

(2010) 11 P&H CK 0585

High Court Of Punjab And Haryana At Chandigarh

Case No: First Appeal from Order No. 429 of 1998

Smt. Sona Devi and Others

APPELLANT

Vs

Anil Kumar and Others

RESPONDENT

Date of Decision: Nov. 30, 2010

Acts Referred:

- Motor Vehicles Act, 1988 - Section 123, 139, 148, 152, 165
- Motor Vehicles and Transport Management Act, 2049 - Section 30

Citation: (2011) 161 PLR 578 : (2011) 3 TAC 552

Hon'ble Judges: K. Kannan, J

Bench: Single Bench

Judgement

K. Kannan, J.

I. The cause of action or the bundle of causes

1. The appeal is at the instance of a claimant, who along with several other persons through independent petitions approached the Motor Accident Claims Tribunal, for claiming compensation for death of the 1st claimant's husband in a motor accident. The deceased was one of 54 pilgrims, who had hired tour operator's services from Karnal to go to several places on worship in Northern India, including Haridwar, Ayodhya, Jagan Nath Puri and also to Nepal and reach the starting point in India through bus having registration No. UP-10B-0939. The tour was said to have been operated by a tour operator in India and the bus in the course of its transit at Kathmandu fell into Trishuli Nadi. All the persons travelling in the bus drowned in the river and had died.

II. Accident in Nepal, a foreign country - the maintainability is the core issue

2. On a preliminary objection taken by the insurance company that the petition was not maintainable, for the accident had taken in a country to which the provisions of the Motor Vehicles Act are not applicable, the Tribunal rejected the claim petition

without going to the merits of the case and found that the provisions of the Motor Vehicles Act were applicable only to the territory of India excluding Jammu and Kashmir and therefore, there was no valid cause of action for pursuit before the Tribunal for an accident that had taken place in Nepal. The point urged in appeal by the claimants is that Section 168 of the Motor Vehicles Act makes possible the place of residence of the claimant as constituting a jurisdiction for the Tribunal to entertain the claim and therefore, the case filed at Court of Ambala where they were residing had jurisdiction. The Tribunal rejected the petition on the ground that the Tribunal which is constituted under the Motor Vehicles Act can hear and dispose of case only in respect of accidents that take place within the limits of India to which the provisions of the Act is extended. The Tribunal observed that any accident, if it takes place in a foreign country, can leave no cause of action to enforce before the Tribunal.

III. Existence of foreign element, cause for application of private international law

3. The issue in this case really is one of application of the Rules of Conflict of Laws or Private International Law, for the claim is at the instance of legal representatives of a deceased, who was an Indian citizen, who had entered into a contract with the contractor in India, who had availed the services of a public service vehicle in India and who was supposed to return to a place in India where a foreign country was merely a place of transit. The only foreign element involved in the case is that the accident had taken place in a foreign country; otherwise, all the causes of action relating to a contract to carry a passenger, the person who caused the accident, the owner of the vehicle who was involved in the accident are all Indians.

IV. Relevant provisions of MV Act that invoke foreign elements"

4. On the claims for death or bodily injury arising out of motor accident taking place within India is undoubtedly governed by the provisions of the Motor Vehicles Act. It has no extra territorial application except in so far as the Act itself provides for certain permits to be issued for vehicles being plied in a foreign country. Section 88 of the Motor Vehicles Act provides for validation of permit for use outside the region in which it is granted. Section 139 of the Motor Vehicles Act empowers the Central Government to make Rules for grant and authentication of travel passes to persons temporarily taking vehicles out of the country. Section 148 of the Motor Vehicles Act deals with validity of policies of insurance issued in reciprocating countries. That the particular vehicle, which was involved in the accident, had a permit to be driven in a foreign country itself is not in dispute. I assume that all the relevant provisions of the Motor Vehicles Act of 1988 were followed in order to take the vehicle to Kathmandu. Section 165 of the Motor Vehicles Act under which the Motor Accident Claims Tribunal is constituted empowers the Tribunal to adjudicate "upon claims for compensation in respect of accidents involving the death or bodily injury to persons arising out of use of motor vehicles or damage to any property of a third party so arising or both." The Act which makes provision for taking vehicles registered in

India outside India and for provision for issuance of permits on reciprocal basis must be assumed to be aware of situations where a vehicle which is registered in India and which is being taken out in India could involve in any accident and Section 165 of the Motor Vehicles Act, when it makes reference to adjudication of claims relating to motor accidents, must be understood as covering every situation where a vehicle registered in India and being taken to a foreign country runs into an accident. It does not limit merely to situations of a claimant suffering an accident injury or death within India. The foreign element cannot be discarded and therefore, it has to be seen whether Section 165 of the Motor Vehicles Act could be invoked to vest in a Tribunal with jurisdiction to try a case of the result of an accident taking place outside the India.

