

(1988) 07 BOM CK 0055
In the Bombay High Court
Case No : First Appeal No. 417 of 1984

Indarjeet Singh and Co.

APPELLANT

Vs

Kamal Prakash Pawar and Others

RESPONDENT

Date of Decision : 05-07-1988

Acts Referred:

Motor Vehicles Act, 1939 — Section 110, 95(2), 96(1)

Citation : (1989) ACJ 132 : AIR 1989 Bom 325 : (1988) 3 BomCR 274 : (1989) 91 BOMLR 552 : (1988) MhLj 863

Hon'ble Judges : W.M. Sambre, J;P.S. Shah, J

Bench : Division Bench

Advocate : S.M. Gorwadkar and Shaunak Satpute, for the Appellant; A.N.S. Nadkarni, B.N. Naik and K.S.V. Murthy, for the Respondent

Judgement

P.S. Shah, J.—This appeal is preferred by original Opponent 3, a partnership firm Inderjeet Singh and sons which carries on a transport business against the judgment and order dt. April 9, 1984 passed by the Member, Motor Accidents Claims Tribunal Pune (hereinafter referred to as "the Tribunal ") in Application No. 120 of 1981 filled by Respondents Nos. 1 to 4 against the appellant and Respondents Nos 5 to 7. Respondents 5 and 6 are original Opponents 1 and 2 and Respondent 7 is the Insurance Company which was Opponents 4 in the application, The tribunal passed an award directing the Appellant and Respondents 5 to 7 to pay Rs. 1,50,000/- by way of compensation together with future interest thereon at the rate of 9 per cent per annum from the date of the application till realization together with the costs of the application. The liability of the Insurance Company was restricted to the extent of Rs. 50,000/-.

2. The accident took place on Jan. 15 1981 at about 4.35 p.m. on Range Hills Corner Road at Karkee, District Pune. The motor vehicle involved in the accident is a goods truck bearing Registration No. MHF.6906 belonging to the appellant. AT the material time, respondent 6 was serving as a driver on this truck in the employment of the Appellant. The truck with its ignition-key used to remain in

the custody of respondent 6. At the time of the accident, however, the truck was being driven by respondent 5, who is the brother of respondent 6. In the accident, one Prakash Anandrao Pawar, aged about 28 years and serving as a helper in the employment of the Maharashtra State Road Transport Corporation, died. Respondent 1 is his widow: Respondent 2 is the minor daughter and Respondents 3 and 4 are the parents of the deceased Prakash. A claim for compensation as stated above was filed by respondents 1 to 4 on June 25, 1981 before the Tribunal. It is not necessary to state the facts showing the negligence on the part of the driver as the finding recorded by the Tribunal in that behalf has not been challenged before us. The Tribunal has held, on appreciation of evidence, that Prakash Anandrao Pawar died as accidental death due to rash and/or negligent driving of the said truck by respondent 5. Similarly, the finding as regards the quantum of compensation is also not challenged before us.

3. Shri Gorwadkar, learned counsel appearing for the Appellant, urged two contentions before us. Firstly, it has been contended that the Appellant cannot be fastened with the vicarious liability in view of the fact that the truck at the material time was being driven by respondent 5, who was not in the employment of the Appellant and also was driving the truck without the authority of the Appellant, had committed a criminal Act for which the Appellant as the master of Respondent 6 could not be held vicariously liable. Secondly, it has been contended before us that the tribunal erred in law in restricting the liability of respondent 7, the Insurance Company with whom the truck was insured to Rs. 50,000/-. In view of the amendment of S. 95 of the Motor Vehicles Act, 1939 (hereinafter referred to as "the Act") by the Amending Act No. 47 of 1982, which came into force on Oct. 1 1982 i.e., during the tendency of the proceedings before the Tribunal the limit of liability of the insurer was enhanced from Rs. 50,000/- to Rs. 1,50,000/-. Learned Counsel contended that this amendment is retrospective and the Tribunal was bound to give effect to this amendment by passing an award against Respondent 7 holding it liable for the whole amount of Rs. 1,50,000/- which is the amount awarded against the appellant and respondents 5 and 6.

