Dattu Nathu Kudekar and anr. Vs. the National Insurance Company and ors.

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Court : Gujarat

Decided On : Dec-11-1990

Reported in : II(1991)ACC8; 1991ACJ743; AIR1991Guj126; (1991)1GLR534

Judge : C.V. Jani and; Y.B. Bhatt, JJ.

Acts : Motor Vehicles Act, 1939 - Sections 95 and 110-B

Appeal No. : First Appeal No. 719 and 720 to 727/79

Appellant : Dattu Nathu Kudekar and anr.

Respondent : The National Insurance Company and ors.

Advocate for Def. : B.R. Shah, Adv.

Advocate for Pet/Ap. : S.B. Vakil, Adv.

Judgement :

C.V. Jani, J.

1. These 9 First Appeals Nos. 719/79 to 727/79 under Section 54 of the Motor Vehicles Act, 1939 arise out of the common judgment and Awards delivered by the learned Motor Accident Claims Tribunal, Panchmahals at Godhra, in Motor Accident Claims Petition Nos. 148 / 78, 167/ 78, 267/ 78, 272/78, 300/78, 301/78, 305/78, 315/78 and 314/78 respectively.

2. The 27 Special Civil Application Nos.1441/79, 1442/79, 1443/79, 1444/79, 1445/79, 1446/79, 1447/79, 1448/79, 1449/ 79, 1450/79, 1451/79, 1452/79, 1453/79, 1454/79, 1455/79, 1456/79, 1457/79, 1458/ 79, 1459/79, 1460/79, 1461/79, 1462/79, 1,463/179, 1464/79, 1465/79, 1466/79 and 1467,179 also have been filed by the same appellants against the same National Insurance Company and the claimants in Motor Accident Claim Petition Nos. 265/ 78, 266/ 78,'270/78, 273/78, 274/78 278/78, 299/78, 302/78, 303/78, 304/78, 306/ 78, 309/ 78, -310/78, 321/78, 322/78, 323/78, 325/78, 326/78, 311/78, 312/78, 313/78, 314/78, 316/78, 317/78, 318/78, 319/78 and 320/78 respectively.

3. As all the Motor Accident Claim Petitions filed by the different claimants for compensation in respect of the death of two persons Makna Siska and Magan Mansing Chhobla and injuries caused to the claimants in the same motor accident were consolidated, and decided by a common judgment by the learned Motor Accident Claims Tribunal on 28-2-1979, all the appeals and the Special Civil Applications challenging the dismissal of the claim against the National insurance Company are now being decided by this common judgment.

4. As no appeal lies against any Award of the Claims Tribunal, as per sub-section (2) of Section I 10-D of the Motor Vehicles Act, 1939, if the amount in dispute in the appeal is less than Rs. 2,000/ -, the judgment in Motor Accident Claim Petition Nos. 267/78 to 320/78, in which the Tribunal awarded less than Rs. 2,000/ - has been challenged by filing Special Civil Applications purporting to be under Article 226, but, virtually under

Article 227 of the Constitution of India.

5. In all the appeals the appellants are the driver, the owner and the hirer of the motor vehicle and the common respondent No. 1 is the Insurance Company, which had insured the motor vehicle, and other respondents are the original claimants. In the same way, in all the Special Civil Applications, the driver, the owner and the hirer of the motor vehicle are the petitioners, the Insurance Company, respondent No. 1, and the original claimants are the other respondents.

6. The facts giving rise to the motor -accident claim petitions are, in brief, as follows.

7. The deceased Makna Siska, the deceased Magen Mansing Chhobla and other applicants, after completion of their labour work during the night shift on 12-5-78, were, travelling in the early morning on 13-5-1978. in the truck belonging to the appellant No. 2, Modern Construction Company, for going to their residential colony. While climbing a slope the appellant No. 1 Dattu Nathu Kudekar, who was driving the vehicle lost control over its motion, as a result of which the truck fell back in a ditch and Makna Siska and Magan Mansing Chhobla died on the, spot; while other claimants received injuries. So, the heirs of the two deceased and other. injured persons filed their claims in the Tribunal. They pleaded that Advance Engineering Company, which is appellant NO.3 in these appeals, and the petitioner No.3 in the Special Civil Applications, engaged the truck which belonged to the Modern Construction Company, and which was insured with the respondent National Insurance Company.

