

(2016) 01 KAR CK 0323

In the Karnataka High Court

Case No : MFA Nos. 24463, 24464 and 24465/2011 (MV)

The M.D. and Self Insurance and Others

APPELLANT

Vs

Duragappa Bhimappa Madar and Others

RESPONDENT

Date of Decision : 27-01-2016

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 22, Order 41 Rule 33
Motor Vehicles Act, 1988 — Section 147, Section 147(1), Section 157, Section 2(19),
Section 2(30)

Citation : (2016) 01 KAR CK 0323

Hon'ble Judges : B. Veerappa, J.

Bench : Single Bench

Advocate : P.R. Bentur, Advocate, for the Appellant; Suresh P. Hudedagaddi,
Advocate, for the Respondent

Final Decision : Disposed off

Judgement

B. Veerappa, J.—1. All these appeals are filed by NWKSRTC against the judgment and award dated 18.6.2011 made in MVC Nos. 93/2007, 334/2006 and 335/2006 granting compensation of Rs. 4,42,000/- each in all the three MVC cases with interest at 6% p.a. from the date of petition till the date of realization.

2. The claimants filed MVC Nos. 93/2007, 334/2006 and 335/2006 claiming compensation contending that on 5.9.2006 that at about 8.30 p.m. KSRTC bus bearing Reg. No. KA-26/3771 was proceeding from Gadag to Mulgund side and near Kanavi cross, the driver of KSRTC Bus drove it in a rash and negligent manner so as to endanger human life and dashed to Tipper Lorry and thereby Riyazahamad (deceased in MVC No. 93/2007), Basavaraj (deceased in MVC No. 334/2006) and Chandru @ Chandrappa (deceased in MVC No. 335/2006) all aged 19 years who were traveling along with other persons died on the spot as result of the accident. Petitioner Nos. 1 and 2 in MVC No. 93/2007 are the parents of the deceased Riyazahamad. He was studying in BA 1st year in Gadag and that during holidays he was working as agriculture coolie and earning Rs.

5,000/- per month and respondent Nos. 1 to 5 being owner and insurer of the offending bus, respondent Nos. 3 and 4 being owner and insurer of the Tipper Lorry and respondent No. 5 being KSRTC to whom the offending bus was given on hire basis at the time of accident, are jointly and severally liable to pay compensation to the petitioners.

3. The petitioners in MVC No. 334/2006 are parents of deceased Basavaraj, who was earning Rs. 5,000/- per month as agriculture coolie and respondent Nos. 1 to 3 being owner, insurer of the bus and KSRTC respectively, are jointly and severally liable to pay compensation.

4. The petitioners in MVC No. 335/2006 are the parents of deceased Chandru @ Chandrappa, who was doing agricultural coolie and earning Rs. 5,000/- per month and that respondent Nos. 1 to 3 being respectively owner, insurer and KSRTC are jointly and severally liable to pay compensation to the petitioners.

5. In all the above three cases, the Insurer filed the objections denying the accident, age, occupation, income and contended that the bus was insured with the 2nd respondent and was given to 5th respondent on lease basis to ply on the road and hence respondent Nos. 2 and 5 are liable to pay compensation. Therefore, sought for dismissal of the appeals.

6. The 5th respondent - NWKSRTC also filed objections denying the accident, age, occupation, income of the deceased and contended that there was agreement between respondent No. 1 and respondent No. 5. Therefore, respondent No. 1 is liable to pay compensation. In view of the agreement entered into between respondent Nos. 1 and 5, Respondent Nos. 2 and 3 who are owner and insurer of the vehicle are jointly and severally liable to pay compensation.

7. Based on pleadings, the Tribunal framed the following issues:--

"ISSUES IN MVC 93/2007

1. Whether the petitioners prove that, they are only LR's of the deceased?
2. Whether the petitioners prove that on 5.9.2006 on Gadag-Mulgund road after Kanavi cross at about 8.30 pm while Parsulla sab was travelling in the KSRTC bus KA-26/3771 its driver drove the bus in high speed, rashly and negligently, and dashed against tipper lorry KA-31/1002 which was coming from opposite side and as a result Parsulla sab because of actionable negligence on the part of drivers, he sustained injuries and died?
3. To what relief the petitioners are entitled to and from whom?
4. What order?

ISSUES IN MVC 334/2006

1. Do the claimants prove that Basavaraj S/o Durgappa Madar of Neelagund had died due to the accident dated 5.9.2006 on Gadag-Mulgund road after Kanavi

cross at about 14.30 hours due to rash and negligent driving Bus No. KA-26/3771 driven by its driver?

