(1987) 06 KL CK 0065

High Court Of Kerala

Case No: A.S. No. 154 of 1980

Mrs. C.V. Omana and Others	APPELLANT
Vs	
Mr. P.V. David and Others	RESPONDENT

Date of Decision: June 19, 1987

Acts Referred:

- Evidence Act, 1872 - Section 32
- Motor Vehicles Act, 1939 - Section 108, 94, 95, 95(1), 95(2)

Hon'ble Judges: Shamsuddin, J; Balakrishna Menon, J

Bench: Division Bench

Advocate: P. Ramanujam, for the Appellant; T.R. Raman Pillai, for Respondents 1 and 2, for the Respondent

Final Decision: Dismissed

Judgement

Shamsuddin, J.
The Plaintiffs in a suit for damages under the Fatal Accidents Act are the Appellants in this case. The suit was dismissed by the lower Court holding that the accident occurred not due to rashness and negligence of the driver.

2. The material averaments in the plaint can be summarised as follows: The first Plaintiff is the wife and the other Plaintiffs are the children of deceased Bhaskaran alias Sivarajan. He was given a lift by the second Defendant, the driver of lorry bearing Registration No. K.L.E. 2009 on 26th April 1973. The lorry met with an accident and the deceased sustained injuries on his right leg. He was immediately taken to the Kothamangaram Hospital and after first aid was removed to the District Hospital, Ernakulam where his right leg below the knee had to be amputated. However, he died on 14th May 1973. While in the hospital, he suffered pain and the first Plaintiff had to spend about Rs. 2,500 for his treatment and also another amount of Rs. 500 towards his funeral expenses. The deceased Bhaskaran alias Sivarajan was a driver in another lorry and it was for the purchase of some spare

parts for that lorry he travelled in the lorry which met with the accident. The incident took place as a result of rash and negligent driving of the second Defendant and the first Defendant as the owner of the lorry and employer of 2nd Defendant was vicariously liable for the loss and damage. The Plaintiffs restricted their claim to a total sum of Rs. 75,000.

3. Defendants 1 and 2 in their written statement admitted that the accident occurred on 26th April 1973 but contended that the first Defendant had not permitted the second Defendant to take any passenger in the cabin of the lorry and that the deceased travelled in the lorry at his own risk. The second Defendant was giving side to a lorry which came in the opposite direction and at that time the brake of the lorry failed all on a sudden and the lorry capsized and the deceased sustained injury.

4. The 4th Defendant, the New India Assurance Company in its written statement averred that it was not correct to say that the lorry bearing registration No. K.L.E. 2009 was insured with the 4th Defendant and the policy of insurance issued in respect of the goods vehicles is not required to cover any passenger carried in such vehicles as per Section 95 of the Motor Vehicles Act and in any event the liability of the insurer is subject to the provisions contained in Section 95(2) of the Motor Vehicles Act.

5. It has come out in evidence and is admitted that the lorry bearing registration No. K.L.E. 2009 driven by the second Defendant was insured with the 4th Defendant at the material time.

6. The questions that fall for consideration in the appeal are:

1. Whether the accident took place as a result of rash and negligent driving of the 2nd Defendant;

2. Whether the policy of insurance covered any passenger carried in the vehicle in view of Section 95 of the Motor Vehicles Act;

3. Whether the first Defendant is vicariously liable to pay damages to the Plaintiffs if the accident had occurred on account of rash and negligent driving of the 1st Defendant; and

4. Quantum of damages if any.

Sri Ramanujam, counsel for the Appellants strenuously contended that the 4th Defendant is liable to pay damages by virtue of the provisions contained in Section 95 of the Motor Vehicles Act.