8. The present appellants Nos. 1 & 2, who are also the petitioners Nos. 1 & 2 in Special Civil Application, who were the driver and the owner of the motor vehicle in question, filed similar joint written statement in all the petitions, as opponents Nos. 1 & 2. These opponents contended that the claimants and the deceased were the workmen of opponent No. 2 Modern Construction Company which was the owner of the motor vehicle and that the present appellant No. 3 Advance Engineering Company, had no concern with the work undertaken by the Modern Construction Company. It was also contended that the claimants were entitled to workmen compensation and such amount of workmen compensation had already been deducted by the. Executive Engineer, Kadana Dam from the Bills of Chetan Construction Company. They denied that the present appellant No. 3. Advance Engineering Company had hired the truck from the appellant No. 2 Modern Construction Company. They pleaded that the appellant No. 2 was carrying on the work, under sub-contract from M/s. Chetan Construct Company and in prosecution of this contract work, the appellant No. 2 Modern Construction Company was plying its own truck for carrying the labourers. This was the original case put up by the present appellants Nos. 1 &2 in their joint written statements in order to claim indemnity from the respondent No. 1 Insurance Company. It is to be borne in mind that the present appellant Nos. 1 & 2 gave a go-bye to their original defence while leading evidence. The present appellant No. 3, namely, Advance Engineering Company, did not file any written statement.

9. The present respondent National Insurance Company admitted that the Modern Construction Company insured the truck with the respondent Company. It was contended that the deceased and the other claimants were not bona fide employees of the Modern Construction Company, and the Insurance Company was not liable under the policy to pay any compensation as claimed. It was also contended that if the Tribunal held the Insurance Company liable, the liability would be restricted to the amount provided under Schedule IV of the Workmen Compensation Act, 1923.

10. All the opponents, namely the present appellant and the Insurance Company, denied that the driver was rash and negligent in driving the vehicle.

11. After raising almost uniform issues in all the petitions, the learned Tribunal found that the driver of the truck in question was guilty of rash and negligent driving which resulted in the death of Magan Mansing Chhobla and Makna Siska and injuries to the, other labourers travelling by the truck and that they were entitled to recover compensation from the opponent Nos. 1, 2 & 2-A, who are the present appellants, but not from the opponent No. 3 Insurance Company which is the present respondent No. 1.

12. So far as the quantum of compensation and the liability attributed to the present appellant is concerned, it is not disputed in these appeals and the Special Civil Applications. The real challenge is to the exoneration of the Insurance Company, which had insured the truck in question. After appreciation of the evidence on the record and the policy Exh. 42, as well as other documents, the learned Tribunal found that the Insurance Company was not liable to pay compensation.

13. The following factual findings of the learned Tribunal are not challenged, and cannot be assailed on merits in these appeals and the Special Civil Applications:

(i) Truck No. GTA 2194 which met with an accident on 13-5-78 belonged to appellant No. 2 Modern Construction Company, and the appellant No. 1 drove it at the relevant time.

(ii) The said truck was insured with the respondent National Insurance Company.

(iii) The deceased and the injured claimants were engaged as labourers by the appellant No. 3 Advance Engineering Company which was opponent No. 2-A in the motor accident claim petitions.

14. The appellant No. 1 Dattu Nathu Kudekar who was driving the motor truck belonging to the appellant No. 2 Modern Construction Company, admitted in cross examination that all the laborers were working in Advance Engineering Company, and the Advance Engineering Company had hired the truck from the Modern Construction Company. He also admitted that the Advance Engineering Company was paying him his wages. The claimant Bai Bhusi, widow of Makna Siska, also admitted that the claimants and the deceased were employees of Advance Engineering Company.

