

(1996) 07 RAJ CK 0012

In the Rajasthan High Court

Case No : Civil Miscellaneous Appeal No. 172 of 1982

Smt. Shiv Pyari

APPELLANT

Vs

Smt. Vidhyavati and Others

RESPONDENT

Date of Decision : 03-07-1996

Acts Referred:

Motor Vehicles Act, 1988 — Section 2

Citation : (1996) 1 WLN 474

Hon'ble Judges : B.R. Arora, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

B.R. Arora, J.—This appeal is directed against the judgment/Award dated 15.4.82 passed by the Judge, Motor Accident Claims Tribunal, Jodhpur, by which the learned Judge of the Tribunal awarded a sum of Rs. 2,26,400/- as compensation to the claimants alongwith interest @ 6% per annum and held the owner and the driver of the Jonga Jeep liable to pay the amount of compensation. The learned Judge of the Tribunal, however, dismissed the remaining claim of the claimants and, also, held that the owner and the driver of the bus as well as Paschimi Rajasthan Dugdh Utpadak Sahkari Sangh, Jodhpur (for short, "the Sangh") and the National Insurance Company are not liable to pay any amount of compensation.

2. Smt. Vidhyavati-the widow, Smt. Sugni Devi-the mother- and the sons and daughters of deceased Dr. Ashvariya Prasad Purohit, on 14.11.77, filed a claim petition in the Court of the District and Sessions Judge (Motor Accident Claims Tribunal), Merta City for the award of compensation amounting to Rs. 4,55,000/-. It was averred in the claim petition by the claimants that on 21.7.77, at about 6.00 a.m., deceased Dr. Ashvariya Prasad Purohit, who was as Veterinary Surgeon and was the Leader of the Spear Head Team of the Chilling Centre, Merta City, alongwith Dr. Daulat Singh and Compounder Malam Singh, left the Dairy Office, Merta City in Jonga Jeep No. RRQ 3303 for going to villaged

Med, Mundel, Chawadlya etc. for the treatment of the animals and to give medicines to them. When the Jonga Jeep crossed Gujala village a bus No. RSQ 3901 came from the opposite side and took a sudden turn. Both the drivers, i.e., the driver of the Jonga Jeep and the driver of the bus, were driving their vehicles rashly and negligently and at a high speed. The Jonga Jeep, therefore, overturned and Dr. Ashvariya Prasad Purohit, Dr. Daulat Singh and Compounder Malam Singh received serious injuries. They were taken to Mundwa Hospital but Dr. Ashvariya Prasad Purohit died in the way. At the time of death, Dr. Purohit was getting Rs. 1,200/- per month as the pay and Rs. 300/-per month as the travelling and daily allowances. He was only the earning member in the family. He was paying Rs. 1,100/- per month to the family for the maintenance and was spending Rs. 400/- per month on himself. At the time of death, Dr. Purohit was aged about 35 years. Rs. 3,03,600/- were claimed as the loss of dependency; Rs. 1,00,000/- were claimed on account of loss of gratuity and provident Fund Rs. 17,000/- as the loss of practice after retirement; Rs. 10,900/-as the damages for mental agony and physical pain suffered by the claimants Rs. 20,000/- as the mental agony and physical pain suffered by the deceased; Rs. 1,500/- for the cremation expenses; Rs. 1,000/-for the expenses incurred in taking the dead body of deceased Dr. Purohit from Mundwa to Jodhpur and Rs. 1,000/- for litigation expenses.

3. Though the claim petition was filed in the Court of the District Judge (M.A.C.T.), Merta City, but on 25.9.78, as per the order of the High Court, the Claim Petition was transferred to the Motor Accident Claims Tribunal, Jodhpur.

4. The owners and the drivers of the bus and the Jonga Jeep did not contest the claim petition and, therefore, the proceedings against them were taken ex-parte. The Dairy Singh as well as the insurance company contested the claim petition. The Sangh, in the reply, admitted the factum of accident and the death of Dr. Ashvariya Prasad Purohit in this accident but the defence taken by them in the written statement was that the jeep in question was taken on contract by the Chilling Centre, Merta City on daily rated basis and the Sangh was not the owner of the jonga jeep and, therefore, the owner and the driver of the jonga jeep are liable to pay the compensation and the Sangh is not liable for the payment of any amount of compensation. The case of the insurance company, in the reply, was that the jeep was not being driven by the authorised driver but was being driven by a Mistry who had no driving licence with him and the jeep was, also, being driven in contravention of the Conditions of the policy and, therefore, the insurance company is not liable to indemnify the claim.