2. Do the claimants prove that the deceased was aged 19 years old and was earning Rs. 5,000/- per month by doing agriculture coolie work as on the date of the accident?

3. Does the respondent No. 2 proves that the petition is bad for non-joinder of property party as contended in para 2 of the WRITTEN STATEMENT?

4. To what compensation the claimants are entitled for?

ADDITIONAL ISSUES:

1. Whether the petition is bad for non joinder of necessary parties?

2. Whether the respondents prove that there is no cause of action for this petition?

3. Whether the respondent No. 3 proves that respondent No. 2 is liable to compensation to the petitioners, as alleged in para 7 of his WRITTEN STATEMENT?

ISSUES IN MVC 335/2007

1. Whether the petitioners prove that, they are only LRs of the deceased Chandrappa?

2. Whether the petitioners prove that on 5.9.2006 while Chandrappa was traveling in the KSRTC bus KA-26/3771 near Kanavi cross its driver drove the bus in high speed, rashly and negligently, and dashed against tipper lorry KA-31/1002 and as a result because of actionable negligence of driver KA-26/3771 Chandrappa sustained injuries and died?

3. To what relief the petitioners are entitled to and from whom?

4. What order?

ADDITIONAL ISSUES:

1. Whether the petition is bad for non joinder of necessary parties?

2. Whether the respondents prove that there is no cause of action for this petition?

3. Whether the respondent No. 3 proves that respondent No. 2 is liable to compensation to the petitioners, as alleged in para 7 of his WRITTEN STATEMENT?"

8. In order to establish their claim, the claimants in MVC No. 93/2007 examined as PW.1 and witness is examined as PW.2 and marked the documents Exs.P1 to P12. In MVC No. 334/2006 the 1st claimant examined as PW.1 and marked the documents Exs.P1 to P.9. Respondents are examined as RW.1 and RW.2 and

marked the documents Exs.R1 to R3. The claimant No. 1 in MVC No. 335/2006 examined as PW.2 and marked the documents Exs.P1 to P9.

9. After considering the entire material on record the Tribunal recorded a finding that the appellants -claimants proved that they are the legal representatives of the deceased and the accident occurred on 5.9.2006 on account of rash and negligent driving of the KSRTC Bus, which has resulted in the death of the above three persons therefore, the claimants are entitled to Rs. 4,42,000/- in each of the cases with interest at 6% p.a. from the date of petition till the date of realization. Hence the present appeals are filed for reduction of compensation.

10. I have heard the learned counsel for the parties to the lis.

11. Smt. Pushpalatha R. Bentur, learned counsel for the appellant - NWKSRTC contended that the Tribunal erred in fixing the liability on the Corporation without considering the terms of the policy. Therefore, KSRTC is not liable to pay compensation awarded by the Tribunal. She further contended in view of the law declared by the Hon'ble Supreme Court in the case of UTTAR PRADESH STATE ROAD TRANSPORT CORPORATION v. KULSUMAND OTHERS reported in (2011) acj sc 2145 that the hirer of the private bus has held that the Insurance Company is not justified to deny payment of compensation to the claimants and liability is absolutely foisted in the facts of the case and therefore, Insurer is liable to pay compensation and not KSRTC. The learned counsel further contended that all the deceased were bachelors and the Tribunal ought to have deducted 50% of the personal expenses instead of 1/3rd therefore, she sought to allow all the above appeals.

12. Per contra, Sri Suresh P. Hudedagaddi and Sri A.C. Purad, learned counsel appearing for respondent Nos. 1 and 2 sought to justify the impugned award passed by the Tribunal.

13. Sri. M.G. Gadagoli, learned counsel appearing for 4th respondent, Sri G.N. Narasammanavar, learned counsel for 5th respondent and Sri.S.K. Kayakamath, learned counsel for 6th respondent - Insurance Company contended that the owner KSRTC and Insurer are jointly and severally liable to pay compensation and therefore, learned counsel for respondent Nos. 4 and 5 sought to justify the order and contended that Insurance Company is liable to pay compensation in view of the fact that policy was in force.

14. I have given my anxious consideration to the arguments advanced by the learned counsel for the parties and perused the entire material on record.