7. It will be convenient here to refer to Section 95(1) of the Motor Vehicles Act which reads as follows:

95. Requirements of policies and limits of liability.-(1) in order to comply with the requirements of this chapter, a policy of insurance must be a policy which-

(a) is issued by a person who is an authorised insurer, or by a co-operative society allowed u/s 108 to transact the business of an insurer; and

(b) insures the person or clauses of persons specified in the policy to the extent specified in Sub-section (2)-

(i) against any liability which may be incurred by him in respect of the death of or bodily injury to any person or damage to any property of a third party caused by or arising out of the use of the vehicle in a public place;

(ii) against the death of or bodily injury to any passenger of a public service vehicle caused by or arising out of the use of the vehicle in a public place;

Provided that a policy shall not be required-

(i) to cover liability in respect of the death, arising out of and in the course of his employment, of the employee of a person insured by the policy or in respect of bodily injury sustained by such an employee arising out of and in the course of his employment, other than a iability arising under the Workmen''s Compensation Act, 1923 (8 of 1923) in respect of the death of, or bodily injury to, any such employee-

(a) engaged in driving the vehicle; or

(b) if it is a public service vehicle, engaged as a conductor of the vehicle or in examining tickets on the vehicle; or

(c) if it is a goods vehicle, being carried in the vehicle; or

(ii) except where the vehicle is a vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment, to cover liability in respect of the death of or bodily injury to persons being carried in or upon or entering or mounting or alighting from the vehicle at the time of the occurrence of the event out of which a claim arises, or

(iii) to cover any contractual liability.

Explanation.- For the removal of doubts, it is hereby declared that the death of or bodily injury to any person or damage to any property of a third party shall be deemed to have been caused by or to have arisen out of the use of a vehicle in a public place notwithstanding that the person who is dead or injured or the property which is damaged was not in a public place at the time of the accident, if the act or omission which led to the accident occurred in a public place.

The contention of the learned Counsel is that a passenger in a goods vehicle is a third party and is required to be covered u/s 95 of the Act, and therefore the Insurance Company is liable to pay damages to the legal representatives of the deceased person if the vehicle is covered by policy of insurance at the material time.

8. The operation of Sub-section (1) of Section 95 is controlled by Clauses 1 to 3 of the proviso to Sub-section (1) of Section 95. Clause (ii) of the proviso clearly lays down that, except where the vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment, the policy shall not be required to cover the liability in respect of the death of or bodily injuiry to persons who are carried in or upon or entering or mounting or alighting from the vehicle at the time of the occurrence of the event out of which a claim arises. It is not in dispute that though deceased was a passenger, the vehicle is not one in which passengers are carried for hire or reward. In the circumstances the policy shall not attract the liability in respect of the death of or bodily injury of the deceased in view of the provisions contained in Clause (ii) to the proviso to Section 95(1) of the Motor Vehicles Act.

9. The Supreme Court had occasion to consider a similar question in Pushpabai Purshottam Udeshi and Others Vs. Ranjit Ginning and Pressing Co. (P) Ltd. and Another, The relevant passage occurs in paragraph 20 of the judgment and it reads as follows:

20. Section 95(a) and 95(b)(i) of the Motor Vehicles Act adopted the provisions of the English Road Traffic Act, 1960, and excluded the liability of the insurance company regarding the risk to the passengers. Section 95 provides that a policy of insurane must be a policy which insures the persons against any liability which may be incurred by him in respect of death or bodily injury to any person or damage to any property of a third party caused by or arising out of the use of the vehicle in a public place. The plea that the words ''third party'' are vide enough to cover all persons except the person and the insurer is negatived as the insurance cover is not available to the passengers made clear by the proviso to Sub-section which provide that a policy shall not be required.

(ii) except where the vehicle is a vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment, to cover liability in respect of the death of or bodily injury to persons being carried in or upon or entering or mounting or alighting from the vehicle at the time of the occurrence of the event out of which a claim arises.''

Therefore it is not required that a policy of insurance should cover risk to the passengers who are not carried for hire or reward. As u/s 95 the risk to a passenger in a vehicle who is not carried for hire or reward is not required to be insured the plea of the counsel for the insurance company will have to be accepted and the insurance company held not liable under the requirements of the Motor Vehicles Act.

The above observations of the Supreme Court are applicable to the present case and in the circumstances the contention of Sri Lakshmanan Pillai, Counsel for the Insurance Company that the policy was not required to cover a passenger like the

deceased is well-founded.