5. The claimants, in support of their case, examined PW 1 Smt. Vidhyavati, PW 2 Jeevraj (father-in-law of the deceased), PW 3 Shanker Lal, U.D.C. working in the Office of the Sangh, PW 4 Dr. Daulat Singh Parihar and PW 5 Chandra Singh, M.T.O., Police Lines, Nagaur. The Sangh, in support of its case, examined OPW 1 M.L. Gupta-the Managing Officer of the dairy. The insurance company, in support of its case, examined OPW 2 M.L. Mehta.

6. The learned Judge of the Tribunal, by the Award dated 15.4.82, dismissed the claim petition against the insurance company, the Sangh and the owner and the driver of the bus and awarded a compensation amounting to Rs. 2,26,400/- against the owner and the driver of the jonga jeep and dismissed the remaining claim. It is against this Award dated 15.4.82 that the appellant has filed the present appeal.

7. It is contended by the learned counsel for the appellant that though the learned Judge of the Tribunal held the drivers of the bus and the jonga jeep, both, contributory negligent for the accident but still exonerated the owner and the driver of the bus and awarded the compensation only against the appellant, who is the owner of the jonga jeep. It is also, contended by the learned counsel for the appellant that the Sangh, to whom the jonga jeep was given on contract basis, was the owner of the jeep at the relevant time and, therefore, the learned Judge of the Tribunal was not justified in not holding the Sangh liable for payment of the compensation. Lastly, it is contended by the learned counsel for the appellant that the learned Judge of the Tribunal was not justified in not holding the insurance company liable for payment of compensation on the basis of the Condition which is not the part of the Policy.

8. Learned counsel for the respondent-claimants, on the other hand, has submitted that the jonga jeep was being driven rashly and negligently by its driver at the time of the accident, which resulted in the accident and the death of Dr. Purohit. His further case is that the learned Judge of the Tribunal was not justified in not holding the insurance company and the Sangh liable to pay the compensation. Learned counsel for the insurance company as well as the Sangh have supported the Judgment/award passed by the learned Judge of the Tribunal.

9. The first question which requires consideration is: who was the person responsible for the accident ? The learned Judge of the Tribunal though held that both the drivers, i.e., the driver of the jonga jeep and the driver of the bus, were driving their respective vehicles rashly and negligently and on account of which the jonga jeep over-turned; the accident took place and the persons travelling in the jonga jeep received injuries and Dr. Ashvariya Prasad Purohit died in the accident but according to the learned Judge of the Tribunal it has not been established from the evidence available on record that the bus No. RSQ 3901 was involved in the accident and, therefore, the owner and the driver of the bus cannot be held liable for payment of the compensation.

10. PW 4 Dr. Daulat Singh Parihar is the eye witness of the occurrence who was, also, travelling in the jonga jeep which met with an accident and he also received injuries. He has stated before the Court that on 21.7.77 he, alongwith Dr. Ashvariya Prasad Purohit, Leader, Spear Head Team, Chilling Centre, Merta City, was going in the Jonga Jeep from Merta City to Nagaur. The owner of the jonga jeep was Laxman Ram Choudhary and the Jeep was being driven by driver Kana Ram. This jeep was taken on contract by the Sahkari Sangh and at the relevant time it was being used for the work of the Sangh. Dr. Purohit died on 21.7.77 in

the accident. This accident took place near village Jhunjhala. He was sitting on the front seat by the side of the driver and Dr. Purohit was sitting by his side. A bus came from the opposite side. The bus was going towards Merta. The bus and the jeep, both, were being driven at a high speed. The Jeep over-turned twice, due to which Dr. Purohit received injury on the head and died at the spot. He, also, received injuries. The driver of the jeep tried to avoid the accident bus as it was driven at a high speed, therefore, the driver could not keep the control over the jeep, the jeep over-turned and the accident took place. In the cross-examination he has admitted that the jeep was taken on a contract for one year and after the touring duty was over, the jeep used to go to the Headquarters. He has, also, admitted that Kana Ram (the driver) was the employee of the contractor and not of the Sangh. He was not under their direct employment. He has also, stated that the jeep was being driven by Kana Ram and not by any Mistry. He has further stated that the place where the accident took place, there was a turn and after the jeep took the turn, the bus came from the opposite side. At the time of taking the turn, the jeep was driven at a fast speed. He has, also, admitted that after crossing the bus, the jeep over-turn because it was taken on the Kaccha side of the road.

