

(1992) 06 BOM CK 0010

In the Bombay High Court

Case No : First Civil Appeal No. 170 of 1987 and 6 of 1988

Sadiq Sheikh c/o Shaukat Ali Glass Traders

APPELLANT

Vs

Chandrakant D. Volvoikar and Others

RESPONDENT

Date of Decision : 09-06-1992

Acts Referred:

Motor Vehicles Act, 1939 — Section 110, 84, 94, 95, 96(1)(2)(b)(ii)

Citation : (1993) ACJ 291 : (1993) 1 BomCR 654 : (1992) 94 BOMLR 668

Hon'ble Judges : E.S. Da Silva, J

Bench : Single Bench

Advocate : R.M.S. Khandeparkar, for respondent No. 2, E. Afonso and H.R. Bharne, for the Respondent

Judgement

E.S. Da Silva, J.—This judgment will conveniently dispose of both the appeals filed against the Award of the Learned Member of the Motor Accident Claims Tribunal, Panaji, dated 30th September, 1987 in Claim Petition No. 99 of 1983. First Appeal No. 170 of 1987 was filed by respondent No. 5 in First Appeal No. 6 of 1988 one Sadiq Sheikh owner of M/s.Shaukat Ali Glass Traders, Panaji while First Appeal No. 6 of 1988 was filed by respondent No. 5 in First Appeal No. 170 of 1987 M/s. Vishnu V. Kamat Tarkar. The claim petition had been instituted by the applicant one Chandrakant D. Volvoikar against respondent No. 1 M/s. V.S. Dempo & Co. Pvt. Ltd., who was the owner of the vehicle involved in the accident, respondent No.2 one Vasant Kutty who was actually driving the vehicle which met with an accident, respondent No.3 which is the Insurance Company of the vehicle, respondent No. 4 M/s. Vishnu Kamat Tarkar which is a firm dealing with repairs of vehicles having a garage for that purpose and to which the vehicle had been entrusted by the owner and respondent No. 5 which is also a firm dealing with the work of glass and to which respondent No. 4 had entrusted the said vehicle to carry on some work with the glass fittings. The facts of the case are that on 2-8-1983 the claimant had come out of the Menezes Pharmacy at Panaji and was walking along the footpath when near the door of one Chodankar's shop the jeep No. GDE-2179 belonging to respondent No. 1 and

proceeding towards Fountain has come in a rash and negligent manner and dashed against the claimant. As a result of the accident the claimant sustained a compound fracture of the tibia/fibula upper 1/3. The jeep was driven by respondent No. 2. A compensation of Rs. 25,000/- was claimed by the petitioner. The petition was originally filed by the claimant against the owner and driver of the vehicle only. Subsequently by way of amendment he added the names of three more respondents being respondent No. 3 The Insurance Company with whom the Insurance Company had been insured by respondent No. 1, Respondent No. 4 M/s. Vishnu V. Kamat Tarkar to whom respondent No. 1 had entrusted the vehicle for repairs and respondent No. 5 Shri Sadiq Sheikh, Proprietor of M/s. Shaukat Ali Glass Traders to whom respondent No. 4 had entrusted the vehicle for replacement of the windshield glass.

2. The case of the respondent No. 3 Insurance Company is that respondent No. 2 Vasant Kutty who was driving the vehicle at the relevant time was not holding any licence and therefore they were not liable to pay any compensation. The defence of respondent No. 1 was that there was no accident at all involving the vehicle belonging to them. They also pleaded that on the day of the accident the vehicle had been entrusted to respondent No. 4 M/s. Vishnu V. Kamat Tarkar who are independent contractors and owners of a workshop wherein repairs were being undertaken by the vehicle. Therefore they were not liable to pay any compensation. In his turn respondent No. 4 M/s. Vishnu V. Kamat Tarkar's case is that they also were not liable to pay compensation on account of the accident because at the relevant time the jeep which was handed/over to them by respondent No.1 M/s. V.S. Dempo, the owner of the vehicle, had been entrusted by the said respondent No. 4 to the respondent No. 5 to undertake some repairs in respect of the fitting of windshield glass and this also with the permission and full knowledge of the owner. In fact the vehicle was given to respondent No. 5 by respondent No. 4 with the respondent No. 1's consent on 1-8-83 for fixing the front windshield glass and thereafter the respondent No. 4 came to know, by letter of respondent No. 5, dated 2-8-83, that the vehicle had met with an accident while the same was in their custody. Thus respondent No. 4 pleaded that it is only respondent No. 5 Sadiq Sheikh, Proprietor of M/s. Shaukat Ali Glass Traders who was solely responsible for any compensation arising out from the accident involving the jeep belonging to respondent No. 1. However respondent No. 5 pleaded no liability alleging that there was no cause of action against them.. The said respondent No. 5 denied that the vehicle was in their possession at the relevant time. As such he was not responsible to compensate the victim for any accident. The learned Tribunal after recording evidence gave the findings that the accident had been caused due to the rash and negligent driving of respondent No. 2 Vasant Kutty, that the vehicle belonging to respondent No.1 had been entrusted by the owner to the respondent No. 4 for repairs at the material time, that in his turn respondent No. 4 had given the vehicle to respondent No. 5 to undertake some glass works when the accident occurred namely the fitting of the front windshield. On the basis of these findings

