
(1981) 04 MAD CK 0038
In the Madras High Court
Case No : A.A.O. No. 292 of 1977

Mallika and Others

APPELLANT

Vs

S.V. Alagarsami (Died) and Others

RESPONDENT

Date of Decision : 09-04-1981

Acts Referred:

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

Citation : (1982) ACJ 272

Hon'ble Judges : R. Sengottuvelan, J;G. Ramanujam, J

Bench : Division Bench

Advocate : V.C. Srikumar and K. Raman, for the Appellant; M. Veluswami and A. Devanathan, for the Respondent

Final Decision : Allowed

Judgement

G. Ramanujam, J.—In this appeal an interesting question of law arises, as to whether the legal representatives of the deceased who died in a motor accident, and who was himself responsible for the accident, could claim compensation against the owner of the vehicle who was not directly or vicariously responsible for the accident.

2. On 2nd May, 1973, one Krishnamurthi was driving a car MDA 3774 belonging to the first Respondent herein and insured with the second Respondent, on the national highway from Madras to Dindigul. When the car was about to reach Manapparai, it dashed against a tree standing on the left edge of the road and as a result of the impact the said Krishnamurthi died on the spot, steering rod hitting his chest. The wife and children of the deceased Krishnamurthi filed a claim petition before the Motor Accidents Claims Tribunal, Tiruchijapalli, claiming a compensation of Rs. 50,000 from the owner of the car as well as the insurance company with which it was registered, on the ground that it was an inevitable accident and as such they are liable to pay compensation for the death of the deceased.

3. The said claim petition was contested by the first Respondent, the owner of the car, on the ground that he was not aware of the details of the journey, that he never requested Krishnamurthi to travel in his car MDA 3774, that there was no contract of employment with him, that his son Dr. Jayaraman also did not ask or direct Krishnamurthi to drive the car and that therefore, he is not liable to pay any compensation for the death of the deceased. The second Respondent insurance company denied that Krishnamurthi drove the vehicle at the time of the accident, that he had a driving licence or that he was authorised by the owner to drive the vehicle and stated that there was no contract of employment either with owner of the car or with his son by the deceased Krishnamurthi, that the insurance policy does not cover a claim of this nature, that the owner of the car never invited Krishnamurthi to travel in the car or to drive the car, that Krishnamurthi and members of his family were gratuitous passengers in the car, that there is no liability on the part of the owner of the vehicle to insure the safety of the gratuitous passengers and that the accident had occurred due to his own rashness and negligence. There is no liability on the part of the owner of the vehicle or the insurance company to pay compensation. In any event the compensation claimed was excessive. On these rival contentions the Tribunal has set down the following two questions for consideration:

(1) Whether the deceased drove the vehicle MDA 3774, what was the cause of the accident and whether he died due to accident ?

(2) To what compensation, if any, are the Petitioners entitled to and against which of the Respondents ?

4. After analysing the evidence in detail, the Tribunal found as follows: The deceased Krishnamurthi, his wife and children accompanied one Dr. Jayaraman from Dindigul to Madras in the car MDA 3774, belonging to the first Respondent herein who is the father of Dr. Jayaraman. All of them returned in the car from Madras on 1st May, 1973. When they reached Trichy, the driver of the car by name Subramaniam felt extremely tired and the deceased relieved him and drove the car from Trichy. While they neared Manapparai the car dashed against a tree on the left edge of the road. As a result of the impact the car was seriously damaged and Krishnamurthi sustained fatal injuries. On the facts found the Tribunal held that the accident was due to rash and negligent driving of the vehicle by the deceased and that as such the legal representatives of the deceased cannot claim compensation as against the owner or the insurance company. However, the Tribunal went into the question relating to the quantum of compensation and held that a sum of Rs. 33,600 will be a fair and reasonable compensation. But in view of its earlier finding that the deceased himself is responsible for causing the accident which resulted in his death, his legal representatives cannot claim compensation in relation to that accident, the entire claim petition was dismissed. Aggrieved by the dismissal of the claim petition, the claimants have come up in appeal before this Court.

5. According to the learned Counsel for the Appellants, the Tribunal is in error in

holding that the deceased was rash and negligent in driving the vehicle and that the accident was due to such rashness and negligence on his part. The accident should be taken to be an inevitable one as the road was full of pits as a result of which the steering went out of control and the car hit against a tree and there was no negligence or rashness at all on the part of the deceased in driving the vehicle. In this case immediately after the accident the vehicle was inspected by the Motor Vehicles Inspector. The vehicle has been found to have no mechanical defect. If really because of the deep pits in the road the steering went out of control, that would have been detected by the Motor Vehicles Inspector when he inspected the vehicle after the accident. Therefore, the plea of the claimants that it is because of the big pits on the road the steering went out of control and it is for that reason the vehicle hit against the tree cannot be accepted. Even if there were big pits on the road as suggested by the claimants still the deceased who was driving the car should have taken sufficient care and precaution to avoid the pits either by swerving his vehicle to the right or to the left. The fact that the deceased did not do so amply shows that he was rash and negligent in driving the vehicle. We, therefore, agree with the finding of the Tribunal that the deceased himself was rash and negligent in driving the vehicle and that it has resulted in the car hitting against the tree involving in the death of the deceased.