15. In view of this evidence of the claimant and the driver, the learned Tribunal did not accept the evidence of Bipinchandra, Exh. 80. Workshop Supervisor of Modern Construction Company Ltd. to the effect that the Modern Construction Company and the truck engaged the driver was being plied for the work of the Modern Construction Company. The Tribunal also did not attach much importance to the deduction of - Rs. 50,400/- by the State Government from the Bills of Chetan Construction Company, which had entered into a contract with the State Government for the construction of a masonry Dam, and to the claim form Ext. 84 filed by the Modern Construction Company, particularly in view of the endorsement made therein, to the effect that 'labourers not on duty when the accident occurred directly not employed.'

16. So, the finding of the Tribunal that the truck was hired by the Advance Engineering Company from the Modern Construction Company, and that the labourers were in the employment of the Advance Engineering Company could not be seriously assailed by the learned Advocate appearing for the, appellants.

17. Mr. S. B. Vakil, learned Advocate appearing for the appellants, has, however, made the following submissions on point of law:

(i) The Insurance Company could not escape the statutory liability imposed by S. 95 of the Motor Vehicles Act;

(ii) The Insurance Company was also liable under the driver's extension clause contained in the policy Ext. 42.

18. Mr. B. R. Shah, learned Advocate appearing for the respondent-Insurance Company, submitted that the labourers did not sustain bodily injuries in the course of their employment with the insured Modern Construction Company and their employment with the Advance Engineering Company has no reasonable and rational association with the work and the business of the insured. Mr. B. R. Shah also submitted that the driver's extension clause indemnifying the driver did not indemnify the insured if the vehicle was used or driven otherwise than in accordance with the conditions incorporated in the policy. He further submitted that the truck in question was a private carrier and was insured as such, and so, as per the terms, of the policy, it could not be hired out by the insured.

19. In order to appreciate the submissions made by Mr. Vakil, on the first count, it is necessary to refer to the

relevant provisions of Ss. 94, 95 and 96 of the Motor Vehicles Act, 1939:

'94. Necessity for insurance against third party risk, - (1) No person shall use except as a passenger or cause or allow any other person to use a motor vehicle in a public place, unless - there is in force in relation to the use of the vehicle by that person or that other person, as the case may be. a policy of insurance complying with the requirements of this Chapter.

Explanation.- xxx xxx xxx xxx

(2) and (3)-xxx xxx xxx xxx xxx

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) is issued by a person who is an authorised insurer (or by a co-operative society allowed under S. 108 to transact the business of an insurer), and

(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 of or bodily injury to any person or damage to any property of 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 or 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) to cover liability in respect of the death, arising out of and in the course of his employment, of the employee of a person insured by the policy or in respect of bodily injury sustained by such an employee arising out of and in the course of his employment other than a liability arising under the Workmen's Compensation Act, 1923 (8 of 1923), in respect of the death of, or bodily injury to, any such employee

(a) engaged in driving the vehicle, or

(b) if it is a public service vehicle, engaged as a conductor of the vehicle or in examining '94. Necessity for insurance against third tickets in the vehicle, or

(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) to cover any contractual liability.

Explanation.- xxx xxx xxx xxx

(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) where the vehicle is a goods vehicle, a limit of one lakh and fifty thousand rupees in all, including the liabilities, if any, arising under the Workmen's Compensation Act, 1923, in respect of the death of, or bodily injury to, employees (other than the driver), not exceeding six in number, being carried in the vehicle;

(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;

(c) save as provided in Clause (d), where the vehicle is a vehicle of any other class, the amount of liability incurred;

(d) irrespective of the class of the vehicle, a limit of rupees (six thousand) in all in respect of damage to any property of a third party.).

(3) (* *)

(4), (4A) and (5) xxx xxx xxx xxx

96. Duty of insurers to satisfy judgments against persons insured in respect of third party risk.- (1) If, after a certificate of insurance has been issued under sub-section (4) of S. 95 in favour of the person, by whom a policy has been effected judgment in respect of any such liability as is required to be covered by a policy under Cl.(b) of sub section (1) of S. 95 (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel or may have avoided or cancelled the policy, the insurer shall, subject to the provisions of this section, pay to the person entitled to the benefit of decree any sum or exceeding the sum assured payable there under, as if he were the judgment-debtor, in respect of the liability, together with any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.

