

Purushothama Devadiga Vs. Smt. Thangamma and Others

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Court : Karnataka

Decided On : Feb-06-1997

Reported in : 1999ACJ470

Judge : Hari Nath Tilhari, J.

Acts : [Motor Vehicles Act, 1939](#) - Sections 95(2); Karnataka Motor Vehicles Rules, 1963 - Rule 3; [Insurance Act, 1938](#) - Sections 64-UC; [Motor Vehicles ACt, 1988](#) - Sections 147

Appeal No. : Miscellaneous First Appeal No. 711 of 1994

Appellant : Purushothama Devadiga

Respondent : Smt. Thangamma and Others

Advocate for Def. : Sri P.K. Bhat and ;Sri M. Sowriraju, Adv.

Advocate for Pet/Ap. : Sri A.S. Viswanath, Adv.

Judgement :

1. This is an appeal by insured-owner of the vehicle from the judgement and award dated 1-2-1994, delivered by Sri K. Rajashekhar, II Additional District Judge/Member, Motor Accidents Claims Tribunal-III, D.K., Mangalore, in M.V.C. Case No. 468 of 1988, whereby the Tribunal has awarded the claimants respondents a sum of Rs. 64,000/- as total compensation less Rs. 15,000/- award

received from respondent 3 in the claim petition namely from United India Insurance Company.

2. The Tribunal, to be in brief, held as under:

That, the motor accident was due to negligence of the driver respondent 1 of the vehicle as also contributory negligence of the deceased Balakrishna, which, had taken place on 25-3-1988 and on account of which Balakrishna had died of the injuries suffered by him. The Tribunal after having recorded about the negligence and contributory negligence further held that the liability of the Insurance Company has been limited to the extent of Rs. 15,000/- and the Insurance Company was liable to pay Rs.15,000/- only and not more, while the balance of Rs. 49,000/-, the Tribunal found and held, to be recoverable from respondent 2 the Owner of the bus.

3. Feeling aggrieved from the judgement and award of the Tribunal, the owner of the bus has filed this appeal. No cross-objections or cross-appeal has been filed in respect of quantum of compensation awarded nor with reference to the finding on Issues 1 and 2 i.e., question of negligence and contributory negligence. The appeal filed by the owner raises one question of law namely the extent of liability of the Insurance Company or that of the owner of the bus. The question is whether the liability of Insurance Company-respondent 3 in the memo of appeal has rightly been held to be limited to the extent of Rs. 15,000/- or that finding is incorrect.

4. I have heard the learned Counsel for the appellant Sri A.S. Vishwanath and Sri M. Showriraju, learned counsel for the Insurance Company-respondent 3. None has appeared on behalf of respondents 1 and 2 i.e., the claimant and the driver.

5. Sri A.S.Vishwanath, learned Counsel for the appellant, contended before me that in the present case if this Court comes to the conclusion that the deceased was a passenger and not a person other than a passenger, then his appeal may fail. Learned Counsel submitted that the evidence on record reveals that the deceased was not a passenger at the time the occurrence did take place. Learned Counsel in this connection made a reference to the depositions of P.W. 1 and P.W. 2 as well as to the statement of D.W. 1 and placed before me which I will

quote hereafter. He submitted that the evidence of these witnesses clearly reveals that the finding recorded by the Tribunal to the effect that the deceased was a passenger and the liability of the Insurance Company was limited to the tune of Rs.15,000/- only is incorrect on facts and in law. In support of his contention on the point of law, the learned Counsel made reference to the provisions of Section 95(1) and sub-section (2)(b)(ii) thereof the Motor Vehicles Act 1939, which is analogous to the sub-section (D(b)(ii) of Section 147 of Motor Vehicles Act, 1988. Learned Counsel for the appellant also made a reference to the Division Bench decision of the Bombay High Court in the case of Prakash Anand Pednekar v Smt. Sitabai R. Gawas and Others and to the decision of Orissa High Court in the case of United India Insurance Company Limited v Smt. Susila Panigrahy and Others and contended that so long as a person has not entered or mounted into a bus, he cannot be termed to be a passenger. Learned Counsel contended that the deceased has not even mounted on the bus or entered into the bus and he was on the road, so he could not be taken to be a passenger and as such liability of the Insurance Company in such a case was unlimited in terms of the policy itself.

