(1981) 04 MAD CK 0004

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 95

Citation : (1982) ACJ 272

Hon'ble Judges : Sengottuvelan, J;Ramanujam, J

Bench : Division Bench

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

Judgement

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. 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, Tiruchirapalli,

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.

2. 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?

3. 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.

4. 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.

5. 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 under 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 S. 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 S. 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, S. 95 creates a

statutory and absolute liability to pay compensation on the part of the owner and that the benefit of S. 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 S. 95 of the Act

and also the terms and conditions of the Insurance policy taken in this case.

6. S. 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-S. (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. S. 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 S. 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. S. 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 S. 95(1) can be construed as including the liability of the owner of the car for the death 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 S. 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 under 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 under 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.

7. The Insurance Policy taken in pursuance of S. 95(1) has been marked as Ex.

B1 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 S. 2 of Ex.B1. That clause deals with the liability to third party. That

clause also is on the same lines as in S. 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 S. 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 S. 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 S. 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 S. 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 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 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 tortfeasor himself or any person claiming

under the tortfeasor. 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.

8. On the question as to whether the tortious liability should be established as against the owner of the vehicle for claiming the benefit under 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 Mimu B. Mehta and

another v. Balakrishna Ramachandra Myyan and another AIR 1977 S.C. 1245 =90 L.W. 69 (S.N.) 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 S. 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-Cl.(ii) of S. 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.

9. After referring to the expression ''liability which may be incurred by him'' which is occurring in S. 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 damaged 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 for 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 Zakaria and Others Vs.

Naoshir Cama and Others, the Patna High Court in New India Assurance Company Ltd. Vs. Sumitra Devi and Another, and the Bombay High

Court in Marine and General Insurance Co. Ltd. and Others Vs. Balkrishna Ramchandra Nayan, 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.

10. 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 S. 95(1)(b)(i) and the clause (1) of S. 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 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

S. 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.

11. This view of ours finds support from a decision of a Division Bench of this Court in Thilagavathi and Others Vs. Sundaram and Another, . 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

under S. 110-A 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 been 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. 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 Another Vs. Balkrishna Ramchandra Nayan and Another, we do not think that this is a fit case for the grant of leave. Hence the request

for the leave is rejected.

