

(1974) 08 KAR CK 0007
In the Karnataka High Court
Case No : M.F.A. No. 242 of 1971

Padmavati and Others

APPELLANT

Vs

Dugganaika and Others

RESPONDENT

Date of Decision : 09-08-1974

Acts Referred:

Motor Vehicles Act, 1988 — Section 110 A

Citation : (1975) ACJ 222

Hon'ble Judges : Nesargi, J; Honniah, J

Bench : Division Bench

Advocate : C.N. Kamath, for the Appellant; T.S. Ramachandra, for the Respondent

Final Decision : Dismissed

Judgement

Nesargi, J.—This appeal is directed against the award passed by the Motor Accidents Claims Tribunal, Shimoga, in Misc. No. 16 of 1969 (Motor Accidents Claim), dismissing the application of the Appellants filed u/s 110A of Motor Vehicles Act.

2. Respondent 1 Dugganaika is the owner of a jeep bearing registration No. MYS 438. On 16-3-1969, he (Traveled in the jeep from Hiriyaarka to Kodur. Respondent 3 Mohiddin was the driver of Respondent 1. He drove the jeep on that day. Respondent 1 got down from the jeep at Kodur and directed Respondent 3 to take the jeep to Hosanagar and fill up petrol in the tank. Respondent 3 took the jeep. At Kodur itself, P.W. 3 Krishna Bhat and the deceased Ramakrishna got into the jeep. P.W. 3 sat in between Respondent 3 and Ramakrishna. The jeep proceeded towards Hosanagar, and when it had covered a distance of about one mile from Kodur, P.W. 2 Rama Rao, who was waiting for a bus to arrive, gave a signal to Respt. 3 to stop the jeep. Respt. 3, it appears, did not observe that signal at that time. Then P.W. 2 observed the jeep slowing down at a little distance away. By that time, P.W. 2 had heard some sound emanating out of the jeep. He, thinking that Respt. 3 the driver was going to stop the jeep in order to

give him a lift, signaled that the jeep might proceed ahead. The jeep went ahead and then it so happened that the right hand side front wheel of the jeep flew away, the jeep toppled and Respondent 3 and Ramakrishna were thrown out. Ramakrishna sustained severe injuries and ultimately succumbed to those injuries. The Appellants claimed compensation of Rs. 45,000 from Respondent 1 the owner of the jeep, Respondent 2 Skandia Insurance Co., the insurer, and Respondent 3 the driver of the jeep.

3. The contention on behalf of the Respondent was that the jeep had not been driven either rashly or negligently by Respondent 3 and it was a sheer accident that one of the bolts fixing the wheel to the axle of the jeep gave way and the wheel flew away from the axle.

4. The Tribunal held that it was a case of sheer accident and that the claimants had not established that the accident had taken place because of the rash and negligent driving by Respondent 3.

5. Mr. C.N. Kamath, learned Advocate appearing on behalf of the Appellants, vehemently urged that it was the duty of Respondents 1 and 3 to have kept the jeep road-worthy and the fact that the wheel flew away from the axle was by itself sufficient to show that they had not discharged this duty and that spelled out negligence on their part. He, in this connection, expounded that if Respondent 3 had got the jeep checked up periodically, he would have noticed the defect that caused the wheel to fly away.

6. We are unable to agree with this contention because Respondent 3, examined as D.W. 1 in this case, has given evidence that one of the bolts of the wheel had been cut and because of that, the wheel flew away. There is no material to show that there was any such defect in the bolt that caused the bolt to give way at that time. Periodical check-up could have disclosed a patent defect and not a latent defect. When there is no material to show that the defect in the bolt was patent, such a question does not arise. Moreover, the material on record shows that Respondent 1 had traveled in that jeep from Hiriya to Kodur and the jeep had run in a normal manner. The contention of Mr. Kamath that Respondents 1 and 3 had not carried out periodical check-up on the jeep, is based on the fact that neither Respondent 1 nor Respondent 3 have, in their evidence, stated that such periodical check-up had been carried out. We are unable to see how it was incumbent either on Respondent 1 or Respondent 3 to have given such positive evidence in this behalf. For all these reasons, we agree with the conclusion of the Tribunal that it was a sheer accident and not a case of rash and negligent driving by Respondent 3.

