
(1992) 2 MLJ 389

Madras High Court

Case No: None

New India Assurance
Co.

APPELLANT

Vs

Meenal and Others

RESPONDENT

Date of Decision: Dec. 20, 1991

Acts Referred:

Motor Vehicles Act, 1988 " Section 95

Citation: (1992) 2 MLJ 389

Hon'ble Judges: Abdul Hadi, J

Bench: Division Bench

Judgement

Abdul Hadi, J.

This appeal by the 2nd respondent-Insurance Company is against the order dated 13.9.1984 in M.CO.P.No.8 of 1984 on

the file of Motor Accident Claims Tribunal, Pudhukottai awarding a compensation of Rs. 2 lakhs to the respondents 1 to 4 who are claimants in

the above said M.C.O.P. The said compensation was awarded on account of the death of one Muthuraman when he himself drove the car

MDT.3004 on 5.9.1982 and met with an accident which resulted in his death. The 5th respondent herein is the owner of the said car and the

claimants are Muthuraman's wife, two minor children and his mother.

2. The case of the claimants briefly is as follows: The said Muthuraman was driving the said car taking along with him in the said car his relatives

and was proceeding in a normal speed. A cyclist, coming in the opposite direction suddenly swerved to the right in front of the car. In order to avert

dashing against him and killing him, the said Muthuraman suddenly swerved his vehicle to the left, thereby brought it down to the mud portion of the

road and, as the road was slippery the vehicle skidded and went uncontrollable and capsized. Due to this, the deceased sustained grievous injuries

in the lower part of the abdomen and after the villagers removed him and other occupants from the car by bringing it to the normal position, he was

admitted in Ponnamaravathi Hospital to which he was carried in a town bus. Immediately on admission he succumbed to the injuries. The accident

is only due to the slippery condition of the road and the deceased was not in any way responsible for the same. The first respondent is the owner

of the car the deceased was driver in the car as a third party, and the insurer as well as the owner are liable to answer the claim.

3. In the light of the discussion, necessary in the present case, there is no necessity for setting out the further pleadings. The first respondent in the

M.C.O.P. (5th respondent herein) remained ex parte. The second respondent-Insurance Company (the appellant herein) filed a counter inter alia

pleading that there is no actionable claim against the Insurance Company, that the accident-was caused due to the rash and negligent driving on the

part of the deceased, that hence the claimants are not entitled to claim any compensation, that u/s 95 of the Motor Vehicles Act (hereinafter

referred to as the "Act") a policy is required to indemnify the owner only in respect of a liability incurred by him, traceable under Law of Torts, and

in respect of the death or bodily injury, or damages to the property of a third party, arising out of the use of a vehicle in a public place and that the

deceased was not a paid driver.

4. The tribunal below has accepted the case of the claimants and has held that the said Muthuraman did not drive the car negligently and that there

is no contra-evidence on the side of the Insurance Company which has simply taken the question of maintainability of the petition. Then, on the

question whether the petitioners before it are entitled to the compensation, it has observed that the petitioners before it have not claimed the

compensation on the ground that the said Muthuraman was a paid driver under the 5th respondent herein, that the claim was not made by the third party against the owner of the vehicle and the Insurance Company, that, since the car was entrusted to the deceased Muthuraman, he was in possession of the vehicle in the capacity of the owner of the vehicle and that hence the Insurance Company is liable to pay the compensation to the claimants.

5. Even before considering the submissions of the learned Counsel for the appellant, we have to see whether the above said claim petition is

maintainable at all, even on the very plea of the claim petition itself. It is elementary that for maintaining any action for such compensation, the

wrong or tort committed by the 5th respondent must be specifically pleaded. But, we find from the claim petition, (the relevant portion of which has

been already extracted) that it does not show any wrong on the part of the owner of the car, the 5th respondent herein. There is absolutely no

allegation in the claim petition that the owner of the vehicle has committed any tort. Not only there is no plea that the owner committed any wrong,

there is also no proof to that effect. In fact, P.W.2 the brother of the deceased, who was sitting in the front seat of the same car when it met with

an accident, and who is also the only eye-witness to the accident, admitted in cross-examination that it was not a rainy season, that he did not tell

P.W.1 or his mother about any oil remaining spilt on the said road at the said time when the accident took place, that he saw the cyclist at an 80

feet distance, and that the driver did not apply the brake as soon as he saw the cyclist, that there was a distance of 15 feet between the place

where the driver reduced the speed of the car and the place where the car hit the tree. Taking the abovesaid evidence of P.W.2 into account, it

cannot be concluded that the accident was an inevitable one. On the other hand, it can be concluded that the said deceased himself was negligent

in driving the car.

