

(1972) 07 MP CK 0002

In the Madhya Pradesh High Court

Case No : Miscellaneous Appeal No. 108 of 1967

Shantibai and Others

APPELLANT

Vs

The Principal, Govindram Sakseria Technological Institute and
Others

RESPONDENT

Date of Decision : 10-07-1972

Acts Referred:

Contract Act, 1872 — Section 148

Motor Vehicles Act, 1939 — Section 110A, 96(2)

Citation : (1972) ACJ 354

Hon'ble Judges : S.R. Vyas, J;G.L. Oza, J

Bench : Division Bench

Advocate : A.K. Mathur, for the Appellant; A.K. Chitle, for No. 1, G.M. Chaphekar, for No. 2 and B.S. Johar, for No. 3, for the Respondent

Final Decision : Allowed

Judgement

G.L. Oza, J.—The Appellants have filed this appeal against an order passed by the Motor Accidents Claims Tribunal, Indore, (hereinafter called the Tribunal), rejecting the claim petition filed by them.

2. The facts giving rise to this appeal are that the Appellants along with one Gulab, the father of the deceased Kanhaiya, submitted an application before the Tribunal for award of compensation u/s 110-A of the Motor Vehicles Act, 1939. It was alleged in this application that the Station Wagon bearing number MPF-439, owned by Respondent No. 1, was being driven by Respondent No. 2 on 24th August 1965 on Agra-Bombay Road, near Rajgarh Kothi, Indore. The vehicle was being driven towards Bombay when it knocked down a cyclist named Kanhaiya, who died on the spot. The incident is alleged to have taken place in the evening. It was alleged that at that time the vehicle was being driven at a high speed and negligently and it was because of this that the incident took place resulting in the death of the deceased. It was also alleged that the deceased was earning Rs. 150/- p.m. On this basis, the widow of the deceased along with his father and

minor children filed a claim petition claiming Rs. 50,000/- as compensation from the Respondents.

3. Respondent No. 1 denied that the Respondent No. 2 was his regularly employed driver. The allegations about negligence were denied because of want of knowledge. In his reply, Respondent No. 2 contended that he was an employee of M/s Sanghi Brothers and the vehicle had come to their workshop for repairs. According to him, he had taken out the vehicle for trial. At that time, it was raining heavily and when he came on the cross-roads near Rajgarh Kothi the cyclist suddenly took a turn and, therefore, collided against the vehicle. Respondent No. 3?Insurance Company raised a plea that as the vehicle was being taken on reliability trial, under the terms of the policy the Company is not liable.

4. As regards compensation, the Tribunal held that the Appellants were entitled to Rs. 15000/- and allowed the application as against the Respondent No. 2. But the Tribunal rejected the application as against the other Respondents on the ground that the Respondent No. 2 was not the driver of Respondent No. 1 and so the Respondent No. 1 could not be held liable for the negligence of Respondent No. 2. It was also held that the reliability trial was exempted in the exemption clause of the insurance policy. The Tribunal also found that there was nothing to show that the Respondent No. 2 held an effective driving licence. Consequently the Respondent No. 3, Insurance Company, was held not to be liable. It is against this that the present appeal has been filed.

5. Respondent No. 2 has also filed cross-objections.

6. Mr. A.M. Mathur, learned Counsel for the Appellants, contended that the conclusion of the Tribunal that the Respondent No. 1 could not be held liable as Respondent No. 2 was not a driver in his service, cannot be justified. According to the learned Counsel, in view of the pronouncements of the Supreme Court in *New Asiatic Insurance Co. Ltd. Vs. Pessumal Dhanamal Aswani and Others*, and *Sitaram Motilal Kalal Vs. Santanuprasad Jaishankar Bhatt*, . the conclusion arrived at by the Tribunal is not justified. He also contended that: the principle of vicarious liability, as it now stands, cannot be based on the theory that the master should be in a position to control the acts of his servant. Learned Counsel also referred to certain passages from "*Clerk & Lindsell on Torts*". As regards the reliability test being one of the conditions of exemption in the insurance policy, learned Counsel contended that the only exemption could be what is contained in Section 96(2) of the Motor Vehicles Act, and the clause that could be considered clearly indicates that such a trial, as is alleged in the present case, cannot be said to be exempted. He contended that the question whether Respondent No. 2 was not a licensed driver, was not raised and so there is nothing on record to indicate whether or not he held a valid driving licence. According to the learned Counsel, in absence of any plea raised by the insurance company, on that basis the claim petition could not be dismissed.

7. Learned Counsel Mr. B.S. Johar and Mr. A.K. Chitale, appearing for Respondents Nos. 3 and 1 respectively, vehemently contended that as the vehicle was given for repairs to M/s Sanghi Brothers, it was given on bailment, and consequently Respondent No. 1 had no control over the vehicle. They contended that the Respondent No. 2 was not a servant of Respondent No. 1 and he could only be said to be the servant of an independent contractor, and consequently no liability could be fixed against Respondent No. 1 for the negligent act of the servant of an independent contractor. To support their contention, reliance was placed on B. Govindarajulu Chetty Vs. M.L.A. Govindaraja Mudaliar and Others, and Unique Motor and General Insurance Co. Ltd. Vs. M. Kannappa Naicker and Another, Learned Counsel also referred to certain English decisions and passages from "Winfield on Tort".