the learned Tribunal came to the conclusion that once respondent No. 1 was not in possession of the vehicle at the material time and had parted with possession entirely with respondent No. 4 the respondent No. 1 could not be held liable to pay compensation for the accident and consequently the Insurance Company who had insured the vehicle would also not be liable to pay compensation once no indemnity could be demanded from the Insurance Company when the insured was not to be made liable for the accident. Accordingly the learned Tribunal held that the petitioner/claimant was entitled for compensation of Rs. 17,300/- with interest from the date of the filing of the petition and cost of Rs. 1800/- on account of the injuries sustained in the accident but the said compensation should be jointly and severally paid by the respondents No. 2, 4 and 5 only. As it was stated above the said Award was challenged by both the respondents No. 5 M/s. Vishnu V. Kamat Tarkar and respondent No. 5 Sadiq Sheikh in Appeals No. 170 of 1987 and 6 of 1988 respectively.

3. On the day of hearing the respondent No. 5 in Appeal No. 6 of 1988 who is the appellant, in Appeal No. 170 of 1987 chose to remain absent. As a result I am unable to find any merit in his appeal because after perusing the impugned Award I find no infirmity or impropriety in the conclusion arrived at by the learned Presiding Officer of the Tribunal as far as the liability of the appellant/respondent No. 5 in Appeal No. 6 of 1988 is concerned as well as in respect of the amount of compensation actually awarded by him in favour of the claimant and for which the appellant/respondent No. 5 in Appeal No. 6 of 1988 was also made liable jointly with respondent Nos. 3 and 5 in Appeal No. 170 of 1987.

4. So far Appeal No. 6 of 1988 is concerned Shri Bharne, learned Counsel appearing for the appellant, has raised two propositions while challenging the impugned Award. The first proposition is to the effect that since the vehicle has been entrusted by the respondent No. 4 to the respondent No. 5 Sadiq Sheikh of M/s. Shaukat Ali Glass Traders for the purpose of carrying on some glass works namely fitting of the windshield the liability of respondent No. 4 had ceased because he was no more in control of the vehicle which was actually in exclusive possession of respondent No. 5 Shri Bharne has submitted that the fact of this entrustment had been communicated to the respondent No. 1, the owner of the vehicle, who had been told that some glass works would be required and this has to be done by respondent No. 5 Shri Bharne contended that the owner of the vehicle was thus aware of the entrustment and had agreed to that. I am however unable to accept these submissions of Shri Bharne. It is an admitted position that on the relevant day the vehicle belonging to respondent No. 1 had been entrusted by the owner to the respondent No.4 who has a garage doing repairs of vehicles for the purpose of carrying on some repairs. It is not disputed by the respondent No. 4 that the vehicle was thus in their exclusive possession and that the owner was not in possession of the said vehicle. Being so even assuming that the repairs which had to be carried on by respondent No. 4 and for which purpose the vehicle had been entrusted to them by respondent No. 1 could not be completed without the glass works which were required to be done by another

agency, namely, the respondent No. 5, the circumstance of the vehicle having been in custody of the respondent No. 5 on account of its entrustment done by respondent No. 4 could not by any stretch of imagination absolve the respondent No. 4 from the liability arising out of the accident since admittedly the same occurred during the time the repairs were still being done by the respondent No. 4 and had not been completed to the satisfaction of the owner and the owner had not been given back the possession of the vehicle of the said respondent No. 4. Shri Bharne's contention that the vehicle had been handed over to respondent No. 5 with the knowledge and consent of the owner has not been substantiated by the learned Counsel by way of any conclusive evidence on record. Hence I am inclined to reject the proposition advanced by Shri Bharne in this respect.