11. PW 5 Jabbar Singh, the M.T.O., Police Lines, Nagaur, has stated that the accident took place because the Jeep was being driven at a fast speed and suddenly the breaks were applied, on account of which the jeep over-turned. On the Court's question, the witness replied that on account of the fast speed, the jeep became out of control and that was the only reason, due to which the jeep over-turned.

12. None of the witnesses has given the number of the bus or anything more. Even from the statement of PW 4 Dr. Daulat Singh Parihar-the co-passenger and the injured in the accident- and PW S Shanker Singh it stands established that the accident took place on account of the rash and negligent driving of the jonga jeep by its driver. There is no evidence on record from which it could be established that bus No. RSQ 3901 was involved in this accident. The learned Judge of the Tribunal was, therefore, justified in holding the driver of the jonga jeep No. RRQ 3303 responsible for the accident.

13. The next question which requires consideration is: who is/are liable to pay compensation: whether it is only the owner and/or the driver of the jeep who are liable to pay the compensation or the owner and the driver of the bus, the Sangh and the insurance company are, also, liable to pay the compensation ?

14. So far as the owner and the driver of the bus are concerned, it has not been established from the evidence produced by the claimants that the bus No.RSQ 3901 was involved in the accident and, therefore, they are not liable to pay any compensation. The learned Judge of the Tribunal was justified in dismissing the claim petition against the owner and the driver of the bus.

15. Now, so far as the liability of the Sangh is concerned, it is not in dispute that

as per the agreement, the jonga jeep was hired by the Sangh on a contract basis @ 80 paise per kilometre and it was on daily rated basis as per the terms of the contract. PW 4 Dr. Daulat Singh Parihar has admitted that the jeep was taken on contract by the Sangh as per the agreement and the jeep used to be taken on contract for a period of one year. OPW 1 M.L. Gupta, the Managing Officer of the Sangh, has stated that the Sangh was not the owner of the jeep but it was hired by it @ 30 paise per kilometre and at the time of the accident, the owners of the jeep were Laxman Das and Smt. Shiv Pyari and the driver of the jeep was Kana Ram. He has also, proved the agreement arrived- at between the parties. The jeep was taken on contract by the Sangh from the owners and at the relevant time the jeep was being used for the work of the dairy. This witness has further stated that Kana Ram (the driver) was employed by the owners of the jeep and was not employed by the Sangh. Though at the time of the accident the jeep was in the possession of the Sangh and was being used by the Sangh for its work as it was hired by the Sangh on contract basis @ 80 paise per kilometre but the ownership of the jeep was that of Laxman Ram and Smt. Shiv Pyari, who are the registered owners of the jeep. The driver, who was driving the jeep at the relevant time, was under the direct control of his employers Laxman Das and Smt. Shiv Pyari and was not under the control of the Sangh. The driver was not maintained by the Sangh but he was maintained by the registered owners of the jeep and his salary was, also, being paid by the registered owners of the jeep. The cost of petrol, oil and other repairing charges etc. had to be paid by the registered owners of the jeep and the Sangh had to pay the amount @ 80 paise per kilometre, which distance the jeep covered while in the employment of the Sangh. The Sangh had no effective control over the jeep and the effective control over the jeep was that of its owners.

16. Section 2 (19) of the Motor Vehicles Act, 1939 defines the word "owner". The definition of "owner" given in Section 2(19) of the Act, 1939 is not extensive but it is an inclusive definition which takes within it the guardian of the minor if the person is in possession over the vehicle is minor and in the case of hire purchase agreement, the person in possession over the vehicle under that agreement. A person who has hired the vehicle on a payment of 80 paise per kilometre as per the terms of the agreement, cannot be said to be the owner of the vehicle. The jeep was being used for the work of the Sangh during the subsistence of the agreement but the company cannot be deemed to be the owner of the vehicle for the time being as the vehicle was engaged on the payment of 80 paise per kilometre. The driver of the jeep was in the employment of the registered owner and he was acting under the directions of the owners of the jeep and was under their direct control and, therefore, the Sangh cannot be said to be the owner of the vehicle (Jonga jeep).

