
(2010) 08 AHC CK 0118

In the Allahabad High Court

Case No : First Appeal from Order No. 3049 of 2008

Rameshwar Bux Singh

APPELLANT

Vs

Kashi Ratneshwar Dayal Tiwari and Others

RESPONDENT

Date of Decision : 26-08-2010

Acts Referred:

Evidence Act, 1872 — Section 101

Insurance Act, 1938 — Section 64

Motor Vehicles Act, 1988 — Section 166, 173, 2(19), 2(30)

Citation : (2011) 1 TAC 681

Hon'ble Judges : Ram Autar Singh, J;Prakash Chandra Verma, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Ram Autar Singh, J.—This first appeal has been directed against the judgment and award dated 14.3.2002 passed by learned M.A.C.T./Special Judge (E.C. Act), Allahabad in Motor Accident Claim Petition No. 67 of 1993 Kashi Ratneshwar Dayal Tiwari and Ors. v. Sudama Lal Sonkar and Ors. wherein the claim petition has been allowed and the appellant Rameshwar Bux Singh, respondents Sudama Lal Sonkar owner and Dinesh Sonkar driver of the vehicle have been held liable jointly and severally to pay Rs. 2,98,000/- as compensation, however, respondent/opposite parties City Bank and Oriental Insurance Company have been absolved of their liabilities.

2. A perusal of the record goes to show that a petition u/s 166 of Motor Vehicles Act was moved by respondents/petitioners Kashi Ratneshwar Dayal Tiwari and four others claiming themselves to be dependents and legal heirs of deceased Praksh Chandra Tiwari aged about 20? years, for compensation with regard to his death in the accident in question, with this allegation that on 21.8.1992 at about 12.00 A.M. a Jeep bearing registration No. M.P. 07A-7331 being driven rashly and negligently from Allahabad to Pratapgarh dashed Scooter No. U.P. 70/4005 by which deceased Prakash Chandra Tiwari was coming from Pratapgarh to

Allahabad, near village Maganpur on Faizabad Allahabad Road within the circle of P.S. Mauaima, Allahabad, as a result of which the deceased succumbed to his injuries and died soon after the accident. The offending vehicle was being driven with very high speed beyond the control of the driver, who did not observe the traffic rules and failed to blow horn or give signal. The deceased was a qualified Bachelor of Engineering in Civil Side (Architect) and he completed his course from a recognised Engineering Institute, namely, Manohar Bhai Patel Institute of Engineering and Technology of Gondia University, Nagpur. The deceased had also appeared in the Indian Engineering Services Examination (Pre) in the year 1992, conducted by the Union Public Service Commission, New Delhi. The deceased was getting Rs. 4000/- per month as salary besides outside work of the trade.

3. The opposite party No. 1 Sudama Lal Sonkar in his written statement denied the allegations made in the claim petition and alleged that the vehicle No. M.P. 07A-7331 was being driven with controlled speed on the correct and proper side i.e. left of the road as per the traffic rules and when all of sudden the driver of Scooter No. U.P. 70/4005, which was being driven rashly and negligently with three passengers i.e. driver and two persons on back seat, came from opposite direction and the driver became nervous after having seen jeep in question, he lost his control over his scooter and thus he suddenly came on the wrong side of the road and he himself dashed above jeep resulting in accident and the driver of the jeep inspite of due precaution could not avoid the accident. The deceased was unemployed having no independent income and he was dependent on his father. The opposite party No. 1 purchased above Jeep Mahendra bearing registration No. M.P. 07A-7331 by taking loan from City Bank, N.A. Jeewan Bharti Building 124, Cannaught Circus, New Delhi on 4.4.1991 and it was under hypothecation of City Bank on the date of the accident. In view of the rules and customs prevalent, the Bank got the vehicle insured with the Oriental Insurance Company opposite party and thus City Bank and Oriental Insurance Company would be liable to pay compensation, if any. It was also alleged by opposite party No. 1 that on the date of the accident the opposite party No. 4 Excise Inspector, R.B. Singh asked the opposite party No. 1 to provide jeep in question as he wanted to go to Pratapgarh and come back on the same day, at which the opposite party No. 1 expressed his inability to provide the same as the driver of the vehicle was on leave due to his illness whereupon R.B. Singh himself brought some person to driver the vehicle and ill-fated accident took place due to fault of scooter driver.