4. As regards the second contention regarding the liability of the Insurance Company, in our opinion, the point is concluded by a decision of the Supreme Court in the case of Padma Srinivasan Vs. Premier Insurance Company Limited. Before we advert our attention to the aforesaid decision of the Supreme court, it is necessary to mention that in the insurance cover of the truck in question, it is stated that the limit of the amount of the Company's liability under S.II-1 (I) in respect of any one accident, such amount as is necessary to meet the requirements of the Motor Vehicles Act, 1939. Section II (I) of the insurance cover interlay. Postulates that subject to the limits of liability the company will indemnify the insured against all sums including claimants cost and expenses which the insured shall become legally liable to pay in respect of (I) death of or bodily injury to any person caused by or arising out of the use of the motor vehicle, (ii) damage to property caused by the use of the motor vehicle. It is not

necessary for us to reproduce the proviso to the aforesaid clause, namely, S.II-I (I) and S, II(I) (I) mentioned in the insurance cover.

5. The accident took place on Jan 15 1981 when the Amending Act had not come into force. The provisions of S. 96 (1) of the Act as they stood on the date of the accident limited the liability of the insured to Rupees 50,000/- It may be mentioned that s, 96 (2) of the Act was amended by Amending Act No. 56 of 1969 which came into force on Mar. 2, 1970. Whereby the limit of the Insurance Company at Rs. 20,000/- was enhanced to Rs. 50,000/-. The Amending Act No.47 of 1982. Which enhanced the limit of liability of the Insurance company from Rs .50,000/- to Rs.1,50.000/- came into force during the tendency of the claim petition before the Tribunal on Oct 1, 1982. It was contended by learned counsel the amendment must be given retrospective effect having regard to the fact that there is no restrictive cause in the Amending Acr and also because it is a social legislation to alleviate the sufferings of the dependents of the deceased involved in the accident. Learned Counsel further relied on the provisions of S. 96(1) of the Act which provides for the duty of insurers to satisfy judgments against persons insured in respect of third party risks. Section 96(1) of the Act , inter alia, provides as under;-

"96. (1) , after a certificate of insurance has been issued under sub-sec. (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 respect to be covered by a policy under cl. (b)of sub-sec. (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 the decree any sum not exceeding the sum assured payable thereunder, 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 respect of interest on that sum by virtue of any enactment relating to interest on judgments".

6. Relying on this provision, it was contended that the liability of the Insurance Company arises only on the date of the judgment and , therefore in any event , the provisions of the Amending Act No. 47 of 1982 which had come into force before the date of the judgment must apply to the instant case. We are unable to accept this argument for the simple reason that the liability of the Insurance Company is incurred on the date of the accident.the judgment merely determines the quantum of compensation payable to the claimants arising out of the accident. It is the date of the accident, therefore , which is the relevant date for the applicability of S. 95(2) of the Act which provides for the liability of the Insurance Company incurred in respect of any one accident. It would , therefore be not Insurance Company arises on the date of the judgments. Section 96(1) of the Act only deals with the obligation of the Insurance Company to satisfy the judgment, whereas the liability of the Insurance Company is dealt with by S.

95(2) of the Act .