6. Further, there is also no plea that there was any master-servant relationship between the owner of the car and the said Muthuraman. In such a

case, no vicarious liability also will arise or can be foisted on the owner the 5th respondent herein. It is also well-settled law that when the

owner/insured is not liable, the insurer cannot be held liable. This position is also accepted by the learned Counsel for the claimants.

7. However, the argument of the learned Counsel for the claimant is as follows :

The driver in having averted hitting against the cyclist and killing him has saved the owner of the car from the claim for compensation by the said

cyclist or his legal representatives. So, the owner must compensate the present claimants who are the legal representatives of the driver

Muthuraman, who saved the owner from paying any compensation to the cyclist or his legal representatives.

8. This argument of the counsel cannot be accepted at all. First of all, there is no plea or proof that in order to avoid the alleged liability of the

owner, the deceased swerved to his left. Further the deceased was not driving the car on any errand of the owner. Further what has been pleaded

itself would also show negligence on the part of the driver himself. If only he had driven the car slowly and cautiously, he could have easily avoided

hitting against the above said cyclist. If according to P.W.2, the car after reducing the speed was going in 15 kmph speed, easily the driver could

have avoided hitting against the cyclist and at the same time would not have dashed against the tree. The learned Counsel could not also establish

that such a claim would be a tortious claim. The learned Counsel no doubt relied on Carmarthenshire County Council v. Lewis (1955) 1 All. E.R.

565. But we don't think that it was any application to the present case since in the said case, the owner of the lorry was not held liable for the

death of his driver who drove the lorry and said to have averted hitting against the child coming on the road.

9. After making the abovesaid argument, the learned Counsel went on to make another argument taking entirely a different stand, there again, not

based on pleading or proof. It is as follows:

This was a case of strict or absolute liability as was in the case of Rylands v. Fletcher (1886) L.R. 3 H.L. 330. For this, he contended that the

motor vehicle itself was a dangerous chattel coming within the principle of the said liability. He also cited in this connection Gujarat State Road

Transport Corporation, Ahmedabad Vs. Ramanbhai Prabhatbhai and Another, . But there, the Supreme Court only observed thus:

In view of the fast and constantly increasing volume of traffic, the motor vehicles upon the roads, may be regarded to some extent as coming within

the principle of liability defined in Rylands v. Fletcher (1886) L.R. 3 H.L. 330.

[emphasis supplied].

10. But, from this it cannot be concluded that the motor vehicles are always dangerous chattels coming within the principle of the abovesaid

liability. Further, here also, there is neither plea nor proof that the abovesaid car was such a dangerous chattel which would give rise to the

abovesaid strict liability under Law of Torts. That apart in B. Govindarajulu Chetty Vs. M.L.A. Govindaraja Mudaliar and Others, , it was held

that the motor vehicles are not such dangerous things. The following observations therein are significant, ""...there is ample authority for the view that

the lorry is not in itself a nuisance or a hazardous chattel so as to attach the doctrine of absolute liability....At page 665 the learned Law Lord (in

(1909) 2 K.B. 652) has explained as to why the rule in Rylands v. Fletcher (1886) L.R. 3 H.L. 330 would not apply to the ownership of a motor

vehicle.

11. Further in BishanDeviv. Sirbaksh Singh AIR 1979 S.C. 496, the Supreme Court has held as follows :

A liability can be cast on another only if he is in any way responsible for the accident which occasioned the injury. In other words there is no scope

for any absolute liability on the owner of the vehicle to compensate the injured. The provisions of the Motor Vehicles Act do not contain any

statutory provision to that effect. The act does not provide a new right or a new remedy to a person who is injured by an accident. The provisions

of the Act do not in any way interfere with the substantive common law on the subject.