(2) No sum shall be payable by an insurer under sub-section (1) in respect of any judgment unless before or after the commencement of the proceedings in which the judgment is given the insurer had notice through the Court of the bringing of the proceedings, or in respect of any judgment 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) and (b) xxx xxx xxx xxx xxx

(i) to (iii) xxx xxx xxx xxx xxx'

20. It is Mr. Vakil's submission that the labourers who were being carried in pursuance of a contract of employment in the vehicle, which was insured by the respondent-Insurance Company, who consequently became liable under S. 95 of the Motor Vehicles Act, suffered injuries.

21. Reliance was placed on a Division Bench judgment of this Court in the case of Oriental Fire & General Insurance Co. Ltd. v. Ganchi Ramanlal Kantilal, 20 GLR 134: (1979 Lab IC 531). In Ramanlal's case the station wagon belonging to the same Modern Construction Company was proceeding from Dharoi colony to Dharoi Project site and two employees of the State Government who were travelling by the Station Wagon expired due to the accident that took place on 20th November 1973. The awards made by the Tribunal in favour of the heirs of the deceased were challenged only on two grounds:

(i) The deceased were gratuitous passengers and the Insurance Company was not liable to pay anything to the claimants in order to indemnify the insured;

(ii) In the alternative, the liability of the Insurance Company was limited in terms of the policy to a sum of Rs. 15,000/- only.

22. The first contention of the learned Advocate appearing for the Insurance Company was rejected on the

ground that the expression 'any passenger' used in the policy covered all the categories of passengers including gratuitous passengers. The learned Advocate appearing on behalf of the owner of the vehicle, however, submitted that the Insurance Company would be liable under the provisions of S. 95(2)(b) of the Motor Vehicles Act. Emphasis was placed on Clause (b), which reads as under:

'Where a vehicle is a vehicle in which passengers are carried for hire or reward or by reason or in pursuance to a contract of employment.'

The Division Bench held that even though the deceased Sevantilal and Ramanlal were not employees of Modern Construction Company, but of the Government of Gujarat, which had entered into the contract with the Modern Construction Company, they were carried in the vehicle in pursuance of a contract of employment because their employment had a reasonable connection with the business of the owner of the vehicle. The learned Advocate for the Insurance Company had argued that the expression 'contract of employment' meant contract of employment between the deceased and the insured and no other contract of employment. The learned Advocates for the claimants and the owner of the vehicle had argued that the expression 'contract of employment' would mean that any contract of employment with which, directly or indirectly the insured was reasonably connected.

23. The Division Bench, therefore, observed that:

'The expression 'a contract of employment' used in S. 95(2)(b) is not conditioned by any qualifying words. Therefore, we see no reason to narrow down or squeeze its connotation so as to mean a contract of employment between the deceased and the insured. While on one hand we are not prepared to take such a narrow view of such expression, on the other hand we cannot take such a view so as to mean any contract of employment, which the deceased may have with any one in the world. Whereas the narrow connotation of this expression is unjustified by the language of legislation because if the Parliament had intended only 'a contract of employment' between the insured and the deceased it would have certainly used an appropriate qualifying expression for the purpose, the wider connotation is equally unjustified because we cannot fasten upon the insurance company the liability of every employed person carried by a vehicle irrespective of whether his employment had any reasonable and rational connection with the business of the owner of the vehicle - the insured or in any other manner. Whereas if we take the narrow view we would be guilty of stepping out of our bounds and trespassing into the realm of legislation, if we take the wider view we shall be exposing the insurance companies or insurers to unforeseen, unexpected and unimagined business hazards. Therefore, in our opinion, what the expression 'a contract of employment' means is that the passenger carried in a vehicle must be a passenger who is either employed by the insured or whose employment with some one else has a reasonable and rational association with the business which the insured is carrying on.'

24. Mr. Vakil also placed reliance on a latter judgment of another Division Bench of this Court in the case of United India General Insurance Co. Ltd. v. Shantaben Jerambhai Parmar : AIR1982Guj212 , in which certain observations made by another Division Bench in Jam Shri Saiji Digvijayasingji v. Daud Taiyab : AIR1978Guj153 were extensively reproduced.