7. Having regard to the provisions of S.95 (2) of the Act , it will have to be held that the liability has been incurred by the Insurance Company in respect of the accident on the date of the accident and not on the date of the award., though the executability or enforcement of the obligation on the part of the Insurance Company is postponed till the date of the judgment which determines the quantum of the liability of the Insurance Company within the limits laid down in S.95(2) of the Act . It is really not necessary for us to elaborate further in this aspect in view of the decision of the Supreme Court in *Padma Srinivasan Vs. Premier Insurance Company Limited*, . The facts of that case were that the accidents took place on April 5, 1970. The owner of the truck involved in the accident had taken a statutory insurance policy with the respondent-Insurance Company which was operative from June 30, 1969 to June 29, 1970. The appellant filed an application before the Motor Accidents Claims Tribunal, Bangalore under S. 110-A of the Act seeking compensation for her husband's death in the accident. The Tribunal limited the liability of the respondent-insurer to a sum of the high court holding that on the date on which the insurance policy was alleged to have been issued by it, its statutory liability was limited to a sum of Rs.20,000/- only and therefore, the Tribunal was in error in passing an award against it in the sums of Rs. 50,000/-. The Tribunal limited the liability of the insurer to a sum of Rs. 50,000/- in view of the amendment of the Act by the amending Act No.56 of 1969 which came into force on March 2, 1970. The Supreme court set aside the judgment of the High Court holding that the liability must be determined by Chapter VIII of the Act at the relevant time, , that is to say, at the time of the insurer to pay a claim under a motor accident policy arises on the occurrence of the accident and not until then. One must necessarily have regard to the state of the law obtaining at the time of the accident for determining the extent of the insurer's liability under a statutory policy. The Supreme court further observed that the governing factor for determining the application of the appropriate law is not the date on which the policy of insurance came into force but the date on which the cause of action accrued for enforcing liability arising under the terms of the policy. In this view of the matter, the Supreme court set aside the judgment of the High court and restored that of the Tribunal having regard to the fact that the Tribunal having regard to the fact that the accident having happened on April 5, 1970, the extent of the insurer's liability must be determined by the application of the law introduced by the amendment which had come into force before the accident.

8. In the present case, the accident took place, admittedly, prior to the commencement of the Amending Act No. 47 of 1982. Therefore, the provisions of S. 95 (2) as they stood on the date of the accident, which is the date of the accrual of the cause of action., must be applied. Learned Counsel tried to contend that the Supreme court did not take into consideration the effect of S. 96 (1) of the Act . This contention is not tenable, firstly because the binding nature of the decision of the Supreme Court is not affected merely because a

particular provision is not referred to or considered by the Supreme Court . Moreover, as held by us above, the provision of s.96(1) of the Act must be read in the light of S. 95(2) of the Act . Section 96(1) of the Act will have no relevance as regards the questions as to the date on which the liability of the Insurance Company in respect of the accident arises, Reliance was placed by learned Counsel on another decision of the Supreme court in the case of The Commissioner of Excess Profits Tax, West Bengal Vs. The Ruby General Insurance Co. Ltd., . That was a case under a different statute altogether and has no relevance to the interpretation of the provisions of the Act with which we are concerned . The question before us is squarely covered by the decision of the Supreme Court in the Padma Srinivasan Vs. Premier Insurance Company Limited, .

9. Learned Counsel drew our attention to a decision of a learned single Judge of the Goa Bench of this Court in the case of O.F.&G.I.Co.v.Shantabai 1987 Mh LJ 35: AIR 1987 Bom 52. In that case, it has been held that the benefit of S.92-A of the Act , which provision was inserted in the Motor Vehicles Act by the Amending Act No.47 of 1982 is available to all pending cases even though the accident had occurred prior to the coming into force of S.92-A of the Act . It appears that this construction of S.92-A of the Act .It appears that this construction of S.92-A of the Act by the learned single Judge of this Court in Shantabai's case has not been accepted by Andhra Pradesh High Court in the case of Ratni Devi Shyam v.B.Venkata Rami Reddy, 1988 Acc CJ142. The Andhra Pradesh High Court has held that the provisions must be considered as affecting the vested rights accrued to the parties and as such cannot be given retrospective effect. We have our own reservations about the correctness of the view taken in O.F.&G.I. Co. v.Shantabai AIR 1987 Bom 52 by the learned single Judge of the Goa Bench. However, since we are not called upon to construe S.92-A we are not called upon to construe S.92-A we do not think it necessary to decide the question in this matter where we are concerned with the interpretation of a different provisions viz. S.95(2). As held by us above. The question as to whether the amendment of S.95(2) of the Act is retrospective or not is squarely covered by the decision of the Supreme Court in Padma Srinivasan Vs. Premier Insurance Company Limited, . We have gone through the provisions of the Amending Act No.47 of 1982 which amended S.95(2) along with other Sections of the Act . There is nothing in the provisions of the Amending Act which suggests that the Legislature expressly or impliedly intended to make amendment to S.95(2) retroactive. It is needless to state that the amendment to S.95(2) affects the rights and liabilities of the parties which were vested prior to the amendment. In the absence of clear intendment on the part of the Legislature to make the provisions retroactive, it is not possible to accept the contention that S.95(2) as amended by Act 47 of 1982 is retrospective.

