

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

FIRST APPEAL NO.979 OF 1991

Punjab Travels Private Limited and Anr. .. Appellants

vs.

Smt.Sumanben Chimanbhai Panchal and Ors. .. Respondents

Mr.Mayur Khandeparkar with Ms.Bhairavi Pathak i/b M/s.I.R.Joshi and
Co. for the appellants

Mr.T.J.Mendon for the respondent nos.1 to 4

CORAM : K.K.TATED, J.
DATED : 09/07/2015

Judgment:

1 Heard the learned counsel for the parties.

2 Office note shows that name of appellant no.2 New India Assurance Co. Lt. is deleted as per order dated 1.3.2012. Office note further shows that as per request of Advocate for Appellant, this court (Coram: Mrs.Mridula Bhatkar, J.) by order dated 1.3.2012 permitted the appellant to delete the names of respondent nos.5, 6, 7 and 8.

3 This appeal is preferred by original opponent no.3 challenging the judgment and award dated 30.9.1989 passed by MACT Thane in M.A.C.Application No.144 of 1984 holding that the respondents claimants are entitled sum of Rs.2,81,440/- with 12% interest p.a. by way of compensation from original opponent no.1, 3, 4 and 5.

4 For the sake of convenience, hereinafter the parties will be referred to as per their nomenclature in the original Claim Petition No.144 of 1984 i.e. appellant - opponent no.3 Contractor/owner of Luxury Bus and respondent nos.1 to 4 - Claimant nos.1 to 4.

5 In the present proceeding, the claimants preferred Cross Objection (ST). No.4866 of 1993. Those Cross Objections were decided by this court (Coram: R.D.Dhanuka, J.) partly allowing by order dated 28.8.2014..

6 The learned counsel for the Opponent No.3 submits that the Trial Court has not given any reason in the impugned award dated 30.9.1989 on what basis the opponent no.3 was liable to pay compensation to the claimants. He further submits that the name of the driver was deleted by the claimants in the Trial Court. He submits that if the driver is not made party to the proceeding at the time of hearing and final disposal of the Claim Petition, the Claim Petition itself is not maintainable in law. These facts are not considered by the Tribunal at the time of passing the impugned order.

7 The learned counsel for the opponent no.3 submits that the Tribunal failed to appreciate that the claimants had not examined any independent witness to prove the negligence on the part of the driver of offending vehicle. He further submits that even the Tribunal has not considered the contributory negligence at the time of awarding the compensation. He submits that the compensation awarded by the Tribunal is on the higher side.

8 The learned counsel for the opponent no.3 submits that when the accident occurred on 25.5.1982, in a truck more than 7 persons were travelling. He further submits that though the claimants raised contention that the deceased was travelling along with his goods at the time of accident in a truck, that contention was not accepted by the Tribunal. Hence, the claimants were not entitled to any compensation from the appellant. He further submits that the owner of the offending vehicle was opponent no.1 Shri Tanmal B. Jain. He submits that the opponent no.3 was holding the said offending vehicle as an agent of opponent no.1. Hence, the opponent no.3 was not liable to pay any compensation to the claimants. He submits that these facts are not considered by the Tribunal on its own merits. Hence, the judgment and award passed by the Tribunal dated 30.9.1989 is required to be set aside. He submits that if the present appeal is not allowed, irreparable loss and injury will be caused to the appellant.

9 On the other hand, the learned counsel for the respondents / claimants vehemently opposed the present First Appeal. He submits that in view of the order passed by this court dated 28.8.2014 (Coram: R.D.Dhanuka, J.) allowing the Cross Objection filed by the claimant, nothing survives in the present First Appeal. Same is required to be dismissed with costs. He further submits that the opponent no.3 on his own withdrew the First Appeal against opponent no.1, 2, 5 and 6. He submits that as per the contention of the opponent no.3, opponent no.1 was the owner of the offending vehicle and they were holding the said vehicle as an agent. He submits that if the appeal is withdrawn against the owner himself, nothing will survive in the present First Appeal and

same is required to be dismissed with costs. He further submits that even if it is presumed that the opponent no.3 was holding the offending vehicle as an agent of the owner i.e. opponent no.1 then also they were liable to pay compensation. In support of this contention, he relies on the judgment of the Apex Court in the matter of *Rajasthan State Road Transport Corporation v. Kailash Nath Kothari and Others*¹. He relies on paragraph 13 and 14 which reads thus:

“(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

1 1997 ACJ 1148

not to ply the ill-fated bus on the fateful day. The passengers were being carried by RSRTC on receiving fare from them. 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 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), the 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 therefrom 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 pay roll 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 RSRTG 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 the 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 No. 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 No. 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 No. 15 of the agreement either. Thus, both on facts and in law the liability to pay compensation for the accident must fall on the RSRTC.”

10 The learned counsel for the claimants submits that the opponent no.3 had not examined any witness in support of his contention that the driver of the offending vehicle was not negligent at the time of accident. He further submits that the deceased was travelling in a vehicle as a passenger. He was not driving the offending vehicle. Hence, there is no question of any contributory negligence on the part of the deceased. In support of this contention, he relies on the judgment of the Apex Court in the matter of *Andhra Pradesh State Road Transport Corporation and another vs. K. Hemalatha and Others*². Paragraph 10 of the judgment reads thus:

“(10) 'Composite negligence' refers to the negligence on the part of two or more persons. Where a person is injured as a result of negligence on the part of two or more wrong doers, it is said that the person was injured on account of the composite negligence of those wrong-doers. In such a case,

2 2008 ACJ 2170

each wrong doer, is jointly and severally liable to the injured for payment of the entire damages and the injured person has the choice of proceeding against all or any of them. In such a case, the injured need not establish the extent of responsibility of each wrong-doer separately, nor is it necessary for the court to determine the extent of liability of each wrong-doer separately. On the other hand where a person suffers injury, partly due to the negligence on the part, of another person or persons, and partly as a result of his own negligence, then the negligence on the part of the injured which contributed to the accident is referred to as his contributory negligence. Where the injured is guilty of some negligence, his claim for damages is not defeated merely by reason of the negligence on his part but the damages recoverable by him in respect of the injuries stands reduced in proportion to his contributory negligence.”

11 The learned counsel for the claimant also relies on the judgment of our High Court in the matter of *Chhaganlal Nathubhai Patel v. Bhagirath Kheraji and others*³. Paragraph 3 of the judgment reads thus:

“(3) Counsel representing Chhaganlal and respondent Nos. 2 and 3 have been heard. The first point for decision is whether the Tribunal was in error in holding the mishap to be the result of contributory negligence. In coming to this conclusion, the Tribunal has overlooked the very obvious fact of Chhaganlal not being a contributor to the mishap. Chhaganlal was not at the steering wheel of the Fiat car. He

3 1993 ACJ 1152

was an innocent passenger in the said car and if there was any person guilty of contributory negligence from amongst the inmates of the car, it was Hasmukh. If that finding is correct, the mishap should have been described as the result of a composite negligence, the tort-favors being Hasmukh and Pakarsingh. Their liability would be joint and several. But there is an apparent error in equating the driver of the Fiat car with the driver of the goods truck. Pakarsingh was prosecuted for rash and negligent driving in the Court of Judicial Magistrate, First Class. He pleaded guilty to the charge, was convicted and sentenced. It may be that the plea of guilt by Pakarsingh was motivated by considerations other than the plea being a reflection of the true position. Pakarsingh who has been examined as a witness admits his conviction on the basis of an admission. He does not say that the admission was made to get a lenient sentence or to save time. Having regard to the admission it was for the respondents to establish that the guilt lay at the doors of the others or that it had to be shared between Pakarsingh and the driver of the Fiat car. No such evidence has been led and the absence of such evidence fortifies the inference arising out of the conviction recorded by the Magistrate against Pakarsingh. This apart, we have good evidence on record to show that the mishap occurred solely on account of the negligence of Pakarsingh. He himself testified that instead of stopping after sighting the broken down vehicle on the road, his truck was taken ahead though this required his going to the wrong side of the road and then bringing it to his correct side. The Fiat