15. In all these cases, it is not in dispute that all three persons died on 5.9.2006 in a road accident on account of rash and negligent driving by the driver of the KSRTC Bus. It is also not in dispute that the policy was in force as on the date of the accident with the United India Insurance Company - the 4th respondent. It is also not in dispute that all the three persons died in the accident. The Tribunal considering the income of the deceased at Rs. 3,000/- per month has deducted

1/3rd and accordingly granted Rs. 24,000/- p.a. The Tribunal while awarding compensation has not considered the future prospects i.e., by adding 50% of actual income of the deceased and not deducted 50% towards personal and living expenses. The same is contrary to the law laid down by the Hon''ble Supreme Court in *munna lal jain v. vipin kumar sharma* reported in , (2015) 6 SCC 347. In view of the law laid down by the Hon''ble Supreme Court stated supra, the income of the deceased was taken by the Tribunal at Rs. 3,000/- + Rs. 1,500/- (after adding 50% of the future prospects) = Rs. 4,500/- per month and after deducting 50% of the income it comes to Rs. 2,250/- x 18 x 12 = Rs. 4,86,000/-. The claimants are entitled to just compensation of Rs. 4,86,000/- towards loss of dependency. The claimants are entitled to Rs. 25,000/- towards funeral expenses, Rs. 50,000/- towards love and affection. Thus in all, the claimants are entitled to compensation of Rs. 5,61,000/-.

16. The Tribunal while awarding compensation failed to consider 50% addition towards future prospects and 50% deduction and reasonable compensation towards love and affection and funeral expenses, therefore, in all these appeals, though the claimants have not filed any appeal for enhancement, but applying the law declared by the Hon''ble Supreme Court in *munna lal Jain's* case and exercising the power of the Appellate Court under Order 41 Rule 33 of CPC while determining just compensation this Court is of the considered opinion that the claimants are entitled to just compensation of Rs. 5,61,000/- in each of the above appeals.

17. The provisions of Order 41 Rule 33 of the Code of Civil Procedure reads as under:--

"33. Power of Court of Appeal- The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection (and may, where there have been decrees in cross-suits or where two or more decrees are passed in one suit, be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees).

(Provided that the Appellate Court shall not make any order under Section 35A, in pursuance of any objection on which the Court from whose decree the appeal is preferred has omitted or refused to make such order.)"

18. This Court while exercising powers under Order 41 Rule 33 of CPC and Rules 22 and 33, as Appellate Court can also pass such other order decree as the case may be to meet the ends of justice in view of the dictum of the Hon''ble Supreme Court in the case of *mahant DHANGIR AND ANOTHER v. SHRI MADAN MOHAN AND OTHERS* reported in , air 1988 SC 54 at paragraph 15 held as follows :

"But that does not mean, that the Math should be left without remedy against the judgment of learned single judge. If the cross-objection filed under R. 22 of O. 41 CPC was not maintainable against the co-respondent, the Court could consider it under R. 33 of O. 41 CPC. R. 22 and R. 33 are not mutually exclusive they are closely related with each other. If objection cannot be urged under R. 22 against co-respondent, R.33 could take over and come to the rescue of the objector. The appellate court could exercise the power under R. 33 even if the appeal is only against a part of the decree of the lower court. The appellate court could exercise that power in favour of all or any of the respondents although such respondent may not have filed any appeal or objection. The sweep of the power under R 33 is wide enough to determine any question not only between the appellant and respondent, but also between respondent and co-respondents. The appellate court could pass any decree or order which ought to have been passed in the circumstances of the case. The appellate court could also pass such other decree or order as the case may require. The words "as the case may require" used in R. 33 of O. 41 have been put in wide terms to enable the appellate court to pass any order or decree to meet the ends of justice. What then should be the constraint? We do not find many. We are not giving any liberal interpretation. The rule itself is liberal enough. The only constraints that we could see, may be these: That the parties before the lower court should be there before the appellate court. The question raised must properly arise out of judgment of the lower court. If these two requirements are there, the appellate Court could consider any objection against any part of the judgment or decree of the lower court. It may be urged by any party to the appeal. It is true that the power of the appellate court under R. 33 is discretionary. But it is a proper exercise of judicial discretion to determine all questions urged in order to render complete justice between the parties. The Court should not refuse to exercise that discretion on mere technicalities."