17. In the case of : Government of India and Anr. v. Jeevaraja Alva 1970 ACJ 221 a private vehicle carrying mail under the control with the Postal Authority met with an accident. The driver of the vehicle was employed by the owner of the vehicle and not by the Postal Department. The injured filed a claim petition for

the award of compensation. The question came- up for determination before the Division Bench of the Mysore High Court was : Whether the government is vicariously liable for the tort of the servant, i.e., the driver employed by the independent contractor ? The Division Bench of the Mysore High Court held that "the government is not liable to pay the compensation because the vehicle belongs to an independent contractor and the driver continued to be his servant. While deciding this controversy, the Division Bench of the Mysore High Court observed as under:

Where under a contract a vehicle is hired out with its driver to another person, the owner of the vehicle exercises his authority by delegating to his driver the discretion in regard to the manner of driving. Ordinarily when a vehicle with its driver is hired, the driver continues to exercise his own discretion which had been vested in him by his regular employer when he was sent out with the vehicle. If however the hirers intervene to give directions as to how to drive for which they have no authority to give, and the driver pro hac vice complies with them, with the result that a third party is negligently damaged, the hirers may be liable as joint tortfeasors.

18. In: *Murari Lal v. Gomati Devi and Ors.* 1986 ACJ 316 a Single Bench of this Court held that "the person who is in possession of the vehicle and who is in charge of the vehicle and who is dealing with the vehicle for his benefit, is the owner of it as defined in Section 2(19) of the Motor Vehicles Act, 1939." The facts of present case are different. In the present case, the Jonga jeep was being driven for the benefit of the registered owners on a hire basis and not for the benefit of the Sangh. The charge of the vehicle was, also, with Kana Ram--the driver of the jonga jeep--who is an employee of the registered owners. Though the jeep was being used for the work of the Sangh but for that a payment @ 80 paise per kilometre was made as per the record. This judgment is, therefore, of no assistance to the learned counsel for the appellant.

19. In: *Brij Lal v. Mongol Chand Maheshwari and Ors.* 1987 ACJ 522 the jeep was taken on hire by the bank from its owner. The jeep was under the custody and the control of the bank and was being used for its purpose when it met with an accident. The driver of the jeep was, also, of the bank. Thus, the total control over the jeep was with the bank and it was in its possession. The registered owner had no control over the jeep. While in the present case the over-all control over the jeep was that of the registered owners of the jonga jeep. The driver employed by the owners of the jonga jeep was driving it. The facts of this case are, therefore, distinguishable and this judgment is not applicable to the facts of the present case.

20. In : *M. Janga Reddy v. Shaik Mahboob and Ors.* 1989 ACJ 1016 the Balal Food Corporation took the vehicle on hire and appointed its owner driver. The driver, on the route, picked-up the passengers on the payment of fare. The vehicle met with an accident on account of the negligence of the driver, in which passenger Sushila, who was travelling in the bus, died. It was held by the Andhra

Pradesh High Court that "the hierer is liable for the tortous act of the driver and the registered owner is, also, coextensively liable."

21. In: Rajasthan State Road Trans. Corpn. Vs. Onkar and Others, the owner of the bus gave it on contract to the R.S.R.T.C. for plying it on the route: the permit for which was granted to the Corporation. The bus met with an accident. The question came-up for consideration before the learned Single Judge of this Court was: whether the person who was running the vehicle under a permit on a contract basis can be considered as the owner or a lessee and is liable to pay compensation The learned Single Judge of this Court, after considering the law on the point, held as under:-

Under clause (30) of Section 2 the words used are "an agreement of lease or an agreement of hypothecation." Lease is a bilateral document. There is a contract between the two and under the contract some amount is paid by the R S.R.T.C. per kilometre to Chiranji lal on account of use of the vehicle. Thus, the vehicle is used for taking on hire the passengers of the particular route for which the permit has been granted to the petitioner RS.RT. C. which leads us to conclude or infer that in fact the possession of the vehicle is with the R S. R T. C. though the driver may be the employee of Chiranji Lal. Thus, in the instance case, I am of the view that RS.R.T.C. cannot disclaim the liability u/s 140 and they should be treated as owner of the vehicle for the limited purpose of payment of compensation to the person who is injured or the legal representatives of the person who has died because of the accident. Of course, Chiranji Lal cannot escape the liability: Thus, the ownership in the instant case will be interpreted as a joint and several ownership and a person who is plying a vehicle on a particular route, shall be considered as a joint and several owner for the purpose of payment of compensation u/s 140 and other provisions of the law and the Act.