V. Common law principles of private international law applicable in Indian Courts

5. The most crucial legal incident shall be whether the Indian Law could be applied to a situation where an accident takes place outside India. A claim of compensation arising out of a negligent or rash driving of a driver lies in the legal genre of tort. The fundamental precept of the law applicable to a tort is *lex loci delicti*, which means the law of the place where the tort has taken place. The actual injury that has taken place is at Nepal and therefore, the compensation law that would be applicable would be normally only Nepal. Yet another principle in Private International Law that is invoked for deciding on the applicability of law is *lex fori*, which means the law of the forum. The forum in which a case can be prosecuted will also determine the law that is applicable. There are some opponents to this principle for the same reason as the opposition exists for "forum shopping", so that persons do not choose the forum to suit their own convenience to find a suitable law to apply. If the *lex loci delicti* were to lead us to believe that it is the law of Nepal which will normally govern and when we are examining a situation whether a petition could be filed before a Tribunal in India, we will have to see whether any other principle of Private International Law allows the applicability of MV Act and invoke the jurisdiction of the Tribunal. Not all legislations have incorporated these principles and making reference to Conflict of Law in matrimonial jurisdiction in [Y. Narasimha Rao and Others Vs. Y. Venkata Lakshmi and Another](#), the Supreme Court said that the rules of Common Law on the subject will govern in such situations and the Courts in India will follow them, where there were no specific statutory provisions.

(i) The double action ability test

6. In England there is now a specific law enacted called Private International Law (Miscellaneous Provisions) Act 1995. Part III of the Private International Law (Miscellaneous Provisions) Act, 1995 deals with provisions for choosing the law to the issue relating to tort. It applies to events occurring in the foreign as well as to events occurring in any other country. The term "issue relating to tort" itself is not defined under the Act. We do not have statutory provisions in India and while in

England the statutory provisions govern and displace Common Law to the accident to which the statutory provisions are made, India will continue to be governed by the principles of Common Law themselves, since we do not have any statutory provisions. The torts committed outside India which are not governed by the statutory provisions in India and to which the Common Law principles would be applicable could be understood by the following position of law prevalent in England and explained through the Halsbury's Law of England Volume 8(3) Fourth Edition Reissue, 2003 in paragraph 375 as follows:

375. The general choice of law rule for torts committed abroad. As a general rule, an act done abroad is actionable as a tort in England only if:

- (1) it would have been actionable as a tort if it had been done in England; and
- (2) it is actionable, though not necessarily as a tort, under the law of the foreign country.

This is known as the rule of "double actionability". If both conditions are satisfied, it appears that the court will adopt English law to dispose of the case.

7. In order to apply condition No. 1, a claimant must show that Indian domestic law allows for a cause of action in tort for the negligent act of the driver. Two, the claimant must also establish that a liability exists towards an accident victim or his representative by the tortfeasor in the foreign country where the accident takes place. I have examined relevant provisions of law applicable in Nepal which is called the Motor Vehicles and Managerial Transport Act, 2049 (1993) that was brought into force on 25.08.1993. The Act contains similar provisions such as the provisions u/s 30 for allowing foreign vehicles to run within the territory after a special permit and contains also a provision for compulsory third party insurance u/s 152. The Act also makes a right of enforcement of claim for compensation for death or injuries and provide for fixed sum of compensation which is recoverable before the Chief District Officer. Section 161 of the Nepal Act provides for punishment of a driver in case of accident that results in death to a passenger and also makes the owner of motor vehicle punishable in case where the vehicle meets with an accident and consequently a person dies. Section 163 contemplates defraying of medical expenses for injuries caused to a passenger in a motor vehicle and Section 163(A) provides for immediate defraying expenses for obsequies. There is no specific Tribunal constituted in the same way as the Motor Vehicles Act contemplates but certainly there exists a regime of compensation for persons when death or personal injuries arise out of motor accident.

8. The double actionability rule under which a right of action is possible in India would be excluded as per the Rules of Private International Law only under situations which is again expostulated in paragraph 376 of Halsbury's Laws of England:

376. Exception to the general choice of law rule for torts committed abroad. The "double actionability" rule has been said to be flexible, and may be departed from in an appropriate case on clear and satisfactory grounds. If all, or virtually all, of the significant factors so indicate, a particular issue or even the entire question of liability may be governed instead by the law of the country which has the most significant relationship with the occurrence in question and with the parties. Thus a claimant may recover even though the law of the place of the tort would have disallowed some or all his claim. Likewise, he may recover in respect of a tort actionable under the law of the place where it occurred even though the conduct would not have been actionable as a tort if it had occurred in England.