10. The learned Counsel for the Appellants, however cited a few decisions in support of his contention that the death of a passenger similarly situated like the deceased is required to be covered u/s 95 of the Motor Vehicles Act. He invited our attention to a Division Bench ruling of this Court in State Insurance Department v. Sosamma 1978 KLT 34. The question that fell for consideration before the Division Bench in that case was entirely different, namely, whether a person carried by the goods vehicle by reason of or in pursuance of a contract of employment is required to be covered by the policy. In that case the deceased passenger was the employee of the owner of the goods and he accompanied the goods in pursuance of a contract of employment and under such circumstances this Court held that the case will fall u/s 95(1)(b) of the Act. It was argued in that case by the counsel for the Insurance Company that the deceased was not in employment of the insured. Following the decision of the House of Lords in Izzard v. Universal Insurance Co. Limited 1937 A.C. 773, this Court held that even then he gets insurance coverage. However a different view was taken by a Full Bench of the Punjab High Court in Oriental Fire and General Insurance Co. Ltd. Vs. Smt. Gurdev Kaur and Others, . In the instant case such a question does not arise for, it was not by reason of or in pursuance of a contract of employment either of the owner of the vehicle or the owner of the goods that the deceased travelled in the goods vehicle.

11. The learned Counsel for the Appellants also placed before us the judgment of the Madras High Court in K. Munuswami Goundar v. Perumal and Ors. 1959 (1) M.L.J. 67. But the question which has come up for consideration in this case did not arise in that case. In that case the counsel for the Insurance Company argued that in the case of goods vehicle only two persons could have been carried and the liability could arise only in respect of two persons. This contention was negatived by the Court, pointing out that Section 95(2)(a) contemplates more than two persons travelling in the vehicle, as otherwise, it could not have provided for liability to the extent of not more than ''six persons'' in a goods vehicle. That decision is not applicable to the facts of this case.

12. Yet another decision of the Gujarat High Court in Oriental Fire and General Insurance Co. Ltd. v. Ganchi Ramanlal Kantilal and Ors. 1979 T.A.C. 178 was also cited by the learned Counsel for Appellants. In this case also the question considered was different from the one which arises in this case. It was contended in that case on behalf of the Insurance Company that the deceased were passengers and therefore the Insurance Company under the terms of the policy was not liable to pay anything to the claimants in order to indemnify the insured. It was held in that case that the expression "a contract of employment" means that the passenger carried in a vehicle must be a, passenger who is either employed by the insured or who is employed with some one else who has a reasonable association with the business which the insured is carrying on. The learned Counsel for the Appellant

argued that the employer of the deceased is also a lorry owner and therefore it has to be held that there is a reasonable association with the business which the insured is carrying on in the instant case. We are unable to appreciate the logic of the contention of the learned Counsel. Merely because the employer of the deceased is also a lorry owner, it cannot be held that his employer has a reasonable and rational association with the business which the insured was carrying on. What is provided in Clause (2) to the proviso to Section 95(1) is to exempt the category of persons of passengers who are carried for hire or reward or by reason of or in pursuance of a contract of employment from the operation of Clause (ii) of the proviso to Section 95(1) of the Act. We have no doubt in our mind that under no stretch of imagination that the passenger in this case can be considered as being carried in a vehicle in which the passenger is carried for hire or reward or by reason of or in pursuance of a contract of employment. To bring the case within the ambit of the expression "except where the vehicle is a vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment, the vehicle in which the passenger is carried must be one in which passenger is carried either for hire or reward or the passenger must be carried by reason of or in pursuance of a contract of employment. It is admitted that the vehicle in which the deceased was carried was not one in which passengers are carried for hire or reward. There is no evidence to show that he was carried by reason of or in pursuance of a contract of employment. So the exemption to Clause (ii) to the proviso to Section 95(1) of the Act is not attracted in the case.

13. It is not disputed that the policy in question is only an ''Act policy''. In the circumstances it is clear that the said policy does not cover the death of the deceased.