8. Shri Chaphekar appearing for the Respondent No. 2 contended that the evidence of two witnesses examined by the Appellants does not establish the negligence of Respondent No. 2 and, therefore, the conclusion of negligence arrived at by the Tribunal is not justified.

9. It is no doubt true that out of the two witnesses examined by the Appellants, one is a tea-vendor having a tea-stall at the cross-road, although it is situated a few feet towards the road going to the east which is described as Gita-Bhawan Road. The other witness is a person who was standing there taking tea. Apart from the evidence of these two witnesses, the evidence of Respondent No. 2 himself and that of Abdul Razak, who claimed to be in the vehicle at the time of the incident, and of the Traffic Constable P.W. 8 Shivarjoon who was posted on that traffic-point, goes to show that at that time there was no other vehicle on the road. Their evidence also indicates that except the deceased on his bicycle and one more cyclist no other vehicles or pedestrians were on the road. It was raining very heavily and all of a sudden the vehicle came and collided against the bicycle. The post-mortem report indicates that the deceased was crushed. These are circumstances which speak for themselves. According to Respondent No. 2 himself, suddenly the bicycle dashed against the vehicle or the vehicle dashed against the bicycle. But he has not been able to explain as to how the accident occurred on such a broad road when no other vehicle or pedestrian was there. The evidence of the two witnesses examined by the Appellants indicates that the vehicle was moving in a curious manner; that is, it was moving like a serpent-sometimes going on the left and sometimes on the right. We have nothing else except these circumstances. In these circumstances, even if the positive assertion of the witnesses examined on behalf of the Appellants about the speed of the vehicle is not accepted, still the only inference that can be drawn would be that Respondent No. 2 was driving the vehicle negligently which resulted in the accident. In this view of the matter, the conclusion arrived at by the learned Tribunal appears to be justified.

10. The insurance company (Respondent No. 3) has raised two special defences in this Court during the course of arguments (i) that the reliability test could be

exempted under the conditions of the policy and would also fall u/s 96(2)(b)(i) (b) of the Motor Vehicles Act, and (ii) that the Respondent No. 2 was not a licensed driver, and which would fall u/s 96(2)(b) (ii) of the Act. The condition of the policy on which reliance has been placed reads thus:

Use for hire or use for organised racing, pace-making, reliability speed testing,

Section 96 (2) (b) (i) (b) is as under:

for organised racing and speed testing". Apparently the clause in the insurance policy and Clause (b) of Section 96(2)(b) (i) are more or less identical. This will only mean speed testing and not a mere trial taken after repairs. There is nothing in the evidence to indicate that the trial was for purposes of speed-testing or for organised racing. In this view of the matter, the contention of the Respondent No. 3 Insurance Company cannot be accepted and the Tribunal was in error in holding that the reliability test would exempt the insurance company from the liability.

11. As regards the licence of driving held by Respondent No. 2, it is clear that the evidence on record does not indicate that Respondent No. 2 had a valid driving licence. The evidence does not also indicate otherwise. Neither the Insurance Company nor the Respondent No. 1 raised any plea to that effect in their replies submitted before the Tribunal. Mr. Johar, appearing for the Insurance Company, contended that the burden of proving that the vehicle was being driven by a licensed driver lay on the Appellants. This contention cannot also be accepted. Section 96(2) of the Motor Vehicles Act provides defences available to the insurance company, and if the insurance company wanted to escape the liability on any one of these grounds of defence, it was for the insurance company to plead exemption specifically and to prove it. In absence of any plea or proof by the insurance company, it cannot be held that the Respondent No. 2, who was driving the vehicle at the relevant time, was not person holding a valid driving licence. In this view of the matter we are supported by a decision of the Bombay High Court in *Pesumal Dhanmal Vs. New Asiatic Insurance Co. Ltd. and Others*, .

12. The next contention raised by the learned Counsel for Respondents Nos. 1 and 3 is about the bailment of the vehicle with the repairer, and the contention that Respondent No. 2 was a servant of an independent contractor and so no liability could be fixed against Respondent No. 1 and consequently Respondent No. 3 also could not be held liable. It will be pertinent to note that before we go into the legal questions, it is necessary to find out as to what was the plea raised before the Tribunal by Respondents Nos. 1 and 3. In paragraph 2 of their claim-petition, the Appellants alleged that at the relevant time the vehicle was being driven by a servant of Respondent No. 1. In his written-reply to this paragraph, Respondent No. 1 stated that "The non-applicant No. 2 is not a regularly employed driver of the non-applicant No. 1". It is significant that immediately after this Respondent No. 1 further pleaded that "this fact, however, is not material because the insurance policy covered accidents arising while any person