This principle is also followed by Kerala High Court in New India Assurance Company Ltd. v. Raju Markose 1989 A.C.J. 643. There also it is

held that proof of negligence is necessary before owner or the insured can be held liable for payment of compensation in a Motor Accident

Claim's case. There, the accident occurred, before Section 92-A of the Act which provided for no fault liability, came into force. It is also

explained there that Section 92-A dispenses with proof of negligence in the matter of award of compensation to the extent indicated therein, that

the said section indicates that the substantive law is changed only to the extent indicated and that, but for the said modification, the substantive law

continues to be in force and no claim for compensation is sustainable without proof of negligence except to the extent such proof is dispensed with

by Section 92-A. It is also so observed in the Supreme Court decision reported in Gujarat State Road Transport Corporation, Ahmedabad Vs.

Ramanbhai Prabhatbhai and Another, while dealing with Section 92-A of the Act in the newly introduced Chap. VII-A of the said Act providing

for "no fault liability". The Supreme Court in the said decision observed as follows :

That part of the Act is clearly a departure from the usual common law principle that a claimant should establish negligence on the part of the owner

or driver of the motor vehicle before claiming any compensation for the death or permanent disablement caused on account of a motor vehicle

accident. To that extent the substantive law of the country stands modified.

[emphasis supplied]

This passage of the Supreme Court is also referred to in our judgment in K. Nandakumar v. The Managing Director Thanthai Periyar Transport

Corporation Ltd., Villupuram C.M.A.No.694 of 1991, dated 20.9.1991 and we have expressed further as follows :

It must be noted here that only to the above extent, the substantive law has been modified in this regard, and not to the extent that, even where the

deceased or the injured, as the case may be, is negligent and not the other party, the former can claim compensation. Where the former is

negligent, there is no scope at all for himself claiming any compensation from any other party for his own fault. That is the substantive law. That

part of the substantive law has not at all been modified by Section 92-A of the Act.

12. Further in *United India Insurance Company Ltd. v. Kantabai* 1991 A.C.J. 22 it was held that even on general principles it was difficult to

entertain the contention that the liability in respect of the tortfeasor himself would be covered by the insurance company.

13. Further in *Mallika v. Alagarsami* (1981)2 M.L.J. 329 : 1982 A.C.J. 272 also it has been held that the question of vicarious liability will not arise

when the claim is made by the tortfeasor himself or any person claiming under the tortfeasor. There, the deceased his wife and children

accompanied the son of the owner in the car. Due to long driving, the driver of the car felt tired and the deceased relieved him and drove the car.

The car dashed against the tree and the deceased sustained fatal injuries. In that context, this Court observed as follows:

Section 95(1), Motor Vehicles Act, in so far as it uses the expression "in respect of the death of or bodily injury to any person or damage to any

property of a third party" should be taken to cover any liability which may be incurred by the owner of the vehicle in respect of death or bodily

injury to any person or damage to any property of a third party. The presence of two expressions "any person" and "third party" in the same

provision would indicate that the expression "any person" has been used in a wide sense and not only in the sense of a "third party". Even if,

Section 95(1) can be construed as including the liability of the owner of the car for the death or bodily injury to any person, this provision cannot

be invoked by the claimants in this case unless the claimants are able to establish that the owner has incurred a liability in respect of the death or

bodily injury to the deceased which liability has to be insured as per the provisions of Section 95(1). It cannot be said that the mere ownership of

the car creates liability on the part of the owner of the vehicle to pay compensation for the death or injury to any person. The liability can arise only

when the owner of the vehicle was in any way responsible for causing the accident which has resulted in that liability. In this case, the accident was

caused by the rashness and negligence of the deceased and in such cases there is no legal liability arising either under the law of Torts or any other

basis under the common law. Only when there is a legal liability, that liability has to be insured u/s 95(1). In this view of the matter, we are unable

to agree with the learned Counsel for the appellants that an absolute liability has been cast on the owner of the vehicle to pay compensation u/s

95(1) and that absolute liability does not depend on the fact as to who caused the accident and whether the owner of the vehicle is negligent or not.

14. Further in *Minu B. Mehta v. Ramachandra Nayan* 1977 A.C.J. 118, the Supreme Court also held that the concept of vicarious liability without

any negligence was opposed to the basic principles of law.

15. Taking all these into account, we are quite convinced that the present claim by the claimants is absolutely misconceived and they cannot claim

any compensation from the owner of the vehicle and consequently they cannot have any claim against the appellant, the Insurance Company.

Hence, the order of the Tribunal below is set aside and the appeal is allowed. In the circumstances, no costs. In pursuance of this judgment, the

appellant is allowed to withdraw the amount deposited by it.