a policy of insurance complying with the requirements of the said Chapter. The persons excepted from this provision are passengers and a driver-employee, and the vehicles excluded therefrom are those owned by the Central or State Government, the local authority or a State Transport Undertaking. S.95 lays down the requirements of the insurance policy. In particular, it requires that the policy must insure persons or classes of persons specified in the policy to the extent stated in sub-section (2) thereof. The liability against which the insured is to be secured is laid down in sub-clause (b) of sub-section (i) of the said Section. That liability is the one which may be incurred in respect of the death of or bodily injury to any person or damage to any property of a third party caused by or arising out of the use of the vehicle in a public place, and also against the death of or bodily injury to any passenger of a public service vehicle caused by or arising out of the use of the vehicle ina public place.

Sub-section (2) of the said section then lays down the limits of the pecuniary liability. We are not concerned here with sections 95A and 95AA which deal with the validity of the policy of insurance issued in reciprocating countries and the security to be deposited by the insurers, respectively. Then comes section 96 with which we are directly concerned in the present case. Sub-section (1) thereof lays down the duty of the insurer to satisfy judgments against persons insured against the third party risks. Sub-section (2) states the conditions under which the absolute liability created by sub-section (1) can be avoided. What is necessary to note is that these are the only conditions under which an insurer can avoid his liabilty. The conditions stated in sub-clause (a) need not detain us here since they are not relevant for our purpose. It is the conditions contained in sub-clause (b) which were pressed into service and extensively debated before us by both sides. We may therefore reproduce the whole of sub-clause (b) of sub-section (2) of section 96 herein :-

"Section 96(2) ..... an insurer..... shall be entitled ..... to defend the action on any of the following grounds namely -

x x x x x x x x x

(b) 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 -

(a) for hire or reward, 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

(b) for orgainsed racing and speed testing, or

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

(d) without side-car being attached, where the vehicle is a motor cycle."

7. What was argued on behalf of the Appellant on the basis of the above sub-clause was that the truck in question was insured as a vehicle used for carrying goods on hire. It had a permit to ply for hire for the purpose of carrying goods. There was therefore no breach of any condition specified in the policy and hence the insurance company cannot be exempted from its absolute liability created by sub-section(1) of section 96. As against this, the argument of the insurance company was that although the permit issued to the truck was only for carrying goods, it was at the relevant time admittedly carrying passengers also. The number of persons that a goods vehicle is permitted to carry is governed by R.118 and the present vehicle being not a light transport vehicle, it could not have carried more than seven persons under the said Rule. At the relevant time admittedly the vehicle was carrying about 15 to 16 persons. Hence the truck was being run in breach of the permit issued to it to ply it as a goods vehicle. The further argument on behalf of the Insurance Company was that by carrying persons in excess of seven, the owner had also committed a breach of the contract of insurance since the conditions on which the insurance policy was issued had prohibited the use of the truck for a purpose other than for carrying the goods. It was therefore contended that clause (b)(i)(a) as well as clause (b)(i)(c) of Section 96(2) were directly contravened and the Insurance Company was not liable to pay the compensation.

8. We are inclined to negative the contentions of the Insurance company on the following grounds. It is true that at the relevant time the truck was carrying about 15 to 16 persons in addition to the goods for the carriage of which alone the permit was issued to ply it. However it must not be lost sight of that under the said Rule 118, even a goods vehicle is permitted to carry persons though up to seven in number. Those persons include the owner or the hirer of the vehicle. The only condition for carrying such persons is that they have to be carried free of charge. Hence even if a vehicle has a permit only for carrying goods, the carrying of persons is not prohibited absolutely. The evidence on record admittedly shows that the passengers in question were the owners of the goods, i.e. the heirs of the vehicle. It is nobody''s case that they were charged any fare. The only condition of the permit which was breached was that the persons in question were in excess of the number permitted by the Rule. This was a breach of the condition of the permit issued for plying the vehicle. The vehicle was however being used essentially for carrying the goods. It cannot therefore be said that the vehicle was not being used for the purpose for which the permit was issed. A breach of the condition of the permit is not the same thing as breach of the purpose for which it is issued. The contravention of one of the other conditions of the permit is not a contravention of the purpose for which the permit is issued. There was therefore no contravention

either of clause (b)(i)(a) or of (b)(i)(c) of section 96(2) which clauses alone are and can be pressed into service on behalf of the insurance company.