For this exception to apply, the connection between the case and the country whose law is to be denied application must be so weak that the law has no interest in being applied to the particular dispute, and another law should be applied instead.

(ii) Explanation of the principle through English law

9. There have been also recent cases in England about accident claims pursued in England, for accidents taking place in a foreign country, say, Australia. The question raised before the House of Lords was whether compensation for particular heads of claim which are not possible to obtain in Australia could be sought for when the litigation commenced in England. This point was taken up in *Harding v. Wealand* 2006 U.K. HL 32. The point raised before the House of Lords was whether damages for personal injury caused by negligent act in New South Wales should be calculated according to the law applicable under the Private International Law (Miscellaneous Provisions) Act, 1995 or to be treated as merely as question of procedure to be normally determined in accordance with English Law. The Court of Appeal, by majority, held that it should be determined in accordance with the applicable law which they decided was the Law of New South Wales. The House of Lords held that it was merely a question of procedure which fell to be determined in accordance with English Law and applied the English Law. In the said case, the accident occurred when, on a dirt track on 03.02.2002 in New South Wales, Ms. Wealand, the Respondent, lost control of the vehicle and it turned over. Negligence was admitted. The Appellant Harding who was a passenger was severely injured and had become a tetraplegic. Mr. Harding was an English and Ms. Wealand was an Australian. At the time of accident they gone together to Australia for holiday and visited to Ms. Wealand's parents. The vehicle belonged to Ms. Wealand and she had been insured with the Australian insurance company. After the accident, Ms. Wealand returned to Australia and the case was initiated in England.

10. The case which was tried in England by the 1st Court applied the English Law for the assessment of damage because the assessment of damages is a matter of procedure governed by *lex fori* and secondly even if it was a substantive law, it was substantially more appropriate to apply the English Law. In New South Wales, the Common Law liability for transport accident had been abolished by Transport

Compensation Act of 1987 and a statutory scheme of compensation substituted it. It was reintroduced subsequently when the 1987 Act was abolished by the Motor Vehicles Act of 1988. The 1988 Act, however, did not contain detailed provisions consisting awards of damages for injuries suffered in motor accidents. They had been replaced by Chapter 5 of Motor Accidents Act 1989 and Section 123 of the said Act specifically provided that a Court cannot award damages to a person in respect of a motor accident contrary to Chapter 5. Chapter 5 provided for cap on liability. In England, on the other hand, there was no specific ceiling on the liability arising out of accident that caused death or bodily injury. The House of Lords however observed that the Common Law of Australia on the point of liability was the same as the law in England and there was no doubt that the damage suffered by Mr. Harding would have satisfied the double accountability test, which I have outlined above. The foreign law, however, touched only the issue of a remedy and procedure for enforcing an obligation.

(iii) Common law example by case in U.S.A.

11. In *Bobcock v. Jackson* (1963) 12 NY 2d 473 : (1963) 2 Lloyd's Rep 286, a decision of the New York Court of Appeals, the facts were as follows:

The Plaintiff, a gratuitous passenger in the Defendant's car, was injured in an accident that occurred in Ontario. At the time the parties, who were New York residents, were on a week-end trip to Canada. The trip had commenced in New York State where the car was licenced, insured and usually garaged. An Ontario statute absolved drivers from liability towards their gratuitous passengers. New York law contained no similar provisions. The Plaintiff successfully sued the Defendant in New York for negligence.

Fuld J. expressing the view of the majority of the New York Court of Appeals said:

The question presented is simply drawn. Shall the place of the tort invariably govern the availability of relief for the tort or shall the applicable choice of law rule also reflect a consideration of other factors which are relevant to the purposes served by the enforcement or denial of the remedy? The judge accepted the latter alternative. He embraced the view expressed in the then latest revision of the Conflict of Laws Restatement to the effect that: The local of the State which as the most significant relationship with the occurrence and with the parties determines their rights and liabilities in torts. (See for further commentaries on this subject in *Private International law* by Cheshire & North, Butterworths, Eleventh Edition pp. 513-544).