19. Coming to the question of liability the Tribunal while awarding compensation has held that KSRTC -appellant in all these appeals is liable to pay compensation relying upon the decision of the RAJASTHAN STATE ROAD TRANSPORT CORPORATION v. KAILASH NATH KOTHARI reported in , 1997 ACJ SC 1148. The said view is no longer res-integra in view of the law dictum of the Apex Court in the case of managing DIRECTOR, KARNATAKA STATE ROAD TRANSPORT CORPORATION v. NEW INDIA ASSURANCE CO. LTD., AND ANOTHER reported in , 2015 acj 2849 held that the Insurance Company according to Section 2(30) of the MVC Act, a person in possession of vehicle under lease agreement has to be considered to be owner of the vehicle. The Corporation can be treated as owner for the purpose of Section 2(30) plying the bus under lease agreement. Ultimately held that the Insurer cannot escape the liability when the ownership changes due to hypothetical agreement, the liability even if the ownership changes, even though the KSRTC is considered owner continues to remain liable as per the terms and conditions of the lease agreement lawfully entered into by KSRTC and ultimately the Hon"ble Supreme Court held that the registered owner,

insurer as well as the KSRTC would be liable to make the payment of compensation jointly, severally to the claimants and the KSRTC being the registered owner would be liable to pay compensation to the claimants as per the terms stipulated or from the insurer. Relevant paragraphs reads as under:--

"26. Now, we come to the question of exclusion of contractual liability under second proviso to Section 147(1). When we read provisions of Section 147 with Section 157 together, it leaves no room for any doubt that there is deemed transfer of policy in case of transfer of vehicle. Hence, liability of insurer continues notwithstanding the contract of transfer of vehicle, such contractual liability cannot be said to be excluded by virtue of second proviso to Section 147(1) of Act of 1988. Hire purchase agreement, an agreement for lease or an agreement for hypothecation are covered under Section 2(30) of the Act of 1988. A person in possession is considered to be an owner of the vehicle under such agreements. In case such contractual liability is excluded then anomalous results would occur and financier under higher purchase agreement would be held liable and so on. In our view, an agreement for lease on hire cannot be said to be contract envisaged for exclusion under contractual liability in second proviso to Section 147(1) of the Act of 1988. The High Court has erred in holding otherwise.

27. KSRTC can also be treated as owner for the purposes of Section 2(30) of the Act of 1988 plying the buses under lease agreement. The insurance company admittedly has insured the vehicle and taken the requisite premium and it is not a case set up by the insurer that intimation was not given to the insurance company of the hiring arrangement. Even if the intimation had not been given, in our opinion, the insurer cannot escape the liability to indemnify as in the case of hiring of vehicle intimation is not required to be given. It is only in the case of complete transfer of the vehicle when change of registration particulars are required under Section 157 of the Act, an intimation has to be given by the transferee for effecting necessary changes in the policy. Even otherwise, that would be a ministerial act and the insurer cannot escape the liability for that reason. When the KSRTC has become the owner of the vehicle during the period it was on hire with it for the purpose of Section 2(30) of the Act by virtue of provisions contained in Section 157 of the Act, the insurance policy shall be deemed to be transferred. As such, insurer is liable to make indemnification and cannot escape the liability so incurred by the KSRTC.

28. In RSRTC v. Kailash Nath Kothari (supra), question of liability of insurance company did not come up for consideration. The vehicle was taken by RSRTC from its owner Sanjay Kumar and it was being plied on the route by RSRTC. The case arose out of accident date 17.7.1981 under the Act of 1939. The definition of second owner under section 2(19) of Act of 1939 came up for consideration before this Court, and conditions 4 to 7 and 15 of agreement between RSRTC and the owner, this Court held that vehicle in question was in possession and actual control of RSRTC as such it cannot escape from liability. Relevant portion of decision is extracted below:--

"(11) Conditions 4 to 7 and 15 of the agreement executed between the RSRTC and the owner read:

"(4) The Corporation shall appoint the conductor for the operation of the bus given on contract by the second party and the conductor of the Corporation shall do the work of issuing tickets to the passengers, to receive the fare, to see that all the passengers get in and get out of the bus, to help the passengers to load and unload their goods, to stop the bus at the stops fixed by the Corporation and to operate the bus according to time- table.

(5) The tickets, waybills and other stationery shall be supplied by the Corporation to the said conductor of the Corporation.

(6) The driver of the bus shall have to follow all such instructions of the conductor, which shall be necessary under the rules for the operation of the bus.

(7) The driver of the bus shall comply with all the orders of the Corporation or of the officers appointed by the Corporation.

(15) Upon the accident of the bus taking place the owner of the bus shall be liable for the loss, damages and for the liabilities relating to the safety of the passengers. The Corporation shall not be liable for any accident. If the Corporation is required to make any payment or incur any expenses through some court or under some mutual compromise, the Corporation shall be able to recover such amounts from the owner of the bus after deducting the same from the amounts payable to him."

