

HON'BLE SRI JUSTICE G. SHYAM PRASAD

M.A.C.M.A. No.952 of 2010

JUDGMENT :

This Civil Miscellaneous Appeal, under Section 173 of the Motor Vehicles Act, 1988 (for brevity "the Act"), is preferred by the appellant – New India Assurance Company Limited (insurer), challenging the Award and decree dated 22.12.2009, in M.V.O.P.No.393 of 2007 passed by the Chairman, Motor Accidents Claims Tribunal-cum-I Additional District Judge, Ongole (for brevity "the Tribunal"), partly allowing the petition awarding compensation of Rs.3,34,500/- with interest @ 6% per annum, as against the claim of Rs.6,00,000/- laid under Section 166 of the Act for the death of the deceased-Gunti Shaktidhar Srimanth, who died in a motor vehicle accident that occurred on 02.10.2007.

2. The appellant – New India Assurance Company Limited is respondent No.3, respondent Nos.1 to 5 are the claim petitioners, and respondent No.6 – A.P. State Road Transport Corporation (APSRTC) is respondent No.1, and respondent No.7 – owner of the offending Bus bearing No.AP-27W-7776 is respondent No.2 in M.V.O.P.No.393 of 2007. For the sake of convenience, the parties are referred to as they were arrayed in M.V.O.P.No.393 of 2007 before the Tribunal.

3. The brief facts of the case are that, on 02.10.2007 while the deceased-Gunti Shaktidhar Srimanth was returning on

his Motor Cycle bearing No. AP-27L-3180 from Medarametla to Ongole after his work, on the way near Ambedkar Centre, Throvagunta, the Bus bearing No.AP-27W-7776 belonging to the APSRTC came in opposite direction at high speed and hit the deceased, as a result of which the deceased sustained multiple injuries and died on the spot. Basing on the report, a case in Crime No.430/2007 was registered under Section 304-A IPC by Ongole Rural Police Station. The petitioners, who are legal heirs of the deceased, laid a claim seeking compensation of Rs.6,00,000/- for the death of the deceased stating that by the date of accident, the deceased was aged 28 years old and he was working as a Head Cook in a Bar and Restaurant, Ongole, and was earning Rs.8,000/- per month and hence the 1st respondent – APSRTC, who hired the offending Bus, 2nd respondent being the owner of the offending Bus, and 3rd respondent being the insurer of the Bus are liable to pay the compensation with subsequent interest from the date of petition till the date of payment.

4. Before the Tribunal, the respondents filed separate counters denying their liability. The Tribunal, on consideration of the evidence of P.Ws.1 to 3 and the documentary evidence under Exs.A.1 and A.2 filed on behalf of the petitioners, and Exs.B.1 to B.3 filed on behalf of the respondents, vide Award and decree dated 22.12.2009, held that the accident occurred due to the rash and negligent

driving of the bus by its driver and accordingly awarded a compensation of Rs.3,34,500/- for the death of the deceased, holding that respondent Nos.2 and 3, who are owner and insurer, respectively, of the offending Bus are liable to pay the said compensation, while dismissing the claim petition against the 1st respondent - APSRTC. Aggrieved by the said Award and decree dated 22.12.2009, the appellant-insurer has preferred this appeal.

5. Heard Sri B. Devanand, learned Standing Counsel for the appellant – insurer, and Sri N. Ravi Prasad, learned counsel for respondent Nos.1 to 5 – petitioners. None appeared for respondent No.6 – APSRTC. Perused the order under appeal and also the evidence on record.

6. Learned Standing Counsel for the appellant-insurer submits that the Tribunal went wrong in fixing liability on the appellant holding that the insurer is liable to pay compensation, though the offending bus involved in accident was hired with APSRTC and the driver was under the control of the RTC and the liability against Corporation was exonerated. It is further submitted that since the APSRTC has not paid additional premium for hiring the bus, there is no coverage of insurance and, as such, the appellant-insurer is not liable to pay any compensation.

7. In support of his contention, learned Standing Counsel for the appellant-insurer placed reliance on a decision in **BRANCH MANAGER, ORIENTAL INSURANCE CO. LTD., LABBIPET v. JAVVAJI BHASKAR RAO**¹, wherein this Court in para-10 of the judgment held as under:

“10. There is no dispute that though appellant insured the offending bus, it was on hire to APSRTC. There is also no dispute that the bus was put to schedule as per the trip sheet fixed by concerned APSRTC officials and the driver was under the control of hirer. In such a case, APSRTC alone would be liable to pay compensation. In that view of the matter, the appellant cannot be made jointly and severally liable to pay award sum. If so advised, first respondent may proceed against APSRTC and recover entire amount awarded.”