5. It was further contended by Shri Bharne that the award passed by the learned Tribunal is also wrong to the extent that the same has unduly exonerated the respondent No. 3, the Insurance Company, from the liability to pay compensation to the claimant. Shri Bharne urged that even assuming that at the relevant time the vehicle was not in possession of the Insurer and had been entrusted by him to the repairer, still the responsibility of the Insurance Company would subsist irrespective of any liability of the insured for the accident caused committed either by the repairer or any of his employees. In the instant case Shri Bharne argued that the accident was caused not by any employee of theirs but by an employee of another agency, namely, the respondent No.5 Sadiq Sheikh of M/s. Shaukat Ali Glass Traders to whom the vehicle had been handed over by them to carry out the work of fitting the front glass windshield. The accident has thus occurred when the car was still being under repairs. Reliance was placed with this regard by Shri Bharne on the case of *Guru Govekar Vs. Miss Filomena F. Lobo and Others*, . This was a case also dealing under sections 94 and 95 of the Motor Vehicles Act, 1939 on account of an accident in which compensation was claimed by the victim. The Supreme Court while adjudicating the liability towards the petitioner held that the liability of the insurer was there even when the vehicle was in the custody of the repairer. The claimant who was the third party suffering injuries in a public place on account of negligence of the mechanic engaged by the repairer was entitled to be compensated by those who were liable to pay compensation found to be due to the claimant. In the said judgment the Supreme Court has clearly laid down that when an owner of the motor vehicle entrusts his vehicle to a repairer to carry out repairs he is in fact allowing the repairer to use his vehicle in that connection. It was also implicit in that transaction that unless there is a contract to the contrary the owner of the vehicle was also causing or allowing any servant of the repairer who is engaged in the work of repairs to use the motor vehicle for the purpose of work of repairs and when such work of repairs was being carried out in a public place if on account of the negligence of either repairer or employee who is engaged with the work of repairs a third party dies or suffers injury either to his person or property the insurer becomes liable to pay the compensation under the provisions of the Act. The Supreme Court further held that while it may be true that under the Law

of Torts, the owner may not be liable on the principle of vicarious liability, the insurer would be liable to pay the compensation by virtue of the provisions of sections 94 and 95 of the Act. Shri Bharne urged that this judgment shows that in the instant case in spite of the fact that the learned Tribunal has found that respondent No. 1 the owner of the vehicle was not to be vicariously held responsible for the compensation due to the fact that the possession of the vehicle had been parted with by the said respondent No.1 in favour of respondent No. 4 for the purpose of carrying out repairs the liability of the respondent No. 3 in respect of the same vehicle could not be denied neither by the Insurance Co. nor by the Tribunal because there was an implied permission on the part of the owner for the repairer to ply the vehicle either personally or through his employee in connection with the work of repairs to be carried out by them. Therefore if any accident has been caused by the repairer or its employee in the course of this transaction the insurer was liable to pay compensation to the third party on account of the driving of this vehicle which was in possession of the repairer by entrustment done by the owner for the specific purpose of carrying out the repairs.

6. Shri Afonso, learned Counsel for respondent No. 4, has vehemently argued that no such liability could be festered on the respondent Insurance Co. unless such liability could be found subsisting against the insured of the vehicle. The learned Counsel urged that the ruling applied by Shri Bharne was not justifying any such liberal interpretation sought to be drawn by him to the effect that the liability of the Insurance Co. would arise even in case the insured was not to be held liable for the payment of compensation. Shri Afonso, took me through the passage of the judgment of the Supreme Court namely, its para 8 wherein it is stated that the liability to pay compensation in respect of death or injury caused to the person or property of a third party undoubtedly arises when such injury is caused when the insured is using the vehicle in a public place and it also arises when the insured has caused or allowed another person including an independent contractor to use his vehicle in a public place and the death or injury to a person or property of a third party is caused on account of the use of the said vehicle during such period unless such other person has himself taken out a policy of insurance to cover the liability arising out of such an accident. According to Shri Afonso this pronouncement of the Supreme Court shows that the liability of the Insurance Co., arises only when the vehicle is driven by the insured or by any person with his permission and the accident is caused due to the fault of the insured or of the person who was actually driving the vehicle with the consent of the insured. I have nothing to oppose to this argument advanced by Shri Afonso because this appears to be the general rule regarding liability of a person causing an accident of a motor vehicle in terms of the Act. There is no doubt that the insured is always liable to pay compensation which is found to be payable by the insured vehicle involved in the accident by way of indemnity. But the question arises as to when the insured is held to be not liable because the possession of the vehicle had been entrusted by him to an independent agency. The liability of

the insurer is to be held still remaining for an accident caused due to the fault of the owner of that independent agency or of its employee. It is in this context that the observations made in the judgment, namely, in its para 9 to which mention has already been done earlier appear to be relevant. It seems that the said judgement lays down some sort of constructive liability on the part of the insurer. In such cases and on the ground that it is always implicit in the transaction which occurs when the owner entrusts his vehicle to the repairer to carry out repairs unless there is any contract to the contrary the owner of the vehicle is deemed to cause or allow any servant of the repairer also who is engaged in the work of repairs to use the vehicle for the purpose of or in connection with the work of repairs and when this happens and an accident occurs due to the negligence of the repairer or his employee the insurer becomes liable to pay compensation. Nowhere the judgment refers in this particular situation to any liability of the insured also in this case and clearly mentions only that the liability vests with the insurer alone. This appears to be the conclusion to be drawn from the passage of the same judgment which was already quoted above namely that, although it is true that, under the Law of Torts, the owner may not be liable to pay compensation under the principle of vicarious liability still the insurer would be liable to pay compensation in view of sections 94 and 95 of the Act.