6. Sri Sowriraju, learned Counsel for respondent 3, originally contested the contentions made by the learned Counsel for the appellant, but very fairly submitted that in view of the finding of the Tribunal to the effect that when accident had taken place, the deceased was coming across the bus asking the driver to stop the bus. So the finding indicates that he had not entered into the bus at all. He submitted that mere purchase of ticket without entering into the bus would not make him a passenger.

7. I have applied my mind to the contentions made by the learned Counsel for the parties. Before I proceed further it will be proper to refer to the provisions of Section 95(1) of the Act of 1939. It reads as under:

'Section 95. Requirements 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)

(b) insures the 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 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;

(ii) 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 in a public place:

Provided that a policy shall not be required.--

(i) not relevant

(ii) except where the vehicle is a 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 injury 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; or

(iii) not relevant.

(2) Subject to the proviso to sub-section (1), a policy of insurance shall cover any liability incurred in respect of any one accident up to the following limits, namely.--

(a) not relevant;

(b) where the vehicle is a vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment.--

(i) in respect of persons other than passengers carried for hire or reward, a limit of fifty thousand rupees in all;

(ii) in respect of passengers, a limit of fifteen thousand rupees for each individual passenger'.

The other sub-clauses are not material for our purpose. A perusal of the section will indicate that one of the requirements of the policy is that the policy of

insurance must be a policy which insures the person or classes of persons as specified in the policy i.e., insured to the extent specified in sub-section (2) against the liability which may be incurred by the insured in respect of death or bodily injury to any person or against liability which may be incurred by him in respect of damage to the property of a third party arising out of use of motor vehicle. Clause (b)(ii) Section 95(1) provides that insurance must also insure against the liability which may be incurred 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 public place. The proviso to sub-section (1) to Section 95 provides that the policy required to be taken under Section 95 shall not be required to cover the liabilities referred to therein vide clauses(i) and (ii) of the proviso itself but subject to further exceptions specified in the clauses (i) and (ii) of proviso itself. Proviso (ii) also specifies exception to general exception under the proviso and that policy shall not be required to cover in respect of vehicle in which passengers are carried for hire or reward or in which passengers are carried by reason of or in pursuance of a contract of employment and to cover liability in respect of the death of or bodily injury to persons being carried in or upon or entering or mounting or alighting from the vehicle at the time of the occurrence of the accident. It appears that the Tribunal has relied on Section 95(2)(b)(ii) of the Act treating the deceased as a passenger. The question is if deceased was a passenger, what expression 'passenger' means. It is not a term of art. In Black's Law Dictionary, the expression 'passenger' has been defined to mean that, in the legal sense it refers to one who is being carried by another for hire; on other occasions, the word is interpreted as meaning any occupant of a vehicle other than the person operating it. Before I proceed further, it will be just and proper to make reference to the statement of the witnesses of occurrence.

The witness of occurrence P.W. 2-Sri Vishwanath, in the course of examination-in-chief, in Paragraph 2, has deposed:

'I was sitting in the front seat on the left side of the driver. Deceased Balakrishna showed his hand to the driver of the bus to stop near the bus-stop at Yeyyadi. But the bus came and dashed against him and it came in a high speed. He fell down. The bus went about 25 feet and stopped. The injured was taken to the hospital.

But he died at the spot itself and then taken to the hospital'.

From the statement of this witness P.W. 2, it comes out that when the accident did take place the deceased had not boarded the bus. He was standing on the road showing his hand to the driver to stop the bus and the bus was in a high speed. By the time it could be stopped, the bus dashed against Balakrishna and Balakrishna fell down. The bus stopped at a distance of about 25 feet. So this evidence clearly shows that the deceased Balakrishna had never boarded the bus when the accident did take place. He might have intended to board the bus when the bus would have stopped. But this witness of P.W. 2 shows that the deceased was a person other than passenger. He was not a passenger. In course of cross-examination as well this P.W. 2 has stated that the accident took place near bus-stand of Yayyadi. The accident took place after the bus left the bus-stand of Yayyadi. It is not true to suggest that the deceased attempted to board the bus and at that time, the accident took place. The statement in cross-examination further reveals that the accident did take place when the deceased was not even had attempted to board the bus. It had taken place earlier or before the bus could have stopped and in effort made by Balakrishna to board the bus.