14. Sri Ramanujam, learned Counsel for the Appellants invited our attention to a decision of the Supreme Court in New Asiatic Insurance Co. Ltd. Vs. Pessumal Dhanamal Aswani and Others, In that case facts were different. A person insured his motor car against third party risk under Chapter viii of the Motor Vehicles Act under a comprehensive policy in that case. Paragraphs 3 to 6 of Section 1(i) of the Policy in that case read as follows:

3. In terms of and subject to the limitations of the indemnity which is granted by this section to the Insured the Company will indemnify any driver who is driving the Motor Car on the Insured''s order or with his permission provided that such driver:

(a) is not entitled to indemnity under any other policy;

(b) shall as though he were the insured observe, fulfil and be subject to the terms, exceptions and conditions of the policy in so far as they can apply.

4. In terms of and subject to the limitations of the indemnity which is granted by this section in connection with the Motor car the Company will indemnify the Insured whilst personally driving a private motor car (but not a motor cycle) not belonging to

him and not hired to him under a Hire Purchase Agreement.

Under the heading ''Avoidance of certain terms and right of recovery'', the policy states:

Nothing in this policy or any endorsement hereon shall affect the right of any person indemnified by this policy or any other person to recover an amount under or by virtue of the provisions of the Motor Vehicles Act, 1939, Section 96.

But the insured shall repay to the Company all sums paid by the Company which the Company would not have been liable to pay but for the said provisions.

Condition 6 reads:

6. If at the time any claim arises under this Policy there is any other existing insurance covering the same loss, damage or liability the Company shall not be liable to pay or contribute more than its ratable proportion of any loss, damage, compensation, costs or expense:

Provided always that nothing in this condition shall impose on the company any liability from which but for this condition it would have been relieved under proviso (a) of Section II-3 of this policy.

The schedule to the policy mentions the limitations as to use and under the heading ''Driver'' notes:

(a) any person;

(b) The insured may also drive a motor car not belonging to him and not hired to him under a hire purchase agreement:

Provided that the person driving holds a licence to drive the motor car or has held and is not disqualified for holding or obtaining such a licence.

At the end of the schedule is an important notice which reads:

The insured is not indentified if the vehicle is used or driven otherwise than in accordance with this schedule. Any payment made by the company by reason of wider terms appearing in the certificate in order to comply with the Motor Vehicles Act, 1939 is recoverable from the insured. See the clause headed ''Advoidance of certain terms and right of recovery''.

The Supreme Court negatived the contention that only such drivers were indemnified as were not indemnified under any other persons and thus drivers who were entitled to indemnity under any other policy were taken out of the general class of drivers driving the car on the insured''s order or with his permission. Their Lordships held that proviso affects the question of indemnity between a particular driver and the company and has nothing to do with the liability which the driver has incurred to the third party for the injuries caused and against which liability was

provided by Section 94 of the Act and was effected by the policy issued by the Company. Their Lordships further held that the Company by agreeing with the person who effects the policy to insure him against liability to third parties, takes upon itself the entire liability of the persons effecting the insurance. It is open to the insurer not to extend this indemnity to the insured to other persons, but if it extends to other persons it cannot restrict it vis-a-vis the right of the third party entitled to damages to recover them from the insured, a right which is not disputed. This decision ajso has no application to the facts of this case.

15. A Full Bench of the Gujarat High Court had occasion to consider the scope of Section 95(1) in the ruling in Ambaben and Ors. v. Usmanbhai Amirmiya Sheikh and Ors. 1979 A.C.J. 292. Following the decision of the Supreme Court in Pushpabai Purshottam Udeshi and Others Vs. Ranjit Ginning and Pressing Co. (P) Ltd. and Another, , the Gujarat High Court held that so far as the policy contemplated by Section 95(1)(b) is concerned, it does not cover the risks to (A) persons other than those who were carried for hire or reward at the time of occurrence of event which gives rise to the claim against the insurer and (B) passengers other than those who were bona fide employees of the owner or hirer of the vehicle not exceeding six in number, carried in pursuance of or by reason of a contract of employment.