10. In the view that we have taken, the contention urged before us is rejected and we held that the liability of the Insurance Company in the present case is limited to Rs.50,000/-.

11. The next question is whether the Appellant can be saddled with vicarious liability having regard to the fact that the vehicle was, admittedly, driven by Respondent 5 who, according to the Appellant, was not in the employment of the Appellant at the time of the accident nor had Respondent 6 authorised The Appellant to employ Respondent 5 at the time of accident. As far as the facts of the case are Concerned, the Tribunal has rejected the evidence of Respondent 5 that he was also serving as a part-time driver with the Appellant at the material time. The Tribunal, however, found on evidence of that the possession of the truck used to remain with Respondent 6 and it was Respondent 6 who must have handed over the ignition-key of the truck to Respondent 5 or must have allowed Respondent 5 to take away the ignition-key from his house. The Tribunal held that the driving of the truck by Respondent 5 was, therefore, with the permission of Respondent 6 and that the truck being in possession of Respondent 6 in the course of the employment of the Appellant, the Appellant-firm was liable, even though Respondent 6 may not have been authorised by the Appellant to handover or allow Respondent 5 to take the ignition-key for driving the truck at the material time. As the unauthorised Act on the part of Respondent 6 was during the course of his employment with the Appellant, the latter was held to be vicariously liable for the negligence of Respondent 6 in handing over the truck in the possession of Respondent 5. In his evidence, Jaspalsingh Inderjeetsingh Arora, who is a partner of the Appellant-firm, has admitted that the possession of the truck used to remain with Respondent 6-Opponent 2. He also admitted that the possession of the truck used to remain with Respondent 6 for allowing Respondent 6 is still in their service. The evidence of Jaspalsingh Inderjeetsingh Arora clearly establishes the fact that the possession of the truck by Respondent 6 at the material time was in the course his employment. If that be so, the handing over of the ignition-key of the truck by Respondent 6 to Respondent 5 or allowing Respondent 5 to drive the truck was a negligent Act on the part of Respondent 6 in the course of employment and therefore, in our opinion, the Tribunal correctly held that the Appellant was vicariously liable to the claim along with Respondents 5 and 6.

12. Shri Gorwadkar relied on a decision of the Supreme Court in the case of Sitaram Motilal Kalal Vs. Santanuprasad Jaishankar Bhatt, , wherein it has been held that the master is not responsible for the negligence or ther wrongful Act of his servant simply because it is committed at a time when the servant is engaged on his master's business. It must be committed in the course of that business, so as to form a part of it, and not be merely coincident in time with it. The Supreme Court further observed that the scope of employment of a servant need not of course be viewed narrowly, but the essential element that the wrong must be committed by the servant during the course of the employment, i.e. in doing the master's business ought always to be present. This decision of the Supreme Court has been considered by the Supreme Court in a later decision in the case of Pushpabai Purshottam Udeshi and Others Vs. Ranjit Ginning and Pressing Co. (P) Ltd. and Another, . The Court observed that the recent trend in

law is to make the master liable for acts which do not strictly fall within the term ""in the course of the employment"" as ordinarily understood. The owner is not only liable for the negligence of the driver if that driver is his servant acting in the course of his employment but also when the driver is, with the owner's consent, driving the car on the owner's business or for the owner's purpose.

13. In the present case, the evidence clearly establishes that the possession of truck was allowed by the Appellant to remain with Respondent 6. The possession of the truck by Respondent 6 at the material time, therefore, was in the course of the employment. If that be so, the handing over of the ignition-key by Respondent 6 to Respondent 5 or Respondent 6 allowing Respondent 5 to take charge of the truck amounted to negligent Act on the part of Respondent 6 in the course of employment. It is therefore, not possible to accept the contention of learned Counsel that the unauthorized Act on the part of Respondent 6 was not in the course of his employment or that the accident had not occurred while the truck was being driven by Respondent 5 in the course of employment. Once it is found on the facts of the case that the wrongful Act committed by Respondent 6 then it follows that the Appellant cannot escape the vicarious liability.