6. Coming to the question as to whether the claimants, who are the wife and children of the deceased could claim compensation for the accident caused by the negligence, the learned Counsel for the Appellants contends that, even if the deceased had been rash and negligent in driving the vehicle, still the owner of the vehicle who is bound to insure the vehicle in respect of bodily injury and death caused to any person u/s 95 of the Motor Vehicles Act, 1939, and the insurance company which in fact insured the vehicle to cover such a risk are bound to pay compensation and that the liability to pay compensation under the terms of the policy which has been taken in accordance with Section 95 of the Act is not dependent on the question as to whether the accident was caused by the rashness and negligence of the deceased or not. In support of the said contention, the learned Counsel would refer to the provisions of Section 95(1) of the Motor Vehicles Act, as also to the terms and conditions of the insurance policy which has been taken in this case in respect of the vehicle which was involved in the accident. According to the learned Counsel, Section 95 creates a statutory and absolute liability to pay compensation on the part of the owner and that the benefit of Section 95 cannot be denied to a person merely because he has caused the accident by his rash and negligent act. To appreciate the said contention it is necessary to scan through Section 95 of the Act and also the terms and conditions of the insurance policy taken in this case.

7. Section 95(1) lays down the requirements of policies to be taken and the limits of liability. It says that in order to comply with the statutory requirements, a policy of insurance must be a policy which is issued by a person who is an authorised insurer insuring a person or classes of persons specified in the policy to the extent specified in Sub-section (2) 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 a third party caused by or arising out of the use of the vehicle in a public place. Section 95(1) contains three provisos. The first proviso which alone is relevant here says that a policy shall not be required to cover liability in respect of the death, arising out of and in the course of his employment of the employee or 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, in respect of the death of, or bodily injury to any such employee engaged in driving the vehicle. This proviso will apply only to the persons employed to drive the vehicle. That is presumably for the reason that in the case of such persons engaged in driving the vehicle the Workmen's Compensation Act gives sufficient protection. Once the proviso is found not to apply to a person other than the one engaged as a driver, the main provision in Section 95(1) should be taken to apply to all persons including the persons who are driving the vehicles either on their own or on the direction of the owner of the vehicle. Section 95(1) in so far as it uses the expression "in respect of the death of or bodily injury to any person or damage to any property of a third party" should be taken to cover any liability which may be incurred by the owner of the vehicle in respect of death or bodily injury to any person or damage to any property of a third party. The presence of the two expressions "any person" and "third party" in the same provision would indicate that the expression "any person" has been used in a wide sense and not only in the sense of a "third party". Even if Section 95(1) can be construed as including the liability of the owner of the car for the death of or bodily injury to any person, this provision cannot be invoked by the claimants in this case, unless the claimants are able to establish that the owner has incurred a liability in respect of the death or bodily injury to the deceased, which liability has to be insured as per the provisions of Section 95(1). It cannot be said that the mere ownership of the car creates liability on the part of the owner of the vehicle to pay compensation for the death or injury to any person. The liability can arise only when the owner of the vehicle was in any way responsible for causing the accident which has resulted in that liability. In this case the accident was caused by the rashness and negligence of the deceased and in such cases there is no legal liability arising either under the law of Torts or any other basis under the common law. Only when there is a legal liability, that liability, has to be insured u/s 95(1). In this view of the matter, we are unable to agree with the learned Counsel for the Appellants that an absolute liability has been cast on the owner of the vehicle to pay compensation u/s 95(1) and that absolute liability does not depend on the fact as to who caused the accident and whether the owner of the vehicle is negligent or not.

8. The insurance policy taken in pursuance of Section 95(1) has been marked as Ex. B-1 in this case. That policy provides for indemnity to the owner of the car in respect of third party liability as well as indemnity to the driver of the vehicle in respect of third party risks if the vehicle has been driven by the person employed

by the owner as a driver. In this case admittedly the deceased was not employed as a driver and therefore, under the terms of the policy of insurance the insurance company is not bound to indemnify the driver for the rash and negligent act committed by him. Therefore, the only provision on which any reliance could be placed is Cl. 1 of Section 2 of Ex. B-1. That clause deals with the liability to third party. That clause also is on the same lines as in Section 95(1), which has been set out above. That clause provides as follows--

1. The company will indemnify the insured in the event of accident caused by or arising out of the use of the motor car against all sums including claimant's costs and expenses which the insured shall, become legally liable to pay in respect of--
(a) death of or bodily injury to any person but except so far as is necessary to meet the requirements of Section 95 of the Motor Vehicles Act, 1939.