car, on the other hand, was on the correct side of the road and it was with a view to avert the collision that it went off the tarred portion of the road. Even so, this did not prevent the collision. The truck gave so severe a dash to the Fiat car that the front side of the car was badly smashed. The left side door of the Fiat car also smashed. Even the lay witnesses of the scene of offence, panchnama which is at Exh. 32, have assessed the damages at Rs. 30,000/-. As against the damage caused to the Fiat car, the goods truck being driven by Pakarsingh suffered nothing worse than a dent on the bumper and the breaking of the head lamp. Unless the truck was in a high speed the collision would not have been so serious. The scene of offence, panchnama, does not show that any attempt was made by Pakarsingh to arrest the speed of the vehicle. Hasmukh who was driving the Fiat car was on the correct side of the road and had even got out of the tanned portion of the road so as to avoid colliding with the truck. He could have done nothing more. The version given by Chhaganlal and Hasmukh is thus borne out by the impersonal circumstances as also the direct evidence. Mr. Desai appearing for the appellant has rightly criticised the approach of the Tribunal in stalling with a firm conviction about the incapacity of the actors involved in the event, to tell the truth. We do not see why this conviction should have been the stalling point for an appraisal of the evidence. After all, Chhaganlal is a foreigner who visits India occasionally and does not appear to have much time to waste over speculative litigation. The version as given by Chhaganlal and

Hasmukh did come from witnesses who had a stake in the success of their claims for compensation. But what they had to say was borne out by the scene of offence, panchnama, showing that it was the goods truck which had strayed from the correct side of the road. The explanation given by Pakarsingh was falsified by the scene of offence, panchnama. The damage caused to the Fiat car shows the larger vehicle being driven at uncontrollable speed and dashing much smaller vehicle with great force. Added to this was the fact of Pakarsingh's admission that on the preceding night he was at the steering wheel for quite some time and had slept very little before commencing the journey back from Bombay. Differing with the Tribunal, we hold that Pakarsingh's rash and negligent driving of the goods truck was the sole and exclusive cause of the mishap.”

12 The learned counsel for the claimant also relies on the judgment of the Apex Court in the matter of *Pawan Kumar and another v. Harkishan Dass Mohan Lal and others*⁴. Paragraph 4 of the judgment reads thus:

“(4) Learned Counsel for the Appellants has contended that though the High Court has rightly held both the vehicles to be responsible for the accident it has committed a glaring error in invoking the principle of contributory negligence in the present case and in apportioning the liability between the drivers/owners of the two vehicles. Relying on the decision of

4 2014 ACJ 704

this Court in T.O. Anthony v. Karvarnan, 2008 ACJ 1165 (SC), which has been followed in a subsequent decision in Andhra Pradesh State Road Trans.Corpn. v. K. Hemalatha, 2008 ACJ 2170 (SC), learned Counsel has urged that in a case where the claimant is a third party (other than the driver/owner of the vehicles involved in the accident) the correct principle for determination of the liability is that of composite negligence which would make the drivers/owners of the two vehicles jointly and severally liable. The principle of contributory negligence so as to apportion the liability between the drivers/owners would be relevant only if the claim for compensation is by one of the drivers himself or by his legal heirs, as the case may be. It is, therefore, contended that the apportionment made by the High Court is against the settled principles of law laid down by this Court.”

13 On the basis of these submissions and the authorities cited above, the learned counsel for the claimants submits that there is no question of considering contributory negligence on part of the deceased at the time of fixing the compensation. The learned counsel for the claimants further submits that several Claim Petitions were filed in the Tribunal due to the accident which occurred on 25.5.1982. He submits that Smt.Sumanben Chimanbhai Panchal filed MACP No.213 of 1986 which was allowed by the Trial Court by judgment and award dated 4.3.1998 for the same reasons. But against the said order neither the opponent no.3 nor other opponent parties preferred any appeal. He further submits that in similar way against the award in MACP No.141 of 1984 arising from the same accident, appeal was not preferred by any

parties. Hence, there is no question of entertaining the present appeal filed by the appellant.