25. Mr. Vakil also relied on a Full Bench judgment of this Court in the case of New India Assurance Co. Ltd. v. Smt. Nathiben Chatrabhuj : AIR1982Guj116 . The Full Bench observed as under:

'27. Now, in an action in which the claim of statutory coverage is advanced in respect of a passenger, who was carried on the insured vehicle when the accident giving rise to the claim occurred, the claimant will have to show that the statutory insurance coverage was available. In other words, he will have to show that the passengers risk was covered either by virtue of the provisions contained in Section 95(l)(b)(i) read with the first part of the second clause of the proviso or by reason of the provisions of S. 95(l)(b)(ii). The insurer, if he wants to disclaim the liability to satisfy the decree that may be passed in favour of the claimant in such an action will have to establish:

1. that on the date of the contract of insurance, the insured vehicle was expressly or implicitly not covered by a permit to ply for hire or reward, that is, by a permit to carry any passenger for hire or reward;

2. that there was a specified condition in the policy which excluded the use of the insured vehicle for the carriage of passengers for hire or reward, and

3. that the vehicle was, in fact, used in the breach of such specified condition on the occasion giving rise to the claim.

If all these facts are established by the insurer, then, by virtue of S. 96(2)(b)(i)(a), he may succeed in avoiding the liability to satisfy the decree that may come to be passed in the action.'

26. In the present case the driver and the insured had originally pleaded that the labourers were employees of the insured and the Advance Engineering Company had no concern with the work of Kadana Dam. They had also denied that the Advance Engineering Company had hired the truck of Modern Construction Company. This version was given a go-bye in the oral evidence. The driver in his oral evidence Exh.73 deposed that all the labourers were working in the Advance Engineering Co., which had hired the truck from the Modern Construction Company, and the Advance Company was paying the driver himself. He also admitted that the truck was a private carrier and it was registered as a private car in R.T.O. and a plate to that effect was displayed on the body of the truck. Bipinbhai Patel, Workshop Supervisor of the Modern Construction Company in his oral evidence Exh. 80 asserted that there was no connection between the Modern Construction Company and the Advance Engineering Company and that the Modern Construction Company had entered into a sub-contract with Chetan Construction Company for doing R.C.C. work of Masonry Dam undertaken by the Government of Gujarat. The Advance Engineering Company paid the claimant Bai Bhusi in her oral evidence Exh.70 also admitted that she was doing labour work in the Modern Construction Company and the Advance Engineering Company and every week labourer's wages. Though Bipinbhai deposed that signatures or thumb impression of the labourers were being taken in the muster roll maintained by the Modern Construction Company no such muster was produced. The learned Tribunal, therefore, rightly inferred that the Advance Engineering Company hired the truck and the labourers who were working under the Advance Engineering Company were not being carried in the vehicle in pursuance to a contract of employment, which had a rational association with the business that the insured was carrying on. Admittedly, the truck in question was a private carrier as per the evidence of the driver who is one of the appellants in these appeals. Mr. Vakil, however, submitted that as per Cl.(b) of subsec.(2) of S.96, the Insurance Company would be entitled to defend the action on the ground that there had been a breach of the specified condition of the policy, namely, the condition excluding the use of the vehicle for hire or reward, where the vehicle is on the date of the contract of insurance not covered by permit to ply for hire or reward. The policy Exh. 42 contain the condition excluding the use of the vehicle for hire or reward. However, according to Mr. Vakil, the Insurance Company can avail of such a condition, in order to avoid the claim, only if the vehicle was not covered by a permit to ply for hire or reward on the date of the contract of insurance. According to Mr. Vakil, the burden proving this condition was on the Insurance Company. He submitted that the Insurance Company and so led no evidence regarding such a permit excluding such a user, the Insurance Company must be held liable.