16. The foregoing discussion would show that the Insurance Company is not liable to pay compensation in respect of the death of the passenger in this case. However, that does not absolve the liability of Defendants 1 and 2 to pay compensation in case it is established that the accident had taken place as a result of rash and negligent driving of the second Defendant. Before going into the question whether as a matter of fact the incident had taken place in this case as a result of rash and negligent driving of the second Defendant, we will advert to certain contentions raised by Sri Raman Pillai, counsel for the Defendants 1 and 2. The learned Counsel argued that the deceased was not carried for hire or reward and he was a rank trespasser and therefore on the theory of volenti non-fit injuria, no compensation can be awarded in respect of the death of the passenger. He also argued that in the instant case the, evidence of D.W. 1 and D.W. 2 would show that there was a clear prohibition by the first Defendant against permitting passengers to travel in the lorry other than the cleaner.

17. The learned Counsel placed before us a decision of the Supreme Court in Sitaram Motilal Kalal Vs. Santanuprasad Jaishankar Bhatt, . In that case the 1st Defendant entrusted his car to the 2nd Defendant for plying the same as a taxi. The 2nd Defendant was not merely the driver but was in entire charge of plying the taxi. The 2nd Defendant had appointed the 3rd Defendant as a cleaner for the taxi. The 2nd Defendant trained the 3rd Defendant to drive the car and took him to R.T.A. for test for obtaining a driving licence. When the R.T.A. was conducting the test of the 3rd Defendant he took a sudden turn without giving signal and injured the Plaintiff''s leg. The majority judgment in the case was delivered by His Lordship

Justice Hidayatullah (as he then was). In paragraph 27 of the judgment His Lordship observed as follows:

The law is settled that a master is vicariously liable for the acts of his servant acting in the course of his employment. Unless the act is done in the course of employment, the servant''s act does not make the employer liable. In other words, for the master''s liability to arise, the act must be a wrongful act authorised by the master or a wrongful and unauthorised mode of doing some act authorised by the master. The driver of a car taking the car on the master''s business makes him vicariously liable if he commits an accident. But it is equally well settled that if the servant, at the time of the accident, is not acting within the course of his employment but is doing something for himself the master is not liable. There is a presumption that a vehicle is driven on the master''s business and by his authorised agent or servant but the presumption can be met. It was negatived in this case, because the vehicle was proved to be driven by an unauthorised person and on his own business. The de facto driver was not the driver or the agent of the owner but one who had obtained the car for his own business not even from the master but from a servant of the master. Prima facie, the owner would not be liable in such circumstances.

Their Lordships held that there was no proof that the 2nd Defendant was authorised to coach the cleaner so that the cleaner might become a driver and drive the taxi. The Supreme Court accepted the plea of the owner that he did not give any authority to the 2nd Defendant to train the 3rd Defendant. In that view of the matter, their Lordships held that the owner was not responsible.

18. His Lordship Justice Subba Rao (as he then was) dissented from the majority view and observed as follows:

The 1st Defendant, being the absentee owner of the car used as taxi, entrusted the entire management of running the said car as taxi to the 2nd Defendant. The 2nd Defendant was not a mere driver of the 1st Defendant''s car, but was his manager to carry on the business of running his taxi. The 2nd Defendant was therefore, given the authority to do all things necessary to keep the taxi in a good condition and to run it effectively to earn profit. It is also implicit in the said arrangement that if for plying the taxi throughout day and night and during the absence of the 2nd Defendant from the city an assistant was necessary to drive the car, the 2nd Defendant could employ one. The 2nd Defendant employed the 3rd Defendant as a cleaner with the approval of the 1st Defendant to keep the car in good condition. In that context, if the 2nd Defendant in the interest of the employer, instead of engaging a third party, as an assistant driver trained the 3rd Defendant as such and sought to obtain a licence for him, it is not possible to suggest that the 2nd Defendant in doing so exceeded the authority conferred on him by the 1st Defendant. I, therefore, find that the 2nd Defendant did not exceed the authority conferred on him by the 1st Defendant in employing the 3rd Defendant as a servant

and permitting him to drive the car in order to obtain a licence for assisting him as a driver. If so, it follows that the 3rd Defendant was the employee of the 1st Defendant in his capacity as an assistant to the driver. In that event, the 1st Defendant would certainly be liable in damages for the accident caused by the 3rd Defendant''s negligence during the course of his employment.