(12) The admitted facts unmistakably show that the vehicle in question was in possession and under the actual control of RSRTC for the purpose of running on the specified route and was being used for carrying, on hire, passengers by the RSRTC. The driver was to carry out instructions, orders and directions of the conductor and other officers of the RSRTC for operation of the bus on the route specified by the RSRTC.

(13) The definition of owner under Section 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. In this case, Shri. Sanjay Kumar, the owner of the bus could not ply the bus on the particular route for which he had no permit and he in fact was not plying the bus on that route. The services of the driver were transferred along with complete "control" to

RSRTC, 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 RSRTC on receiving fare from them. Shri Sanjay Kumar was therefore not concerned with the passengers travelling in that bus on the particular route on payment of fare to RSRTC. 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 RSRTC 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 RSRTC to whom they had paid the fare for travelling in that bus and their safety therefore became the responsibility of the RSRTC 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 RSRTC, 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), RSRTC must be held to be vicariously liable for the tort committed by the driver while plying the bus under contract of the RSRTC. The general proposition of law and the presumption arising there from that an employer, that is the person who has the right to hire and fire the employee, is generally 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 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 RSRTC but actual control and the driver was to act under the instructions, control and command of the conductor and other officers of the RSRTC.

(14) Reliance placed by learned counsel for the appellant on Condition No. 15 of the agreement (supra) in our view is misconceived. Apart from the fact that this clause in the agreement between the owner and the RSRTC, to the extent it shifts the liability for the accident from RSRTC to the owner, may be against the public policy as opined by the High Court, though we are not inclined to test the correctness of that proposition of law because on facts, we find that RSRTC cannot escape its liability to pay compensation. The second part of Condition 15 makes it abundantly clear that the RSRTC did not completely shift the liability to the owner of the bus because it provided for reimbursement to it in case it has to pay compensation arising out of an accident. The words

"if the Corporation is required to make any payment or incur any expenses

through some court or under some mutual compromise, the Corporation shall be able to recover such amounts from the owner of the bus after deducting the same from the amounts payable to him"

in the later part of Condition 15 leave no ambiguity in that behalf and clearly go to show the intention of the parties. Thus, RSRTC cannot escape its liability under Condition 15 of the agreement either. Thus, both on facts and in law the liability to pay compensation for the accident must fall on RSRTC."

It is apparent that question of the liability of the insurer did not come up for consideration and also the relevant statutory provisions relating thereto in aforesaid decision. This Court, considering clause 16 of the agreement entered into by RSRTC and owner, held that RSRTC did not completely shift the liability to the owner of the bus in case it has to pay compensation arising out of an accident. In the instant cases also there are certain clauses referred to above which indicate that if KSRTC has to make the payment, it can recover the same from the owner out of the amount payable by it or from the amount payable by the insurer to the owner. On the strength of decision in Rajasthan State Road Trans. Corpn. v. Kailash Nath Kothari (supra), KSRTC being in actual control of the vehicle would also be liable to pay the compensation, however, in our opinion it can recover the amount from the registered owner or insurer, as the case may be. In fact of the case, vis-?-vis, the claimants" liability would be joint and several upon the KSRTC, registered owner and the insurer.

33. In view of the decision in HDFC Bank Limited v. Reshma, , 2015 ACJ 1 (SC) the insurer cannot escape the liability, when ownership changes due to the hypothecation agreement. In the case of hire also, it cannot escape the liability, even if the ownership changes. Even though, KSRTC is treated as owner under Section 2(30) of the Act of 1988, the registered owner continues to remain liable as per terms and conditions of lease agreement lawfully entered into with KSRTC.

34. In view of the aforesaid discussion, we hold that registered owner, insurer as well as KSRTC would be liable to make the payment of compensation jointly and severally to the claimants and the KSRTC in terms of the lease agreement entered into with the registered owner would be entitled to recover the amount paid to the claimants from the owner as stipulated in the agreement or from the insurer."

20. In view of the law declared by the Hon"ble Supreme Court in the case of managing director, KARNATAKA STATE ROAD TRANSPORT CORPORATION v. NEW INDIA ASSURANCE CO. LTD., AND ANOTHER stated Supra, the appellant, respondent Nos. 3 and 4 are liable to pay compensation jointly and severally to the claimants.

21. In view of the aforesaid reasons, appeals are disposed of. Both the appellant/ owner and Insurance Company are liable to pay compensation jointly and severally to the claimants. It is always open for the Insurer to recover the amount either from the Corporation or from the owner in accordance with law.