8. D.W. 1-Francis Stephen Lobo is the driver of the bus. He has deposed in the course of examination-in-chief as under:

'I was working as a driver in the city bus 'Sri Ganesh' owned by 2nd respondent bearing No. MYG 3916. On 25-3-1988, at 6-45 p.m., I was driving the said bus from Yayyadi towards Bondel side. I do not know how the accident took place. A pedestrian sustained injury in the accident. I do not know which bus dashed against him. He fell on the ground'.

In course of cross-examination on behalf of respondent 3, the driver-D.W. 1 denied the suggestion which had been made on behalf of the Insurance Company that while trying to board the bus, Balakrishna fell from the bus and died. D.W. 1 states that:

'It is not true to suggest that while said man was trying to board the bus he fell down from the bus. I do not know if said man fell down while boarding the bus. I

am not aware if he fell down from our bus'.

9. Thus the evidence on record reveals that the deceased had not boarded the bus. He was on the floor or on the ground when the bus was coming in a high speed. No doubt, that man might have showed his hand to stop the bus. But before the bus could stop, it dashed against him and Balakrishna fell down and died because of the injuries caused in the accident. So the deceased cannot be said to be a passenger in the bus at the time when the occurrence had taken place.

10. The Trial Court has observed in its judgement that it is an admitted fact in the main petition that the bus came and stopped at Yayyadi bus-stand. Few persons were alighted from the bus. It is also found that the bus came at Yayyadi and there some passengers got into the bus and thereafter bus left Yayyadi. While the bus was in slow-motion, the deceased Balakrishna attempted to board the bus and slipped and fell down on the ground and sustained injuries and later succumbed to the same. It held that the driver and conductor of the bus were also responsible for the negligence and the deceased was also responsible for contributory negligence. The Tribunal further referred to the evidence of P.W. 2 that the bus came in a high speed when the deceased came to stop the bus and the bus dashed. But it gave weight to the fact that the driver should have taken care and finally recorded that the accident causing injury and resulting in death did take place on account of the negligence as well as contributory negligence of both the driver and of the deceased. The approach of the Court per se reveals while going through Issue 1 that at the time when the occurrence had taken place, the deceased had not at all boarded the bus. He was on the ground and then the accident did take place. When the deceased had not boarded the bus by the time the accident had taken place, had not entered or had not mounted the bus or any part thereof, even if he had attempted to stop the bus, it cannot be said that he was a passenger of the bus which caused the accident.

11. The expression 'passenger' does not appear to have been defined in the Act, neither in Chapter VIII of the Act nor in Chapter I of the Act. In the Rules framed under the Act by the Karnataka State popularly called as the Karnataka Motor

Vehicles Rules, 1963, the expression 'passenger' has been defined vide Rule 3(k). Under these rules, unless the context otherwise requires, (k) 'passenger' means any person travelling in a public service vehicle other than the driver or conductor or employee of the permit-holder while on duty. The definition per se reveals that to be a passenger what is essential is that at the time of the occurrence, the person must be travelling in the public service vehicle, but it excludes from its scope the driver, the conductor or any employee of the permit-holder while that person is on duty. The expression used in Section 95 is that the expression 'passenger' is not a term of art. It has to be interpreted as it is used in the ordinary parlance. One cannot be said to be a passenger of a bus or vehicle unless and until he has boarded the bus. Merely purchasing of the ticket is not sufficient. When a person purchases a ticket, he intends to travel. It is only when he boards the vehicle and the journey starts, it may be said that he becomes the passenger in the vehicle till the conclusion of his journey or he became the passenger and remained till the destination to which person concerned in the particular vehicle may go. I am not entering into the question that if a person after having entered into the vehicle in between the route, when the vehicle stops comes out of the vehicle concerned for a short while to ease or to do something and to proceed to his destination, whether in such a situation if a passenger meets with an accident, I do not want to express any opinion. But, no doubt, boarding in the vehicle is essential before the commencement of the vehicle from a particular place from where the person concerned has to start and the vehicle has started. But, if a person has not boarded and he is standing on the floor i.e., ground and the accident takes place, he cannot be taken to be a passenger in the vehicle. But once boarded the vehicle and starts for journey, other considerations may apply when he may come down from the vehicle in course of the journey. The passenger who travels or who has started travelling either in a plane or in a ship or in a motor vehicle, once that course had started, then it may be said he may be a passenger. In the present case, as evidence discloses, the deceased had not entered into the bus. The evidence reveals that while he was on the road he was hit or in an attempt to board the bus the person had fallen down and could not enter the bus and suffered injuries resulting in his death. In Prakash Anand's case, supra, in Paragraph 20, the Court observed:

'Upon gathering the above evidence it is clear that the deceased Raghunath had not even entered the bus. He therefore could not be a passenger. Though he wanted to be a passenger, in that minibus that stage had not arrived. Had he got into the bus in that event he would have been a passenger but from the evidence on record it is clear that he had not even entered the minibus and therefore he cannot be termed a passenger. In this view of the matter the 3rd respondent, insurer, cannot claim the benefit of Section 95(2)(b)(ii)'.

This case, in all effects, supports the view I am taking in the present case. Similar view has been expressed by the Orissa High Court in the case of *Susila Panigraky*, *supra*. Material observations therefrom may be quoted as under:

'In many cases he pays the fare after he enters a vehicle. To cover such situation proviso (ii) to sub-section (1) of Section 95 appears to have been enacted. Where a person who did not actually get into the vehicle sustained injuries from the moving vehicle while making an attempt to get entry into it cannot be said to have suffered death or bodily injury while being carried in or upon entering or mounting or alighting from the vehicle. There must be material to show that a person had any physical contact with the vehicle while entering or mounting if he was trying to get in, alighting from the vehicle, if he was trying to get out, when the accident occurred. The use of the words 'entering', 'mounting', 'alighting' clearly shows that the person has already got physical nexus or link with the vehicle. A person who runs after a vehicle or comes towards a vehicle to enter into it, cannot be treated as a passenger so long as he has not entered or mounted it. Facts of the present case show that the deceased had not actually got into the vehicle, and was merely making an attempt to get into the vehicle without any physical contact. Therefore, he cannot be construed to be a passenger to be encompassed by provisions of proviso (ii) to sub-section (1) of Section 95'.

12. In this view of the matter, in my opinion, in the present case the deceased Balakrishna was not a passenger. The policy is on record. It is Ex. D-1, Section II mentioned in the policy relates to the liability to third parties and it provides:

'1. Subject to the limits of liability, the Company will indemnify the insured against all sums including claimant's cost and expenses which the insured shall become

legally liable to pay in respect of.-- (i) death or bodily injury to any person caused by or arising out of the use (including the loading and unloading) of the motor vehicle;

(ii) not relevant'.

The schedule of premium in policy indicates that for additional security for increase in third party limits under head Section 11-1(1) the liabilities mentioned to be unlimited.

13. That, in view of the fact as found that the deceased was not a passenger. He was a person other than a passenger namely he may be said to be in ordinary terms as third party though third party ordinarily would have included a passenger, had clause (ii) in Section 95(b) would not have been there. So, here in my opinion deceased was a person other than a passenger, covered by Section 95(2)(b)(ii) and also indicating the liability in respect of death or injury as per the contract was taken as additional liability and the extent of liability has been unlimited.

14. In this view of the matter, the Tribunal committed an error of law in opining that the liability of the Company was only to the extent of Rs. 15,000/- and not to the entire amount of compensation + interest and cost. Thus considered in my opinion, the appeal deserves to be allowed. The award is modified only to this extent that the compensation payable under the award given by the Tribunal shall be payable jointly and severally by the appellant and the Insurance Company. In other respects, the award will remain as it is. On account of fair approach of the learned Counsel for the respondents, the costs of this appeal are made easy.