27. Mr. Vakil submitted that there was no specific pleading in this connection and there was also no issue on the point. The Insurance Company has merely denied its liability and the only issue raised by the Tribunal was whether the applicants were entitled to compensation from the opponent No. 3 Insurance Company. It is to be borne in mind that no such point about the want of the statutory defence had been raised before the learned Tribunal and naturally, therefore, the Tribunal did not deal with any such point. It cannot, however, be ignored that the oral evidence of the driver was recorded on 8-2-79. The policy Exh. 42 restricting the use of the vehicle only as a 'private carrier' and forbidding the use for hire or reward was produced on that very day. An application Exh. 45 was submitted on behalf of the Insurance Company on 8-2-79 for permission to cross-examine the driver, the owner and the hirer of the motor vehicle, on a clear ground that the insured

owner had committed breach of important conditions of the policy and had kept the Insurance Company in the dark about the real facts. This application was granted by the Tribunal and in cross examination thus permitted, the driver made important admission showing that the truck was a private carrier, registered as such in R.T.O. and the plate was displayed on the body of the truck. Naturally in view of this factual admission, on the part of one of the opponents, who was driver himself, opponent No. 2, namely Modern Construction Company, was expected to produce the permit from its possession, to show if it was not really prevented from plying the vehicle for hire or reward. It cannot be ignored that Bipinbhai, Workshop Supervisor of Modern Construction Company, admitted even in his examination-in-chief that the Modern Construction Company was not doing the business of plying truck on hire. It was obvious that in view of this admission contained in the oral evidence of the driver and the insured, it was necessary for the insured to produce the permit. The parties were very much conscious of the real issues involved and also the statutory defence taken up in the application Exh. 45 and they were also conscious of the fact that the condition of the policy prohibiting the use for hire or reward was violative. Where the parties go to trial fully knowing the rival case, it cannot be said that the absence of a specific plea or an issue was fatal to the case, as laid down in the case of Nedunuri Kameshwaramma v. Sampati Subba Rao : [1963]2SCR208 .

28. Even though the insured now represented by Mr. S. B. Vakil chose not to produce the permit in his possession and even though, the driver had admitted in his oral evidence that the vehicle was a private carrier and registered as such in R.T.O., Mr. Vakil submitted that such oral evidence cannot be permitted to prove the contents of the permit. He relied on Ss. 61, 62 and 64 of the Evidence Act. When faced with the query whether the insured being in possession of the permit under which it plied the vehicle was not expected to produce it in the Court if really it was permitted to ply for hire or reward, Mr. Vakil in spite of his long experience at the Bar, submitted that the insured was not served with any notice to produce any permit under S. 66 of the Evidence Act. Such a submission cannot be countenanced for a moment. No doubt, the burden of proof in any suit or proceedings lies on the person who would fail if no evidence at all were given on either side and one who desires any Court to give judgment as to any right or liability, depending on the existence of facts, must prove that those facts exist. However, the onus of proof shifts from time to time in view of the admissions made during the course of the evidence. Moreover, the Court can presume the existence of certain facts. As per illustration (g) of S. 114 of the Evidence Act, the Court may presume that evidence, which could be and is not produced, would, if produced, be unfavorable to the person who withholds it. In the present case, the Workshop Supervisor of the insured had clearly admitted that the insured was not doing the business of plying the truck on hire and the driver of the vehicle had also admitted that the Advance Engineering Company in spite of being a private carrier had hired the truck. There was a specific condition in the policy prohibiting the use of the hired vehicle for hire or reward. The insured was in possession of the permit. If the insured were permitted to ply the vehicle for hire or reward and thereby evade its personal liability, and shift the liability to the Insurance Company, in spite of the condition mentioned in the policy, it would certainly have produced such a permit in the Court. It was not for the Insurance Company to produce any documentary evidence regarding such permit in view of the admissions made by the insured, the driver and the Insurance Company in their evidence showing that the vehicle was a private carrier as defined in Clause (22) of S. 2 of the Motor Vehicles Act. We will advert to this definition a bit later. It has been laid down time and again that if the party concerned does not place the relevant documents admitted to have been in existence before the Court,, adverse inference can be drawn against that party. In the judgment of the Privy Council in T. S. Murugesam Pillai v. M. D. Gnana Sambandha Pandara Sannadhi AIR 1917 PC 6, Lord Shaw had made the following pertinent observations at page 8:

'A practice has grown up in Indian procedure of those in possession of important documents or information lying by, trusting to the abstract doctrine of the onus of proof, and failing accordingly to furnish to the Courts the best material for its decision. With regard to third parties, this may be right enough; they have no responsibility for the conduct of the suit; but with regard to the parties to the suit it is, in their Lordships' opinion, an inversion of sound practice for those desiring to rely upon a certain state of facts to withhold from the Court the written evidence in their possession which would throw light upon the proposition.'