14 I have heard both the sides at length. Considering the submissions made by the learned counsel for the parties the issues involved in the present First Appeal are as under:

- a) Whether the appellant original opponent no.3 is liable to pay compensation to the claimants?
- b) Whether the compensation awarded by the Tribunal is on a higher side?
- c) Whether the Tribunal failed to consider the contributory negligence at the time of passing the impugned order?

15 I have gone through the copy of Claim Application filed by the claimants, written statement, deposition of witness and other documents. In an accident which occurred on 25.5.1982 the claimant no.1 lost her husband. On the date of accident he was 45 years old. He was working as Consultant Draftsman in Tata Consulting Engineers Private Ltd. His monthly salary was Rs.1800/-. Hence, the claimants filed the application under section 166 of the Motor Vehicles Act claiming total compensation of Rs.3,50,000/-. The tribunal considering the evidence on record held that the claimants are entitled to a sum of Rs.2,81,440/- with 12% interest by way of compensation.

16 The first issue involved in the present Appeal is whether the appellant / original opponent no.3 is liable to pay compensation to the

claimants? The learned counsel for the appellant submits that the opponent no.1 was the owner of the Luxury Bus No.MNP 2736. The said bus was taken by the opponent no.3 on lease basis. Hence, the opponent no.3 was not liable to pay any compensation. It is to be noted that the opponent no.3 filed their written statement dated 4.10.1984 before the MACT, Thane. On the first page of the said written statement, opponent no.1 stated that the said Luxury Bus belonged to opponent no.1 who was the partner of M/s.Punjab Travels, a firm which was functioning till March, 1982. On 1st April, 1982, Opponent No.3 Company came into existence and took over the business of the firm of M/s.Punjab Travels Pvt.Ltd. This itself shows that on the date of accident, the opponent no.3 was also the owner of the offending vehicle. Apart from that, the opponent no.3 admitted that the said luxury bus was taken by them on lease basis from the owner. Even same is accepted, then also, in view of the judgment of the Apex Court in the matter of *Rajasthan State Road Transport Corporation v. Kailash Nath Kothari and Others*, the opponent no.3 is liable to pay compensation because on the date of accident, the same was in their possession. Hence, issue no.1 is answered in the affirmative.

17 On the date of accident, the deceased was working with Tata Consulting Engineers. His salary was Rs.1,800/- per month. On the date of accident, his age was 45 years. Considering the future prospects, the Trial Court rightly held the dependency of the claimants @ Rs.1740 per month i.e. Rs.20,880/- per year. Considering the age of the deceased i.e. 45 years, the Tribunal has taken multiplier of 13 years and awarded sum of Rs.2,71,440/- towards compensation and

Rs.10,000/- towards consortium. Apart from this, the claimants preferred Cross-Objection (ST). No.4866 of 1993. Those were decided by this court (Coram: R.D.Dhanuka, J.) on 28.8.2014 holding that the claimants are entitled total compensation of Rs.4,73,776/- along with 12% p.a. In view of subsequent development, that the order passed in Cross-Objection, I am of the opinion that the amount awarded by the Tribunal cannot be held as on higher side. Hence, Issue no.2 is answered in the negative.

18 In the present proceeding, the deceased was travelling in a vehicle as a passenger. Therefore, it cannot be held that because of his negligence accident occurred. At the most, if there is evidence on record then only court can hold that the driver of the vehicle was negligent. In the present proceeding, though the opponent no.3 before the Tribunal filed their written statement and participated in trial, they failed to examine any witness to show negligence on the part of the driver. Considering the principle laid down by the Apex Court in the matter of *Andhra Pradesh State Road Transport Corporation and another vs. K. Hemalatha and Others* (Supra), *Chhaganlal Nathubhai Patel v. Bhagirath Kheraji and others* (Supra) and *Pawan Kumar and another v. Harkishan Dass Mohan Lal and others* (Supra), court cannot hold contributory negligence on part of passenger. Hence, issue no.3 is answered in the negative.

19 In view of above mentioned facts, there is no substance in the present First Appeal. Hence, same stands rejected.

(K.K.TATED, J.)