4. The appellant /opposite party No. 4, R.B. Singh in his written statement denied the allegations in toto and alleged that he had no concern with the vehicle allegedly involved in the said accident nor he was the owner of the vehicle and thus the claim petition was not maintainable against him.

5. The Oriental Insurance Company Limited respondent/opposite party in its written statement denied all the allegations made in the claim petition and alleged that the vehicle in question was not insured with it on the date of

accident and thus Company would not be liable to pay any compensation. It was mandatory for insured/owner under the contract of insurance to furnish information of the accident to the Insurance Company just after the accident but the owner of the jeep failed to comply with this condition and thus there was breach of contract and as such the Insurance Company would not be liable to indemnify the insured owner. Unless the payment of premium was not confirmed, the insurance company being the insurer of jeep in question would not be liable to pay any compensation u/s 64(v)(b) of Insurance Act.

6. The respondent/Opposite party No. 2, City Bank filed its written statement and alleged that it would not be liable for payment of compensation. The registered owner of the vehicle was liable to get his vehicle insured with Insurance Company and the financier was neither under any obligation to get the vehicle insured nor liable to make payment of compensation.

7. On the basis of the pleadings the following issues were framed by the trial court.

(1) Whether the accident in question took place on 21.8.1992 at 12.00A.M. in Village Maganpur within the circle of P.S. Mauaima due to rash and negligent driving of the jeep bearing registration No. M.P. 07A-7331 which dashed Scooter No. U.P. 70/4005 being driven by deceased Prakash Chandra Tiwari from Pratapgarh to Allahabad resulting in his death? If so, its effect?

(2) Whether the income of the deceased was Rs. 5000/- per month and the deceased used to pay income tax or he was unemployed?

(3) Whether the driver of the scooter lost balance due to the fact that three persons were sitting thereon at the time of the accident which itself dashed jeep, as a result of which accident took place?

(4) Whether the City Bank and Insurance Company are liable to pay compensation, if so, to what extent?

(5) Is amount of compensation as claimed excessive and whether the claimants are entitled to get compensation? If so what amount and from whom?

8. The learned Tribunal decided issue No. 1 in affirmative in favour of the claimants and issue No. 2 in this manner that the deceased was unmarried and he would have saved Rs. 18,000/- per year for his parents, and thus this amount was made basis for calculation of compensation. Issue No. 3 was decided in negative and it has held that the accident did not take place due to negligence of scooter driver. Issue No. 4 was decided in negative and it was held that the City Bank was not liable to pay compensation because the registered owner was bound under law to get his vehicle insured with Insurance Company and the Financier was not bound to do the same. The learned Tribunal held that the insurance policy and driving licence were not produced by the registered owner and thus the insurance company would not be liable to pay compensation. Issue No. 5 was decided in this manner that the registered owner Sudama Lal Sonkar,

R.B. Singh, Excise Inspector, borrower of the vehicle and Dinesh Sonkar, driver of the vehicle jointly and severally would be liable to pay compensation of Rs. 2,98,000/- to the claimants as provided in the judgment, aggrieved by which the appellant R.B. Singh filed this appeal.

9. We have heard Shri Anurag Khanna, learned Counsel for the appellant and Shri K.R.D. Tiwari, learned Counsel for the respondents at length and perused the record.

10. The learned Counsel for the appellant has contended that the Motor Accident Claims Tribunal, Allahabad passed the judgment on 14.3.2002 awarding compensation of Rs. 2,98,000/- against the owner of the jeep, namely, Sudama Lal Sonkar, driver Dinesh Sonkar and present appellant, R.B. Singh alleged to be borrower of the vehicle fixing their liability jointly and severally but the appellant was neither the registered owner of the vehicle nor insurer. The review application No. 38 of 2002 was also filed by the appellant but the same was dismissed by the learned Tribunal on 23.10.2007 and thus this first appeal was filed u/s 173 of Motor Vehicles Act against the judgment and award dated 14.3.2002. It is further contended that the award passed by the tribunal was not sustainable in law and no liability could be fixed upon him, because the appellant was neither the owner, driver or insurer as defined under the provisions of Motor Vehicles Act. The appellant did not even fall within the definition of "owner" of the vehicle as defined in Section 2(30) of Motor Vehicles Act. Admittedly the registered owner of the vehicle was Sudama Lal Sonkar. In the award a finding was recorded by the tribunal to this effect that the appellant had borrowed the vehicle from the owner on ill-fated day. There was also no other finding regarding "benami" transaction of the vehicle as alleged in the argument raised by the learned Counsel for the respondents. The burden to prove that the appellant was benami owner of the vehicle, was upon the claimants. It is also contended that there is settled legal position in view of the judgment of the Hon'ble Supreme Court reported in Jaydayal Poddar (Deceased) through L.Rs. and Another Vs. Mst. Bibi Hazra and Others, in which the following principle has been laid down:

It is well settled that the burden of proving that a particular sale is benami and the apparent purchaser is not the real owner, always rests on the person asserting it to be so. This burden has to be strictly discharged by adducing legal evidence of a definite character which would either directly prove the fact of Benami or establish circumstances unerringly and reasonably raising an inference of that fact. The essence of a benami is the intention of the party or parties concerned; and not unoften such intention is shrouded in a thick veil which cannot be easily pierced through. But such difficulties do not relieve the person asserting the transaction to be benami of any part of the serious onus that rests on him; nor justify the acceptance of mere conjectures or surmises, as a substitute for proof.

Though the question, whether a particular sale is Benami or not, is largely one of fact, and for determining this question, no absolute formulae or acid test,

uniformly applicable in all situations, can be laid down, yet in weighing the probabilities and for gathering the relevant indicia, the courts are usually guided by these circumstances: (1) the source from which the purchase money came; (2) the nature and possession of the property, after the purchase; (3) motive, if any, for giving the transaction a benami colour; (4) the position of the parties and the relationship, if any, between the claimant and the alleged benamidar; (5) the custody of the title-deeds after the sale and (6) the conduct of the parties concerned in dealing with the property after the sale.

The above indicia are not exhaustive and their efficacy varies according to the facts of each case. Nevertheless No. 1, viz. the source whence the purchase money came, is by far the most important test for determining whether the sale standing in the name of one person, is in reality for the benefit of another.

11. No evidence has been led by the claimants or the registered owner to prove the ingredients of benami transaction in this case. In absence of any evidence on record the appellant cannot be held to be benami owner of the vehicle in question. Thus he cannot be held liable to pay any compensation with regard to accident in question.

12. The learned Counsel for the appellant has further contended that the appellant has no concern with the vehicle in question and the claim petition was not maintainable against him. The owner of the vehicle in his written statement alleged that the appellant had borrowed his vehicle in question, however, the owner did not prove this allegation nor adduced any evidence whatsoever. The claimants also filed cross appeal but they did not challenge this finding of the tribunal that Sudama Lal Sonkar was the owner and Dinesh Sonkar was the driver. The learned Counsel for the appellant has further contended that admittedly the jeep was financed by City Bank and there was a lengthy procedure for financing the vehicle and the same could have been done after verifying the credentials of Sudama Lal Sonkar, but the appellant could not be pictured in the same at any stage. It was further absurd to suggest that the appellant was benami owner in view of the fact that the owner of the vehicle would have certainly shifted the burden upon the appellant by suggesting that he was not the owner of the vehicle.

13. The learned Counsel for the appellant has also contended that the claimants are not pursuing any execution against the owner and driver of the vehicle, and award against them has become final as they have not challenged the same before any court. The appellant has been targeted only because he is a government servant and the award can be executed easily against him. It is further contended that from perusal of the entire evidence on record there is not even a whisper by the claimants, owner or any person that the appellant is benami owner of the vehicle in question. In the absence of any evidence on record against the appellant, connecting him with the ownership of the vehicle no liability can be fastened upon him.

14. A perusal of the record goes to show that on behalf of the claimants P.W.1 Ratneshwar Dayal and P.W.1 Inderpal have been examined in support of allegations made in the claim petition, but no evidence has been adduced on behalf of the opposite parties. It is settled principle of law that the registered owner of the vehicle cannot escape his liability to pay compensation in the case of accident, but in the present case the registered owner Sudama Lal Sonkar has mentioned in para 38 of his written statement that on the date of the accident opposite party No. 4 Excise Inspector R.B. Singh asked him to provide his jeep bearing registration No. M.P. 07A-7331 for going to Pratapgarh and coming back the same day, at which he expressed his inability due to the fact that the driver of the said vehicle was on leave, whereupon the Excise Inspector R.B. Singh himself brought some one to drive the vehicle. The opposite party No. 4, Excise Inspector R.B. Singh mentioned in para 16 of his written statement that he had no concern with the vehicle involved in accident nor he was the owner of the offending vehicle.