These oral observations of the Privy Council were cited with approval by the Supreme Court in Hiralal v. Badkulal, 1953 SC 225 where the defendants had relied on the abstract doctrine of burden of proof and urged that it was not part of their duty to produce their books unless called upon to do so.

29. In the present case the failure on the part of the insured to produce the permit in spite of the admission made by the driver and the owner of the Motor Vehicle leads to only one conclusion that the insured did not possess any permit to ply the vehicle for hire or reward. Even during the hearing of these appeals, no such permit came to be produced on behalf of the appellants. There being additional condition in the policy itself, excluding use of the vehicle for hire or reward the Insurance Company was entitled to defend the action successfully as per sub-section (2) of S. 96. Mr. Vakil's submission that there was no specific plea on this point and no specific issue and so, the dismissal of the claim against the Insurance Company should be set aside in the appeal cannot be accepted. At the same time, Mr. Vakil submitted that the matter should not be remanded on this point after a period of I I years to permit the parties to lead their evidence. He simply asserted that the Award should be passed against the Insurance Company also.

30. This submission of Mr. Vakil cannot at all be accepted. The learned Tribunal was not called upon to decide any such point. The insured did not produce the permit, in spite of the admission made by the driver and the employee of the insured, and particularly when no such specific point has been taken in the appeal memo or in the Special Civil Application no such submission can be permitted or accepted at this stage.

31. The term 'private carrier' has been defined in Clause (22) of S. 2 of the Motor Vehicles Act, 1939 as 'an owner of transport vehicle other than a public carrier who uses that vehicle solely for the carriage of goods which are his property or the carriage of which is necessary for the purpose of his business, not being a business of providing transport, or who uses the vehicle for any of the purposes specified in sub-section (2) of S. 42'. Sub-section (2) of S. 42 reads as under:

'42(2). In determining, for the purposes of this Chapter, whether a transport vehicle is or is not used for the carriage of goods for hire or reward,

(a) the delivery or collection by or on behalf of the owner of goods sold, used or let on hire or hire-purchase in the course of any trade or business carried on by him other than the trade or business of providing transport,

(b) the delivery or collection by or on behalf of the owner of goods which have been or which are to be subjected to a process or treatment in the course of a trade or business carried on by him, or

(c)the carriage of goods in a transport vehicle by a manufacturer of or agent or dealer in such goods whilst the vehicle is being used for demonstration purposes,

shall not be deemed to constitute a carriage of the goods for hire or reward; but the carriage in a transport vehicle of goods by a person not being a dealer in such goods who has acquired temporary ownership of the goods for the purpose of transporting them to another place and there relinquishing ownership shall be deemed to constitute a carrying of the goods for hire or reward.'

The vehicle involved in the accident which is admitted to be a private carrier and registered as such in R.T.O. and also in the Insurance Policy, cannot, therefore, be used for carrying any passenger or goods for hire or reward, In any case, if the employees of a party hiring a private carrier belonging to the insured are injured in the accident the Insurance Company will not at all be liable for compensating them for the injuries caused to them, either under the statute or under the Insurance Policy.

32. So far as the second submission of Mr. Vakil regarding driver's extension clause is concerned, that also requires to be rejected in view of the explicit language of the relevant clause in the policy. Para 3 of S. 11 relating to Liability to Third Parties contained in Commercial Vehicle Policy Exh. 42 lays down the usual drivers extension clause.

'3. In terms of and subject to the limitation of the indemnity which is granted by this Section to the Insured the Company will indemnify any Driver who is driving the Motor Vehicle on the Insured's order or with his permission provided that such Driver;

(a) is not entitled to indemnity under any other policy;

(b) shall as though he were the Insured observe fulfill and be subject to the Terms Exceptions and Conditions of this Policy in so far as they can apply.'