14. Our attention has been drawn by learned Counsel for the Claimants to a recent decision of the Supreme Court in the case of *Skandia ns. Co. Ltd. V. Kokilaben Chandravadan* AIR 1987 SC 1184. In that case, the question as to the vicarious liability of the owner of the vehicle did not directly arise. The Supreme Court was required to consider the question as to whether S.96(2)(b)(ii) of the Act extends immunity to the Insurance Company if a breach is committed of the condition excluding driving by a named person or persons or by any person who is not fully licensed, or by any person who has been disqualified for holding or obtaining a driving license during the period of disqualification. While dealing with the arguments advanced on behalf of the Insurance Company, the Supreme Court observed (at p.1190 of AIR):

"".....The expression "breach" is of great significance. The dictionary meaning of "breach" is infringement or violation of a promise or obligation (see Collins English Dictionary). It is therefore abundantly clear that the insurer will have to establish that the insured is guilty of an infringement or violation of a promise that a person who is not (sic) duly licensed will have to be in charge of the vehicle. The very concept of infringement or violation of the promise that the expression "breach" carries within itself induces an inference that the violation or infringement on the part of the promisor must be a wilful infringement or violation. If the insured is not at all at fault and has not done anything he should not have done anything he should not have done anything he should not have done or is not at all in any respect how can it be conscientiously posited that he has committed a breach? It is only when the insured himself places the vehicle in charge of a person who does not hold a driving licence, that it can be said that he is "guilty" of the breach of the promise that the vehicle will be ;driven by a licensed driver. It must be established by the insurance Company that the breach

was on the part of the insured and that it was the insured who was guilty of violating the promise or infringement of the contract. Unless the insured is at fault and is guilty of a breach the insurer cannot escape from the obligation of indemnify the insured and successfully contend the he is exonerated having regard to the fact that he is exonerated having regard to the fact that the promisor (the insured) committed a breach of his promise. Not when some mishap occurs by some mischance. When the insured has done everything within his power in as much as he has engaged a licensed driver and has placed the vehicle in charge of a licensed driver, with the express or implied mandate to drive himself it cannot be said that the insurer is guilty of any breach. And it is only in case of a breach or a violation of the promise on the part of the insured that the insured can hide under the umbrella of the exclusion clause.'"

15. Now, the obligation of the insurer to pay the decretal amount can obviously arise only when it is found that the insured is liable and not otherwise. If the insured is not liable, then the insurer cannot be saddled with the liability to pay any amount under S.95(2) of the Act in view of S.96(1) of the Act . Therefore, though the question as to the vicarious liability of the owner of the vehicle did not directly fall for consideration before the Supreme Court in this case, in the view taken by the Supreme Court as to the liability of the Insurance Company, it would necessarily follow that such a view is possible only on the basis that the insured has incurred the vicarious liability. In our opinion, therefore, the Tribunal was justified in holding the Appellant vicariously liable for the claim.

16. Learned Counsel for the Claimants drew our attention to various decisions of different High court. one of them is of the Karanataka High Court in the case of the Prabbavati Vs. Anton Francis Nazarath, , wherein on the facts it was found that the driver was not only to drive the vehicle but also was entrusted with the vehicle. The driver allowed an unauthorized person to drive that vehicle. The Court held that it was the driver's duty as part of his employment to maintain the vehicle in safe condition without allowing anybody else to tamper with it..Under such circumstances, both the owner and the insurer were held liable to pay the compensation. The facts of the case before us are somewhat similar to those in the aforesaid case decided by the Karanataka High court. Having regard to the above discussion, the contentions urged on behalf of the Appellant must stand rejected. The Tribunal has rightly held that the Appellant is vicariously liable and also that the liability of the Insurance Company is limited to Rs. 50.000/-.

17. In the result, the appeal fails and is dismissed with costs.

18. Appeal dismissed.