7. Shri Afonso has invited my attention to another passage of the same judgment in its para 13 which has referred to the decision of the Supreme Court in the case of *New Asiatic Insurance Co. Ltd. Vs. Pessumal Dhanamal Aswani and Others*, , which has held that once the insurer had issued a certificate of insurance in accordance with sub-section (4) of section 95 of the Act the insured had to satisfy any decree which a person receiving injuries from the use of the vehicle insured obtained against such person insured by the policy. According to Shri Afonso this means that the insurer was liable only when a decree had been obtained by the claimant against the insured also. I again say that I have no dispute against this proposition also advanced by Shri Afonso. The law laid down by the aforesaid judgment arises out of the normal rule of interpretation of the legal enactment. There is no doubt that when the insured is held liable to pay compensation the insurer is bound to indemnify the insured for this liability and pay the compensation due by him. However this does not mean that the insured is liable to pay compensation only in that case if as a normal rule this has to happen. However the judgment relied by Shri Bharne appears to enlarge the liability of the insurer even in situations which are not the normal ones and this Court has to look upon the judgment in *New Asiatic Insurance Co. Ltd. Vs. Pessumal Dhanamal Aswani and Others*, , in the light of the principle enunciated by the Supreme Court in its subsequent judgment in *Guru Govekar Vs. Miss Filomena F. Lobo and Others*, . I once again repeat that this judgment of the Supreme Court relied by *Guru Govekar Vs. Miss Filomena F. Lobo and Others*, , is a ruling based on constructive liability of the insurer irrespective of the liability cast on the insured. Shri Afonso has further cited the ruling in *Minu B. Mehta and*

another v. Balkrishna Ramchandra Nayan and another, 1977 A.C.J. 118, which has held that section 96 of the Act provides that when a judgment in respect of such a liability as is required to be covered by a policy is obtained against any person insured by the policy, then the insurer shall pay to the person entitled the benefit of the decree as if he were a judgment-debtor. The liability is thus limited to the liability as is covered by the policy. In my view this judgment once again reiterates the normal rule regarding the insured and does not take Shri Bharne's case any further. This judgment has been based on facts and cannot be used to change the clear interpretation of sections 94 and 95 of the Act given by the Supreme Court in its recent judgment relied by Shri Bharne.

8. It was further contended by Shri Afonso that the insurer's liability was also to be excluded in this case because the driver of the vehicle involved in the accident was not holding any driving licence. However and apart from the fact that there is no clear finding on the part of the learned Presiding Officer of the Tribunal on this point and also that the Tribunal was exonerating the Insurance Company on this ground the contention of Shri Afonso does not appear to be valid in view of the judgment of the Supreme Court in Skandia Insurance Co. Ltd. v. Kokilaben Chandravadar and others, AIR 1987 S.C. 1184, otherwise relied also by Shri Bharne. In the said decision which is dealing with a case under the Motor Vehicles Act, namely, its sections 96(1)(2)(b)(ii), 94 and 84 the question of exclusion clause in policy prohibiting driving by person other than one holding driving licence and the liability of insurer to satisfy were considered by the Supreme Court. It was then held that mere breach of the clause does not absolve the insurer of his liability and that he had to establish that the insured himself was guilty of committing breach of promise in a contract of insurance. The Court observed that 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. 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. Unless the insured is at fault and guilty of a breach the insurer cannot escape from the obligation to indemnify the insured and successfully contend that he is exonerated having regard to the fact that the promisor (the insured) committed a breach of his promise. In the instant case admittedly the Insurance Company has not discharged the burden of proving that the owner of the vehicle involved in the accident had wilfully and deliberately placed the vehicle in the hands of an unlicensed driver even assuming that the evidence on record suggests that respondent No. 2 while driving the vehicle was not holding any valid licence. It was only in that case that the respondent No. 3 could successfully run away from his responsibility to pay compensation for the accident caused on account of the use of the vehicle insured with them.

9. In view of the clear judgment of the Supreme Court I am of the view that the arguments advanced by Shri Afonso on this ground of defence are also to be

discarded . In the result First Civil Appeal No. 170 of 1987 is dismissed except with regard to the liability of the respondent No. 4 as per my findings in respect of First Civil Appeal No. 6 of 1988 and First Appeal No. 6 of 1988 is partly allowed to the extent that the impugned Award of the learned Tribunal is hereby modified so as to hold the petition as allowed not only against the appellant and the respondents No. 3 and 5 but against the respondent No. 4 also jointly and severally, with no order as to costs in the circumstances of the case.