Under this clause, the insurer is liable to indemnify the insured in respect of the liabilities incurred by him in respect of the death or bodily injury to any person. Even assuming that the expression "any person" in the above clause will include the person who drove the vehicle, still the indemnity contemplated under Cl. 1 of Section 2 will arise only if the owner of the insured has become legally liable to pay the compensation for the death or bodily injury to that person. The expression that "the insured shall become legally liable to pay is quite significant. The insurer is liable to indemnify the insured only if the insured has become legally liable to pay the compensation. Therefore, unless the claimants succeed in establishing that the owner of the vehicle has become legally liable to pay compensation in respect of the accident there is no question of the insured being indemnified by the insurer under Cl. 1 of Section 2, As already pointed out the mere ownership of the car will not make the owner of the car liable for the accident. The legal liability to pay compensation can be fastened on the insured, the owner of the car, only if he has been either directly or vicariously responsible for the accident. Further, there is no direct or vicarious liability on the part of the owner of the vehicle in relation to the accident. Thus, the question of the insurance company indemnifying the owner cannot at all arise. We are not inclined to agree with the contention of the learned Counsel for the Appellants that the claimants need not establish either directly or vicariously the rashness and negligence on the part of the owner of the vehicle for invoking the indemnity clause in Cl. 1 of Section 2. Even though the claimants need not establish rashness and negligence on the part of the owner of the vehicle, they must establish vicarious liability on the part of the owner arising out of such rash and negligent act committed by someone whom the owner of the vehicle has authorised to drive the vehicle, as it is well established the owner of the vehicle is vicariously liable for the rash and negligent act committed by anyone who drove the vehicle and who caused the accident in driving the vehicle. It is equally well established that such vicarious liability on the part of the owner of the vehicle will not arise unless the person authorised to drive the vehicle is guilty of rashness and negligence in driving the vehicle and in causing the accident by such rashness and negligence resulting in the death of or bodily injury to a third

party. Normally, the theory of vicarious liability can be invoked only by third parties, who are aggrieved by the tortious act committed by any person under the authority of the owner of the vehicle. The question of vicarious liability will not arise when the claim is made by the tort-feasor himself or any person claiming under the tort-feasor. In this case since the deceased was not under the employment of the owner of the vehicle as a driver there is no liability to pay compensation by the owner of the vehicle under the provisions of the Workmen's Compensation Act. There is no other statutory provision under which the owner of the vehicle can be made liable for the death which has resulted by the tortious act committed by the deceased himself.

9. On the question as to whether the tortious liability should be established as against the owner of the vehicle for claiming the benefit u/s 95(1) and under the provisions of the policy taken in pursuance of that section, we have the decision of the Supreme Court in *Minu B. Mehta and Anr. v. Balkrishna Ramachandra Nayan and Anr.* 1977 A.C.J. 118(S.C.) wherein the Supreme Court while dealing with the question as to whether it is incumbent on the claimant to prove the negligence before he became entitled to compensation expressed as follows:

Under Section 95(1)(b)(i) of the Act, it is required that policy of insurance must be a policy which insures the persons against any liability which may be incurred by him in respect of death or bodily injury to any person or damage to any property to a third party caused by or arising out of the use of the vehicle in a public place. It may be noted that what is intended by the policy of insurance is insuring a person against any liability which may be incurred by him. The insurance policy is only to cover the liability of a person which he might have incurred in respect of death or bodily injury. The accident to which the owner or the person insuring is liable is to the extent of his liability in respect of death or bodily injury and that liability is covered by the insurance. It is therefore obvious that if the owner has not incurred any liability in respect of death or bodily injury to any person there is no liability and it is not intended to be covered by the insurance. The liability contemplated arises under the law of negligence and under the principle of vicarious liability. The provisions as they stand do not make the owner of the insurance company liable for any bodily injury caused to a third party arising out of the use of the vehicle unless the liability can be fastened on him. It is significant to note that under Sub-clause (ii) of Section 95(1)(b) of the Act, the policy of insurance must insure a person against the death or bodily injury to any passenger of a public service vehicle caused by or arising out of the use of the vehicle in a public place.