8. Reliance was also placed in a decision reported in **RAJASTHAN STATE ROAD TRANSPORT CORPORATION vs. KAILASH NATH KOTHARI AND OTHERS ETC.**², wherein 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.

¹ 2009 (3) ALD 53

² AIR 1997 SUPREME COURT 3444 (1)

The liability of the “owner” is vicarious for 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.

Paragraph Nos.17 and 18 of the judgment read as follows:

“17. The definition of owner under [Section 2\(9\)](#) 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 some what 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, of 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 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.

18. Reliance placed by learned counsel or 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."

Learned Counsel for appellant placing reliance on the above judgments submitted that the Insurer has no liability to pay compensation as the owner of the vehicle is APSRTC, which has hired the vehicle and, therefore, it is only liable to pay compensation and not the Insurance Company.

9. On the other hand, learned counsel for the respondents – petitioners submits that there is a change in the law and in the light of the decision rendered by the Hon'ble Supreme Court in U.P. SRTC v. KULSUM³ and also the decision of this Court in APSRTC, HYDERABAD AND ANOTHER v. B. KANAKARATNABAI⁴, once the premium is paid by the owner of the offending vehicle, the hirer of the vehicle need not pay premium again for coverage of the risk of the third parties and hence sought for dismissal of the appeal.

³ (2011) 8 SUPREME COURT CASES 142

⁴ 2013 (1) ALD 644 (FB)

10. Learned Standing Counsel for the appellant-insurer submitted that the Bus was hired with APSRTC and, therefore, APSRTC is in the capacity of owner of the Bus, which met with the accident. As per Section 2(30) of the Act, 'owner' has been defined as under:

“(30) “owner” means a person in whose name a motor vehicle stands registered, and where such person is a minor, the guardian of such minor, and in relation to a motor vehicle which is the subject of a hire-purchase, agreement, or an agreement of lease or an agreement of hypothecation, the person in possession of the vehicle under that agreement;”

11. It is further submitted that as per Clause 5(iv) of Ex.B.2 – Agreement, the owner shall be responsible for all claims that may arise due to statutory violations out of the operations. Clause 5(iv) of Ex.B.2 – Agreement reads as under:

“5(iv). The owner shall be responsible for all claims that may arise due to statutory violations out of the operations, like claim due to accidents payable under the provisions of M.V. Act, 1988/Rules and APSRTC shall under no circumstances be made liable or responsible to pay compensation that may be awarded by Motor Accidents Claims Tribunal or Tribunals in respect of the accidents. In the event of payment of compensation by APSRTC to the injured persons / dependents of deceased persons or to the owners of the property damaged, by any Award of the Motor Vehicle Accidents Tribunal / Order of the Court in cases involving accident to the hire buses, the APSRTC shall have right to recover the said compensation from the hire bus owner. The hire bus owner hereby agrees that he shall not dispute the said recovery.”

12. Further, the Tribunal has given a clear and categorical finding in this regard holding that as per Clause 5(iv) of Ex.B.2 – Agreement, the APSRTC is not liable to pay compensation to the dependants of the deceased, but the 2nd respondent – owner and the 3rd respondent – insurer are liable to pay compensation to the dependants of the deceased. In view of the above Clause 5(iv) of Ex.B.2 – Agreement, the owner of the crime bus is liable to pay compensation.

13. In view of the clear and categorical findings of the Tribunal and the in the light of the decisions referred above, since the owner has insured the vehicle with the appellant-insurer, the appellant-insurer is liable to pay compensation. Therefore, in the light of the foregoing reasons, I do not see any reason to interfere with the Award and decree passed by the Tribunal in holding the liability against the appellant-insurer and respondent No.7 – owner.

14. In the result, the Appeal is dismissed, while confirming the Award and decree dated 22.12.2009, in M.V.O.P.No.393 of 2007 passed by the Tribunal. The appellant-insurer is directed to deposit the amount in the Court, within one month from the date of receipt of a copy of this judgment and on such deposit being made, the respondents-petitioners are permitted to withdraw the amount.

15. As a sequel, miscellaneous petitions pending, if any, shall stand closed.

GUDISEVA SHYAM PRASAD, J

27.04.2018.
Msr



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