9. The insurer can avoid his liability only if the conditions specified in section 96(2) are satisfied, and not otherwise. The contract between the insurer and the insured may permit the insurer to avoid his liability under various circumstances. However, if those circumstances do not satisfy the provisions of section 96(2), the insurer cannot escape his liability for the third party risks. The statute recognises no other condition for an insurer to escape his liability except those given in Section 96(2) whatever the terms of the contract between the insurer and the insured. The terms of the contract between the insurer and the insured determining their rights and liability towards each other are not and should not be confused with the statutory liability of the insurer for the third party risks. If there is a breach of the contract on the part of the insured, the insurer may proceed against the insured. As far as the third party risks are concerned, the liability being statutory, it cannot be overridden by the terms of the contract of insurance, between the parties.

10. This being the legal position, we see no justification for the defence advanced on behalf of the insurance company in the present case. We are fortified in the view we are taking by a decision of the learned single Judge of the Kerala High Court reported in 1971 Acc CJ 219 , Kesavan Nair v. State Insurance Officer, and by a decision of the Division Bench of the Karnataka High Court reported in The Madras Motor and General Insurance Co. Ltd. and Another Vs. Nanjamma and Others, More or less a similar view is taken by the Andhra Pradesh High Court in a decision reported in 1979 Acc CJ 110, United India Fire & General Insurance Company Ltd. v. Naddali Suseela. With respect these decisions adopt the same line of reasoning as we have adopt the same line of reasoning as we have done here. It is therefore not necessary to discuss the said decisions in detail.

11. In view of what we have held above, it is clear that it is the insurance company which is Respondent No.5 in Appeal No.51 of 1985 and Respondent No.3 in Appeal No.52 of 1985 which will be liable to pay the compensation awarded by the Tribunal and not the Appellant who is the owner-driver of the truck in question. Hence to that extent the decision of the Tribunal will have to be set aside.

12. It has however been rightly pointed out on behalf of the insurance company that the Tribunal''s observations in both the cases, that the question of liability of the insurance company to make initial payment u/s 96 of the Act is kept open is uncalled for and unless it is set aside it is likely to give rise to further litigation. There is not indication in the body of the judgment as to why the Tribunal has found it necessary to keep that question open. The learned counsel appearing for the claimants in both the cases were also unable to enlighten us on the point. It appears for the claimants in both the cases were also unable to enlighten us on the point. It appears that probably the Tribunal had in mind the amendment to the Act whereby Chapter VIIA dealing with liability without fault in certain cases, was introduced. Since the

accident in the present case occured on the 28th July, 1982 and the provisions of the section came into force on a subsequent date, they will not be applicable to the facts of the present case. Hence the said observations have to be set aside.

13. In the result, we allow both the appeals and pass the following orders in them:-

In Appeal No.51 of 1985, the impugned award dt. the 1st Oct. 1984 is hereby set aside. Respondent No.5 is directed to pay Respondents Nos. 1to 4 a sum of Rs. 25,000/- together with interest at 6% per annum from the 30th Sept. 1982, i.e. the date of the filing of the claim application till payment along with costs throughout. Out of the amount of Rs.25,000/- an amount of Rs.5,000/- should be invested in a fixed deposit account in any nationalised bank in the name of each of Respondents Nos. 2 to 4 with Respondent No.1 acting as their guardian. Respondents Nos. 2 to 4 will be entitled to withdraw the said amounts on their attaining majority. Respondent No.1 will however be entitled to utilise the interests accruing on the said amounts from time to time, for the expenses of bringing up Respondents Nos. 2 to 4. The remaining amount of Rs. 10,000/- with interest should be paid to Respondent No.1. The Appellant to bear his own costs.

14. In Appeal No.52 of 1985 the award dated the 1st October 1984 is hereby set aside. Respondent No.3 is directed to pay Respondents Nos. 1 and 2 a sum of Rs. 25,000/- together with interest at 6% per annum from the 30th Sept. 1982, i.e. the date of the filing of the claim application till payment along with costs throughout. A sum of Rs. 5,000/-be invested in the name of Respondent No.2 in a fixed deposit account in any nationalised bank. Respondent No.2 will be entitled to receive the said amount on attaining majority. Respondent No.1 will act as a guardian of Respondent No.2 and will be entitled to receive interest on the said amount of Rs. 5,000/- which may accrue from time to time. The Appellant to bear his own costs. Appeals allowed.