was driving the vehicle". This is the only plea on the basis of which arguments about bailment and independent contractor have been put forth. In fact, this plea only goes to show that Respondent No. 2 was not in the regular employment of Respondent No. 1 but he was driving the vehicle on the date of accident. The further averment about the condition in the policy that any person could have driven the vehicle goes to show that neither Respondent No. 1 raised a plea that the vehicle was given on bailment to M/s Sanghi Brothers and so lost control over the vehicle, nor was it contended that Respondent No. 2 was a servant of M/s Sanghi Brothers and he being a servant of an independent contractor Respondent No. 1 could not be held liable for the tortious act of Respondent No. 2. Similar is the plea raised by Respondent No. 3. In its reply to paragraph-2 of the claim-petition, Respondent No. 3 has stated that?"It is admitted that non-applicant No. 2 was driving the vehicle at the relevant time but it is not admitted that non-applicant No. 2 was driving the said vehicle as driver of the non applicant No. 1". Consequently it cannot be doubted that both the Respondents, who before the court below and also before us had taken pains to raise a contention about bailment and also about Respondent i.e. 2 being a servant of an independent contractor, have not at all raised these pleas in their replies to the claim-petition. The reply of Respondent No. 2 also indicates that he has "not admitted that he was driving the sad vehicle as driver of non-applicant No. I". In his reply, Respondent No. 2 has further stated that he is an employee of M/s Sanghi Brothers and the vehicle had come for repairs in the workshop of the said concern and he had taken the vehicle from the workshop for trial on Agra-Bombay road where the accident took place. Consequently, the only facts that have emerged from the pleadings of the parties appear to be that Respondent No. 2 was a servant of M/s Sanghi Brothers and was driving the vehicle at the relevant time for trial as it had come to the workshop for repairs. It cannot also be doubted that in his reply the Respondent No. 2 could not refer to the terms of contract between Respondent No. 1 and M/s Sanghi Brothers. If it was a contract of bailment, it could only be pleaded by Respondent No. 1 and the documents could have been produced. Section 148 of the Contract Act reads thus:

148. A "bailment" is the delivery of goods by one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them. The person delivering the goods is called the "bailor". The person to whom they are delivered is called the "bailee".

Explanation?If a person already in possession of the goods of another contracts to hold them as a bailee, he thereby becomes the bailee, and the owner becomes the bailor, of such goods although they may not have been delivered by way of bailment.

It cannot, therefore, be doubted that the necessary facts to draw an inference of a contract of bailment as contemplated by this provision have in the present case neither been pleaded nor have they been proved.

13. It is also clear that when Respondent No. 2 was taking a trial, it cannot be said that he was not taking the trial on behalf of Respondent No. 1. In fact, the Respondent No. 1 in his reply quoted above has only alleged that the Respondent No. 2 was not a regularly employed driver, indicating thereby that the employment may be of casual nature, that is, even though he may be a mechanic in the service of M/s Sanghi Brothers, he might have taken out the vehicle for trial on behalf of Respondent No. 1. It is also significant that the Respondent No. 1 has not even pleaded that at that time the vehicle was not in his possession and was not being driven on his behalf or under his instructions. In the absence of these pleas either raised by Respondent No. 1 or by Respondent No. 3, we do not think that the contentions raised before us deserve any consideration. On the basis of the pleas raised before the Tribunal issue No. 2 only was framed. This issue, as framed, does not appear to be of any consequence as it is not necessary that the driver at the time of the accident ought to be in the regular employment of Respondent No. 1 as the conditions in the policy provide that anyone may be driving the vehicle. As already discussed above, in absence of specific pleas the contentions raised by Respondents Nos. 1 and 3 cannot be accepted.

13. Mr. Chaphekar has also filed a cross-objection on behalf of Respondent No. 2 in which he raised the contention that the conclusions arrived at by the Tribunal about the negligence of Respondent No. 2 cannot be maintained. So far as that contention is concerned, as discussed above it is not of any substance. In this cross-objection, another contention raised is about the quantum of compensation. The evidence in the case indicates that the deceased was getting Rs. 97/- p.m. as salary although the witnesses have deposed that he used to earn something more by doing part-time work. The learned Claims Tribunal has taken into account only Rs. 97/- p.m. as his salary and estimated compensation on the expectation of life upto 60 years. The father of the deceased, who had stepped into the witnessbox, was of 56 years when he was examined. In this view of the matter, the estimated expectation of life does not appear to be unreasonable. On this calculation, the compensation comes to Rs. 18,000/-. But the Tribunal has even reduced this amount by Rs. 3000/- as the compensation is being awarded in lump sum. Thus it appears that the quantum of compensation determined by the Tribunal is not unjustified. Consequently this contention also is without any force.

14. In the light of the discussion above, this appeal is allowed. The application for compensation filed by the Appellants is allowed and Rs. 15000/- is awarded as compensation to the Appellants for the death of the deceased Kanhaiya. Respondents Nos. 1 and 2 shall both be jointly and severally liable for this amount. Respondent No. 3 insurance company has also failed to establish any reasons on the basis of which it can escape the liability. The Appellants shall be entitled to costs of this appeal from the Respondents. Cross-objections filed by Respondent No. 2 are also dismissed with costs. Counsel's fee as per schedule if certified.