The ratio of this case does not apply to the present controversy because the definition of the word "owner" given in- Section 2(3o) of the Motor Vehicles Act, 1988 includes the agreement or an agreement of lease or as agreement of hypothecation. In this case the person in possession of the vehicle under that agreement has been treated as the owner while under the Motor Vehicles Act, 1939 the definition of "owner" does not include these persons and includes only the guardian of the minor in case the owner is a minor or under the hire purchase agreement the person who is in possession of the vehicle as per the agreement. Under the new Act, 1988 the hirer is liable to pay the compensation out under the old Act, 1939 if the hirer is under the complete control over the vehicle then alone he can be held liable but not in the case where the vehicle has been hired on the payment of a fixed sum per kilometre. That is a temporary custody of the vehicle and neither the ownership nor the possession of the vehicle is transferred as the driver of the vehicle was that of the registered owners.

22. Learned counsel for the appellant has also, placed reliance over: State of Madhya Pradesh and Another Vs. Chatru Lal, but this judgment is of no

assistance to the learned counsel for the appellant because that is also, under the new Act of 1988 where the hirer, under an agreement, has also, been included in the definition of the word "owner" in view of Section 2(30) of the Act, 1988.

23. The effective control over the jonga Jeep was that of the appellants who are the registered owners of the jonga jeep. The driver was appointed by them. The Sangh had only to pay the charges of actual playing of the jeep @ 80 paise per kilometre. All other expenses were to be incurred by the registered owners. The payment of salary to the driver was being made by the registered owners of the jeep. The petrol oil and other miscellaneous expenses were, also, to be borne by the registered owners and therefore, the Sangh cannot be said to be the "owner" of the vehicle as the effective possession and control of the vehicle never passed to the Sangh and the same remained with the registered owners. The learned Judge of the Tribunal was, therefore, right in dismissing the claim against the Sangh as it cannot be said to be the owner of the jonga jeep u/s 2(19) of the Act, 1939 at the time of the accident.

24. The next question which requires consideration is: the liability of the insurance company to indemnify the claim? The learned Judge of the Tribunal dismissed the claim petition against the insurance company on the ground that the jonga jeep was being driven against the terms of the policy. The contention of the learned counsel for the appellant is that the Conditions are not included in the insurance policy but they form the part of the cover-note only and as the Conditions are not the part of the Policy therefore, they cannot be used for dismissing the claim petition against the insurance company. The contention raised by the learned counsel for the appellant is devoid of any force. The Conditions are the part of the policy. It has been mentioned in the Conditions that this policy and the Schedule shall be read together and any word or expression, to which a specific meaning has been attached in any part of this policy or of the Schedule, shall bear the same meaning wherever it may appear. Section (11) of (his policy deals with the liability towards third party. There is general exception in which the company has not covered the risk of the vehicle. The Schedule of the policy contains the following conditions--

The policy does not cover use for hire or reward or in organised racing, pace-making reliability trial speed-testing the carriage of goods (other than samples) in connection with any trade or business or use for any purpose in connection with Motor Trade; provided that the person driving holds a licence to drive the Motor car or has held and is not disqualified for holding or obtaining such a licence.

Clause (3) of the General Exception included in the policy provides that "any accident loss damage and/or liability caused sustained or incurred whilst any Motor car in respect of or in connection with which insurance is granted under this policy is: (a) being used otherwise than in accordance with the limitation as to use or; (b) being driven by any person other than a Driver.

25. The vehicle was insured for third party risk with certain limitations. The risk was covered against the third party when the vehicle was only used for social, domestic or pleasure purposes and the policy did not cover the use of the vehicle for hire or reward. In the present case, admittedly the jonga jeep was used for hire. As the vehicle was used otherwise than in accordance with the limitations as to the use prescribed in the Policy, the insurance company cannot be therefore, held liable to indemnify the insured. The learned Judge of the Tribunal was therefore, right in dismissing the claim against the insurance company.

26. In this view of the matter, the Judgment/Award passed by the learned Judge of the Tribunal does not require any interference and the appeal deserves to be dismissed.

27. In the result, I do not find any merit in this appeal and the same is hereby dismissed.