19. It can be noticed that the majority decision in that case was rested on the fact that the 1st Defendant had not given any authority to the 2nd Defendant to train the 3rd Defendant and therefore his taking the car for test cannot be considered as being in the course of employment. The taxi was taken for the use of the 3rd Defendant himself and injury was caused while he was taking a turn during the course of the test. The 3rd Defendant was not the driver or agent of the owner but one who obtained the car for his own business not even from the master, but from a servant of the master. In the instant case it cannot be said that the 2nd Defendant was not driving the vehicle at the time of accident in the course of employment of the 1st Defendant and therefore the dictum laid down in Sitaram Motilal Kalal Vs. Santanuprasad Jaishankar Bhatt, is not applicable to the instant case. The only question that has to be considered in that context is whether in view of the prohibition of the 1st Defendant against permitting strangers to travel in the lorry, the 2nd Defendant is liable to be absolved from liability. On this aspect also the Supreme Court had occasion to speak in Pushpabai Purshottam Udeshi and Others Vs. Ranjit Ginning and Pressing Co. (P) Ltd. and Another, . Dealing with the question the Supreme Court observed as follows:

It is now firmly established that the master''s liability is based on the ground that the act is done in the scope of course of his employment or authority. The position was stated by Lord Justice Denning in Young v. Edward Box and Co. Ltd. (1951) I T.L.R. 789 at p. 793. The Plaintiff and fellow workmen were given a lift on one of the Defendant''s lorries with the consent of his foreman and of the driver of the lorry. On a Sunday evening the Plaintiff, in the course of that journey, was injured by the negligence of the driver of the lorry and the Plaintiff brought an action against the Defendants claiming damages for his injuries. The defence was that the Plaintiff, when on the lorry was a trespasser. The traffic manager of the Defendants pleaded that he had never given instructions to the foreman that he should arrange for lifts being given to the Plaintiff and his fellow-workmen on Sundays and that the foreman had no authority to consent to the Plaintiff''s riding on the lorry. While two learned Judges held that the right to give the Plaintiff leave to ride on the lorry was within the ostensible authority of the foreman, and that the Plaintiff was entitled to relay on that authority and in that respect was a licensee, Lord Denning held that although the Plaintiff, when on the lorry, was a trespasser, so far as the Defendants were concerned, the driver was acting in the course of his employment in giving the Plaintiff a lift and that was sufficient to make the Defendants liable and that he did not base his judgment on the consent of the foreman. Lord Justice Denning stated the position thus:

...the first question is to see whether the servant was lible. If the answer is Yes, the second question is to see whether the employer must shoulder the servant's liability. So far as the driver is concerned, his liability depends on whether the Plaintiff was on the lorry with his consent or not.

The next question is how far the employers are liable for their servant''s conduct. In order to make the employers liable to the passenger it is not sufficient that they should be liable for their servant''s negligence in driving. They must also be responsible for his conduct in giving the man a lift. If the servant has been forbidden, or is unauthorised, to give anyone a lift, then no doubt, the passenger is a trespasser on the lorry so far as the owners are concerned; but that is not of itself an answer to the claim.

In my opinion, when the owner of a lorry sends his servant on a journey with it, thereby putting the servant in a position, not only to drive it, but also to give people a lift in it, then he is answerable for the manner in which the servant conducts himself on the journey not only in the driving of it, but also in giving lifts in it, provided, of course, that in so doing the servant is acting in the course of his employment.

Lord Justice Denning concluded by observing that the passenger was therefore a trespasser, so far as the employers were concerned; but nevertheless the driver was acting in the course of his employment, and that is sufficient to make the employers liable. It will thus be seen that while two of the learned Judges held that the right to give the Plaintiff leave to ride on the lorry was within the ostensible authority of the foreman and the Plaintiff was entitled to rely on that authority as a licensee, Lord Denning based it on the ground that even though the Plaintiff was a trespasser so far as the Defendants were concerned, as the driver was acting in the course of his employment in giving the Plaintiff a lift, it was sufficient to make the Defendants liable. Applying the test laid down there can be no difficulty in concluding that the right to give leave to Purshottam to ride in the car was within the ostensible authority of the Manager of the Company who was driving the car and that the Manager was acting in the course of his employment in giving leave to Purshottam. Under both the tests the Respondents would be liable.