15. The above findings recorded by the learned tribunal in this regard has been challenged by the appellant in this appeal. The learned tribunal has held that on the date of the accident the appellant borrowed the offending jeep from its registered owner Sudama Lal Sonkar as he wanted to go to Pratapgarh by that vehicle on ill-fated day and thus he would also be liable to pay compensation jointly and severally.

16. The learned Counsel for the respondents has relied on decision of the Hon'ble Apex Court in the case of M/s. Godavari Finance Company v. Degala Satyanarayanamma and Ors. reported in Supreme Court Judgment 2008 MACC 121. wherein the Hon'ble Apex Court has observed that in case of a motor vehicle which is subjected to a hire purchase agreement, the financier cannot ordinarily be treated to be owner. The person, who is in possession of the vehicle, and not the financier being the owner would be liable to pay damages for the motor accident. The owner of the vehicle, although may not have anything to do with the use of vehicle at the time of the accident actually he may be held to be constructively liable as the employer of the driver. What is, therefore, essential for passing an award is to find out the liabilities of the persons, who are involved in the use of the vehicle or the persons who are vicariously liable. The observations made by the Hon'ble Apex Court in above case are reproduced below:

17. The question came up for consideration before this Court in Rajasthan State Road Transport Corporation Vs. Kailash Nath Kothari and other etc., where the owner of a vehicle rented the bus to Rajasthan State Road Transport Corporation. It met with an accident. Despite the fact that the driver of the bus was an employee of the registered owner of the vehicle, it was held:

Driver of the bus, even though an employee of the owner, was at the relevant time performing his duties under the order and command of the conductor of R.S.R.T.C. for operation of the bus. So far as the passengers of the ill-fated bus

are concerned, their privity of contract was only with the R.S.R.T.C. to whom they had paid the fare for travelling in that bus and their safety therefore became the responsibility of the R.S.R.T.C. while travelling in the bus. They had no privity of contract with Shri Sanjay Kumar, the owner of the bus at all. Had it been a case only of transfer of services of the driver and not of transfer of control of the driver from the owner to R.S.R.T.C., the matter may have been somewhat different. But on facts in this case and in view of Conditions 4 to 7 of the agreement (supra), the R.S.R.T.C. must be held to be vicariously liable for the tort committed by the driver while plying the bus under contract of the R.S.R.T.C. The general proposition of law and the presumption arising therefrom that an employer, that is person who has the right to hire and fire the employee, is generally responsible vicariously for the tort committed by the employee concerned during the course of his employment and within the scope of his authority, is a rebuttable presumption. If the original employer is able to establish that when the servant was lent, the effective control over him was also transferred to the hirer, the original owner can avoid his liability and the temporary employer or the hirer, as the case may be, must be held vicariously liable for the tort committed by the employee concerned in the course of his employment while under the command and control of the hirer notwithstanding the fact that the driver would continue to be on the payroll of the original owner. The proposition based on the general principle as noticed above is adequately rebutted in this case not only on the basis of the evidence led by the parties but also on the basis of Conditions 6 and 7 (supra), which go to show that the owner had not merely transferred the services of the driver to the R.S.R.T.C. but actual control and the driver was to act under the instructions, control and command of the conductor and other officers of the R.S.R.T.C.

17. The definition of owner u/s 2(19) of the Act is not exhaustive. It has, therefore, to be construed, in a wider sense, in the facts and circumstances of a given case. The expression "owner" must include, in a given case, the person who has the actual possession and control of the vehicle and under whose directions and commands the driver is obliged to operate the bus. To confine the meaning of "owner" to the registered owner only would, in a case where the vehicle is in the actual possession and control of the hirer, not be proper for the purpose of fastening of liability in case of an accident. The liability of the "owner" is vicarious for the tort committed by its employee during the course of his employment and it would be a question of fact in each case as to on whom can vicarious liability be fastened in the case of an accident.