VI. Tests of "Double Actionability" & "Significant relationship with occurrence and the parties" applied to the fact situation

12. It will be noticed that the American case has a striking similarity to the case that we are dealing with. I have already observed that the law in Nepal also provides for compensation for injuries arising out of death in a motor accident. It provides for a

particular forum and also caps the liability at Rs. 5 millions for cases of death. There is no cap on liability in India so far as third party's rights are concerned under the Motor Vehicles Act of 1988. The choice of forum is one of procedure and the substantive law of entitlement is the same in both countries. The applicability of *lex loci delicti* principle itself is not a point of obstruction for us, for we had already examined that the law in Nepal as regards entitlement to claim compensation for injuries is not different from how the law in India is but the variation is only with reference to the forum and the quantum of compensation. That was precisely the issue in the House of Lords case that we have seen above. The additional fact is what is provided in the illustration in the American case. This case in India has a more significant relationship with the occurrence and the parties to the particular issues involved and they are better governed by the law of the State to which the parties are litigants. In *Richards v. United States* (1962) 369 US 1 the Hon^{ble} Supreme Court of US observed that general Conflict of Law rule followed by a vast majority of the States is to apply the law of the place of the injury to the substantive rights of the parties but the recent tendency of some States have been to depart from this Rule in order to take into account the interest of the State having significant contact with the parties to the litigation. The Courts in Canada and Australia have also adopted *lex loci delicti* doctrine in their respective domestic laws and rooted for soundness of approach for ease of application and predictability. All this is only to state that there is particularly no bar in the principle of Private International Law for the choice of forum in a country different from where the accident took place. The Appellants here who were the Applicants before the Tribunal were prosecuting cases against Respondents, all whom are Indian citizens and who are permanent residents of India. The driver, the owner, the contractor and the insurer are all Indian parties. The contract took place in India. This is not merely a case of the deceased organizing his travel through a transporter or a travel agent for a travel in a foreign country and meets * with an accident in a foreign country. Situations could be where a local agent in India books tickets for foreign transport in a foreign country in a foreign vehicle and accident takes place in the foreign country. Cases of accident where a foreign transporter is involved and the tortfeasor is himself a foreigner and the place of accident is also a foreign country, the choice of forum in foreign country could be well understood. Here the tour operator was an Indian operating an Indian vehicle commencing and concluding the tour within the places in India but merely taking a foreign country as a place of transit in the interregnum. The major part of the cause of action except the fact of accident itself has taken place in India. Cause of action in a case may spring from a bundle of facts. The Indian elements to the facts involved in the case are far too many to be discarded and to reject the jurisdiction of Indian Tribunal out of reckoning. Even the most outstanding case that remains yet in the memory of any Indian Citizen is the Bhopal tragedy where an industrial accident of mammoth proportion took place in India and the trial jurisdiction was invoked in U.S.A. since the factory was owned and controlled by an American parent company. The

American Court directed the case to go back to India not merely because the accident had taken place in India but it found that although a jurisdiction in USA itself was very much available, it would be a forum non conveniens. In re Union Carbide Corporation Gas Plant Disaster at Bhopal, India in December 1984 634 F. Supp. 842 (S.D.N.Y. 1986). Judge Keenan found that the evidence would have to be recorded in India, for the majority of persons involved in the accident were poor people, who could not travel to foreign country and there was independent sound judicial system in place in India which can adequately bring reparation. In this case, although the accident took place in Nepal, we are discarding the foreign country's jurisdiction by the fact that claimants are Indians, the Defendants are Indians, the contract for travel took place in India and the insurer is also in India. The forum conveniens is also in India.

13. Even apart from Section 165 which we have made reference to in the above paragraph, Section 168 makes possible the place of the residence of the Petitioner to be relevant. I will not invoke this Section only by the fact that the Applicant is an Indian. An Indian Court may not have jurisdiction in a case where the tour operator was a foreigner and the accident had taken place in a foreign country and the tortfeasor was a foreigner and all the Defendants were in foreign country. In this case the marked difference is as regards each one of the above components, except the place of accident remains in India or related to Indians and Indian Court jurisdiction. That according to me would make the difference and make the foreign law inapplicable and the choice of forum in India to be properly rooted by principles of Private International Law.

VII. Disposition

14. The petition filed before the Motor Accident Claims Tribunal was, under the circumstances, perfectly justified and I set aside the order of the Tribunal rejecting the claim and direct the case to be taken on file and dispose of the case in accordance with law. Having regard to the fact that the accident had taken place more than a decade earlier and the case had been disposed of even without reference to the merits, the Tribunal is requested to dispose of the case within six months and report to this Court. 15. The appeal is allowed the parties are directed to appear before the Tribunal on.