7. Even if it is, for the sake of arguments, assumed that the accident was due to rash and negligent driving" by Respondent 3, in the sense that the defect was patent and because of non checking of the vehicle periodically Respondents 1 and 3 had put an un-road worthy vehicle on the road, we find that P.W. 3 Krishna Bhatt, who also traveled in the jeep along with the deceased, has sworn that he

and the deceased got into the jeep at Kodur when the jeep was about to proceed towards Hosanagar as they wanted to go to Hosanagar. He has nowhere stated that they so got into the jeep after taking the permission of Respondent 1, the owner. He has not stated that he and the deceased got into the jeep after taking the permission of Respondent 3 at least. All that he has stated is that he and the deceased got into the jeep by themselves. That absolves the Respondents of any liability. The evidence of P.W. 3 leaves no doubt in our mind that he and the deceased had themselves voluntarily traveled in the jeep. That shows that the principle of *volenti non fit injuria* applies.

8. Mr. C.N. Kamath contended that it was incumbent on Respondent 1 to have stated in his evidence that he had prohibited Respondent 3 from picking up persons in the jeep and his having not stated so gave rise to a presumption that Respt. 3 had permitted P.W. 3 and the deceased to travel in the jeep as authorised by Respondent 1. We are unable to subscribe to this reasoning. The presumption that Respondent 3 was driving the jeep to Hosanagar for Respondent 1 in the course of his employment as a driver under Respondent 1 does arise. In fact, we need not seek the assistance of such presumption in this case because there is a positive evidence of Respondents 1 and 3 that Respondent 3 had been asked by Respondent 1 to go to Hosanagar to take petrol. All that has been proved is that Respondent 3 was driving the jeep in the course of his employment under Respondent 1. No presumption in law can arise that Respondent 1 had permitted Respondent 3 to allow P.W. 3 and the deceased to travel in the jeep. Mr. Kamath, in support of his contention, relied on *Sitaram Motilal Kalal Vs. Santanuprasad Jaishankar Bhatt*, All that the Supreme Court has held in the said decision is that there is a presumption that a vehicle is driven on the master's business and by his authorised agent or servant but the presumption can be met. It cannot be, on this basis, contended that such presumption extends to other acts of a driver. Mr. Kamath next relied on the decision of this Court in *Harsha V. Pal v. Kama* AIR 1973 Mys. 162 . The principle laid down by the Supreme Court in the above said decision in regard to the presumption that arises, is followed in this case. That does not help the Appellants.

9. This Court has, in *Mohiddinsab Gaffarsab Kundgol v. Rohidas Hari Kindalkar* 1973 A.C.J. 424 held that the presumption as enunciated by the Supreme Court in the above cited decision, is the only presumption that arises. In regard to the other acts done by a driver while driving a vehicle for the owner in the course of his employment, this Court has relied on the observations of Sellers, J., in *Twine v. Bean's Express* (1946) 1 All E.R. 202 The observations are as follows:

...If the question is asked: Was the driver, Harrison, in giving a lift to the deceased man acting within the scope of his employment ? The answer is clearly "No"- He was doing something that he had no right whatsoever to do, and quo the deceased man he was as much on a frolic of his own as if he had been driving somewhere on some amusement of his own quite unauthorised by his

employers.... He was in fact doing two things at once. He was driving his van from one place to another by a route that he was properly taking when he ran into the omnibus, and as he was driving the van he was acting within the scope of his employment. The other thing that he was doing simultaneously was something totally outside the scope of his employment, namely, giving a lift to a person who had no right whatsoever to be there. In my opinion, once the facts are understood the case is a perfectly simple one, and there is only one answer to it.

10. This is the principle that aptly applies to the facts and circumstances of this case.

11. The reasoning of Mr. Kamath that Respondent 1 having not stated in his evidence that he had not permitted Respondent 3, the driver, to pick up persons on the way, gives rise to a presumption or at least an inference that such permission had been granted to the driver and, therefore, Respondent 1 was vicariously liable, is adequately met by what has been stated in the book, Clerk and Lindsell on Torts (10th Edn) at p. 122. It is as follows:

A master will usually be responsible for the servant's negligence in doing something which he is merely permitted to do or does for his own purposes, but is not employed to do. If a servant does an act for his own pleasure, quo ad that act he is a stranger to his master, although he may be in other respects engaged at the time upon the masters' business, and the mere fact that the master does not prohibit the doing of the act ought not render him liable.

12. In view of the foregoing reasons, we have no hesitation in holding that the conclusion of the Tribunal is correct and there is no substance in this appeal. Hence, we dismiss the appeal.

13. No order as to costs.