Mr. Vakil submitted that as per this Para 3, the Insurance Company is liable to indemnify the driver, who is primarily liable for the injuries caused to the claimants or the deceased due to his negligent driving. Mr. Vakil, however, ignores the opening phrase of this paragraph:

'in terms of and subject to the limitation of the indemnity which is granted by this section to the insured.'

This limitation is incorporated amongst others in Clause (c) of the proviso to Para 1 of S. 11 which reads as under:

'(c) Except so far as is necessary to meet the requirements of S. 95 of Motor Vehicles Act, 1939 in relation to liability under the Workmen's Compensation Act, 1923, the Company shall not be liable in respect of death of or bodily injury to any person (other than a passenger carried by reason of or in pursuance of a contract of employment) being carried in or upon or entering or mounting or alighting from the Motor Vehicle at the time of the occurrence of the event out of which any claim arises.'

33. The policy Exh. 42 opens with the following preamble:

WHEREAS the Insured by a proposal and declaration, dated as stated in the Schedule which shall be the basis of this contract and is deemed to be incorporated herein has applied to the Company for the Insurance hereinafter contained and has paid or agreed to pay the premium as consideration for such insurance in respect of accident loss or damage occurring during the Period of Insurance.'

Thus the Schedule becomes a part of the contractual insurance. In this Schedule the following limitations regarding use of the vehicle are specifically mentioned:

'Limitations as to use; Private Carrier Use only under a Private Carriers permit within the meaning of the Motor Vehicles Act, 1939.

The Policy does not cover:

(1) Use for hire or reward or for organised racing pace making reliability Trial or Speed Testing.

(2) Use whilst drawing a trailer except the towing of any one disabled mechanically propelled Vehicle.'

The Policy Exh. 42, therefore, clearly prohibited the use of the vehicle for hire or reward. Moreover, the vehicle could be used only under the private carriers permit within the meaning of the Motor Vehicles Act, 1939.

34. As stated earlier, no documentary evidence in the form of the permit was produced by the insured in spite of the admissions of the driver and the employee of the insured. As a result, the Insurance Company was not liable under the driver's extension clause contained in the Policy Exh. 42. Mr. Vakil cited a judgment of the Supreme Court in New Asiatic Insurance Co. Ltd. v. Pessumal Dhanamal Aswani : [1964]7SCR867 . In the case before their Lordships of the Supreme Court, when the respondent Pessumal who was permitted by the owner Asnani to drive his car, he met with an accident, as a result of which the inmates of the car received injuries. The car was insured with the New Asiatic Insurance Co. Ltd. Pessumal himself was the owner of another car insured with the Indian Trade and General Insurance Co. Ltd. The policy taken out by the owner Asnani contained a similar drivers extension clause and also a similar notice, which is incorporated in the

Schedule to the Policy Exh. 42. (at page SC 1738; AIR 1964):

'IMPORTANT NOTICE

The Insured is not indemnified if the vehicle is used or driven otherwise than in accordance with this schedule. Any payment made by the Company by reason of wider terms appearing in the certificate in order to comply with the Motor Vehicles Act, 1939 is recoverable from' the insured see the clause headed 'AVOID ANCE OF CERTAIN TERMS AND RIGHT OF RECOVERY'.

The only contention raised by the appellant New Asiatic Insurance Co. Ltd. was that in ,view of Pessumal's own Policy issued by another Company. Pessumal was indemnified against any liability incurred by him whilst personally driving a private motorcar not belonging to him and not hired to him under a Hire-Purchase Agreement. The Supreme Court held that Pessumal's policy with other Company did not indemnify him - against the liability incurred when driving any particular car and so, it could not be a policy of Insurance in relation to Asnani's car. The appeals were accordingly dismissed.

35. In the present case the truck which was found to have been hired by the appellant 'No. 3 the Advance Engineering Co. from the insured would not be covered by the drivers extension clause.

36. There is, therefore, no merit in these appeals and the Special Civil Applications which are accordingly dismissed with costs. Rule discharged in all the Special Civil Applications.

37. Appeal dismissed.