The above observations of the Supreme Court would make it clear that even if it is established that the driver was forbidden from giving lift, it does not absolve the liability of the owner to compensate if the driver was acting in the course of his employment. It cannot be disputed in this case, the 2nd Defendant was driving the vehicle in the course of the employment of the 1st Defendant.

20. A Division Bench of the Karnataka High Court in M.S. Rayta and Anr. etc. v. Gowrawwa Channabasappa and Anr. etc. AIR 1997 Kar 107 took the view in a similar circumstance that notwithstanding the fact that the driver picked up passengers in violation of the express prohibition of the master, the master is vicariously liable for

damages, following the decision of the Supreme Court in Pushpabai Purshottam Udeshi and Others Vs. Ranjit Ginning and Pressing Co. (P) Ltd. and Another, referred to above.

21. In the light of the above position, it is futile to contend that the 1st Defendant is not vicariously liable to pay compensation if it is established that the incident had occurred as a result of rash and negligent driving of the second Defendant.

22. Now we will examine the question whether the incident took place as a result of rash and regligent driving of the 2nd Defendant. In Pushpabai Purshottam Udeshi and Others Vs. Ranjit Ginning and Pressing Co. (P) Ltd. and Another, referred to above the Supreme Court has held that the principle of "Res Ipsa Loquitur" is applicable to an accident case and it will be for the Defendants to establish that the incident had not happened due to rashness and negligence of the driver. The Supreme Court also held that for the application of this maxim it must be shown that the vehicle was under the management of the Defendant and that the accident is such as in the ordinary course of things does not happen if those who had the management used proper cafe. The owner of the vehicle was examined as D.W. 1 and the driver of the vehicle was examined as D.W. 2. D.W. 1 deposed that he had not permitted D.W. 2 to take anybody in the cabin except cleaner. D.W. 2 deposed that another lorry came on the opposite direction and he was giving side and all on a sudden the brake failed and he lost his control and the lorry capsized. He also stated that two weeks prior to the accident the vehicle was repaired in a workshop at Kothamangalam. Ext. C-5 is the report of the Motor Vehicles Inspector. Ext. C-5 shows that the brake fluid was leaking. The Motor Vehicles Inspector has given evidence as P.W. 6 and in his evidence also he stated that the brake fluid was leaking. He further deposed that at the place of occurrence the road lies zig zag and there is also a slope and the driver would not have been able to control the vehicle if the brake failed. Ext. C-3 scene mahazar also shows that road has zig zag and there is slop at the place and brake fluid was flowing. Ext. C-7 is the F.I. Statement given by the deceased relating to the incident. In this statement he stated that when the lorry reached Ennackal a lorry came on the opposite direction and the driver gave side to the lorry and at that time the brake failed and the lorry capsized and the incident took place. This statement is admissible u/s 32 of the Evidence Act. These items of evidence would show that the version of D.W. 2 that it is not due to his negligence or rashness that the accident took place and the failure of brake due to leakage of brake fluid led to the accident. P.W. 1 is not an eye witness? However, P.Ws. 7 and 8 were examined by the Plaintiff to prove that the vehicle was coming in a high speed. Both of them were working under a contractor by name Varghese for constructing a bridge. P.W. 7 looked towards the scene only on hearing the sound. It is a forest area and it is highly doubtful that they had seen the incident.

23. In view of the overwhelming evidence referred to above indicating that the incident had taken place on account of failure of brake and not on account of rash

and negligent driving of the second Defendant, we are inclined to agree with the finding of the lower Court that the accident has not taken place as a result of rash and negligent driving of the second Defendant and therefore the legal representatives of the deceased are not entitled to compensation.

24. The learned Counsel for, the Appellants also questioned to quantum of damages calculated by the lower court, but in view of our finding that the accident had not taken place as a result of the rash and negligent driving, it is unnecessary for us to consider the adequacy of damages found by the lower Court.

In the result the appeal fails and it is accordingly dismissed. In the circumstances, however, there will be no order as to costs.

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