10. After referring to the expression "liability which may be incurred by him" which is occurring in Section 95(1)(b)(i) it is observed that the said expression covers any liability arising out of the use of the vehicle and it is that liability alone which is covered by the insurance policy. Their Lordships of the Supreme Court pointed out that before a person can be made liable to pay compensation for any injuries and damages which have been caused by his "action it is

necessary that the person dying or injured should be able to establish that he has some cause of action against the party responsible. Causes of action may arise out of actions or wrongs under the common law or for breaches of duties laid down by statutes. In order to succeed in an action for negligence the Plaintiff must prove--(1) that the Defendant had in the circumstances a duty to take care and that duty was owed by him to the Plaintiff, and that (2) there was a breach of that duty and that as a result of the breach damage was suffered by the Plaintiff. The master also becomes liable for the conduct of the servant when the servant is proved to have acted negligently in the course of his employment. Apart from it, in common law the master is not liable for, as it is often said the owner of a motor car does not become liable because of his owning a motor car. Thus the Supreme Court has pointed out that mere ownership of the motor car will not give the cause of action to the person sustaining an injury or damage in respect of a motor accident and that unless the vicarious liability of the owner of the car is established in respect of the rash and negligent action on the part of the driver of the vehicle the owner cannot be made liable. While dealing with this question the Supreme Court has not accepted the contrary view expressed by the Andhra Pradesh High Court in *Haji Zakaria v. Naoshir Cama* 1976 A.C.J. 320 (A.P.) by the Patna High Court in *New India Assurance Co. Ltd. v. Sumitra Devi* 1971 A.C.J. 58 (Pat.) and the Bombay High Court in *Marine & Genl. Ins. Co. Ltd. v. Balkrishna Ramuchandra Nayan and Anr.* 1976 A.C.J. 288 (Bom.) in all of which it has been held that the liability of the insured and consequently of the insurer to compensate a third party dying or being injured on account of the use of the insured vehicle in a public place is irrespective of whether the death, injury, etc., has been caused by rash and negligent driving of the vehicle.

11. Therefore, after the said decision of the Supreme Court it is no longer open to urge on behalf of the claimants that the liability to pay compensation in respect of motor accident is absolute and it is not necessary to prove any negligence on the part of the driver or owner of the vehicle. In this view we have to hold that even if Section 95(1)(b)(i) and the Clause (1) of Section 2 of the policy of insurance in this case are wide enough to include the owner's liability to a driver in respect of his death or bodily injury still, he or his dependants, cannot succeed in claiming such compensation unless there is a legal liability on the part of the owner of the vehicle to pay the same, and in this case since the deceased who was driving the vehicle had been himself rash and negligent in driving the vehicle, there is no question of the owner of the vehicle incurring a vicarious liability. Perhaps for getting compensation under the Workmen's Compensation Act for the death of or bodily injury to a person employed as a driver, it may not be necessary for the legal representatives of the driver to prove vicarious liability and it is sufficient to show in respect of that claim that the driver was employed by the owner of the vehicle and the accident occurred in the course of the employment. But, the provisions of Section 95(1)(b)(i) clearly contemplates a legal liability on the part of the owner of the vehicle which has to be indemnified by the insurer and such legal liability will arise only if a tort has been committed

by the owner of the vehicle either directly or vicariously. Here there is no question of any legal liability. Therefore the claimants who are the widow and children of the deceased Krishnamurthi who himself has been found to be rash and negligent in driving the vehicle and who was himself responsible for the accident in question cannot claim compensation against the owner of the vehicle merely relying on the factum of the ownership of the vehicle.

12. This view of ours finds support from a decision of a Division Bench of this Court in *Thilagavathi and Ors. v. Sundaram and Anr.* 1974 A.C.J. 491 (Mad). In that case the vehicle involved was a tractor. The tractor was owned by the driver's father. While the driver was ploughing the land of his mother with the tractor, the tractor turned turtle suddenly and the driver fell down and was crushed to death. In respect of that accident a claim was made u/s 110A of the Motor Vehicles Act by the widow, daughter and mother of the deceased driver who is none else than the son of the owner of the vehicle. The said claim was rejected by a Division Bench of this Court holding that the deceased driver was neither an employee of the insured nor he committed any tortious act against any third party. The Court had then observed that before making the insurer liable it is necessary for the claimants to prove that the insured has become legally liable to pay any compensation in respect of the deceased that the insured would be legally liable if the deceased had been his employee and he may also be legally liable if the deceased had committed a tortious act against third parties. In the light of the above discussion we have to uphold the findings of the Tribunal in this case that the claimants are not legally entitled to claim compensation in respect of the accident for which the deceased Krishnamurthi himself is responsible. The appeal therefore fails and is dismissed. There will be no order as to costs.

13. The learned Counsel for the Appellants seeks leave of this Court to file an appeal to the Supreme Court against the judgment just now pronounced. Since our decision is mainly based on the view expressed by the Supreme Court itself in *Minu B. Mehta and Anr. v. Balkrishna Ramachandra Nayan and Anr.* 1977 A.C.J. 118 (S.C.) we do not think that this is a fit case for the grant of leave. Hence the request for the leave is rejected.