18. In above cited case the services of the driver were transferred along with complete "control" to R.S.R.T.C., under whose directions, instructions and command the driver was to ply or not to ply the ill-fated bus on the fateful day. The passengers were being carried by R.S.R.T.C. on receiving fare from them. Driver of the bus, even though an employee of the owner, was at the relevant time performing his duties under the order and command of the conductor of R.S.R.T.C. for operation of the bus. So far as the passengers of the ill-fated bus

are concerned, their privity of contract was only with the R.S.R.T.C. to whom they had paid the fare for travelling in that bus and their safety, therefore, became the responsibility of the R.S.R.T.C. while travelling in the bus. They had no privity of contract with the owner of the bus at all.

19. The general proposition of law and the presumption arising therefrom that an employer, that is the person who has the right to hire and fire the employee, is general responsible vicariously for the tort committed by the concerned employee during the course of his employment and within the scope of his authority, is a rebuttable presumption. If the original employer is able to establish that when the servant was lent, the effective control over him was also transferred to the hirer, the original owner can avoid his liability and the temporary employer or the hirer, as the case may be, must be held vicariously liable for the tort committed by the concerned employee in the course of his employment while under the command and control of the hirer notwithstanding the fact that the driver would continue to be on the pay roll of the original owner.

20. In Jaydayal Poddar's case the Hon"ble Apex Court has held that it is well settled burden of proving that a particular sale is benami and the apparent purchaser is not the real owner, always rests on the person asserting it to be so. This burden has to be strictly discharged by adducing legal evidence of a definite character which would either directly prove the fact of benami or establish circumstances unerringly and reasonably raising an inference of that fact. In the present case the question of benami transaction is not involved at all.

21. In this case the registered owner has alleged that the appellant borrowed his vehicle for a day as he wanted to go by his jeep to Pratapgarh and come back on the same day. It has also been alleged that the driver of the registered owner was not available on ill-fated day, whereupon the appellant arranged his own person to drive the said vehicle and he drove the said vehicle on the day of occurrence and thus the appellant was having full control and command over his own man who was driving the offending vehicle at the time of accident and thus the appellant could not escape his liability to pay compensation with regard to death of deceased.

22. A perusal of the record of trial court goes to show that no evidence has been led on behalf of Sudama Lal Sonkar registered owner of the Jeep to prove this fact that his Jeep was borrowed by appellant and he also arranged his own man to drive the offending vehicle on the date of accident. The witnesses examined by the claimants have also not been cross-examined by the registered owner at all. No suggestion has been put to these witnesses in their cross-examination to this effect that the Jeep in question was borrowed by the appellant from its registered owner on ill-fated day. Section 101 of Indian Evidence Act lays down the provision in this regard, which is reproduced below:

S. 101. Burden of proof. - Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must

prove that those facts exist. When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

23. In view of above legal provision the registered owner Sudama Lal Sonkar has not discharged his burden as he has failed to examine himself in order to prove his own allegations made in his written statement. In absence of any evidence on record in this regard it is not found to be proved that the appellant borrowed the offending vehicle from its registered owner. Under these circumstances the above proposition of law laid down by Hon''ble Apex Court in said case is not applicable to the present case and thus the appellant cannot be held liable to pay compensation to the claimants with regard to the accident in question.

24. We have found on the basis of evidence on record and circumstances of the case that the appellant was neither the registered nor benami owner of the offending vehicle on the date of accident. It has also not been established that the appellant borrowed the said vehicle from its registered owner on the date of accident, as there is no evidence on record at all in this regard. Thus no liability can be fastened on the appellant to pay compensation. Consequently this appeal deserves to be allowed.

25. Appeal is thus allowed and the judgment and award dated 14.3.2002 passed by learned M.A.C.T./Special Judge (E.C. Act), Allahabad in Motor Accident Claim Petition No. 67 of 1993 Kashi Ratneshwar Dayal Tiwari and Ors. v. Sudama Lal Sonkar and Ors. is set aside as against the appellant. However, the claimants shall be entitled to get amount of compensation from Sudama Lal Sonkar registered owner and Dinesh Sonkar driver as directed by the Tribunal. No order is passed as to costs.