(1990) 10 MP CK 0004

Madhya Pradesh High Court

Case No: None

Radheyshyam and Another	APPELLANT
Vs	
Nasir Hussain and Others	RESPONDENT

Date of Decision: Oct. 30, 1990

Acts Referred:

- Insurance Act, 1938 - Section 45

Citation: (1991) 1 ACC 479

Hon'ble Judges: A.G. Qureshi, J

Bench: Single Bench

Judgement

A.G. Qureshi, J.

This appeal has been filed aggrieved by the Award dated 22nd July, 1988 passed by the Member, Motor Accident Claims Tribunal, Mandsaur in claims case No. 21 of 86 where-by the application of the appellants filed u/s 110-A of the Motor Vehicles Act has been dismissed by the learned Tribunal.

2. The facts leading to this petition, in short are that one Abhay Kumar, aged about 10 years, met with an accident on 7.1.1986atabout 12.15p.m. on Laduna Road at Sitamau. The said Abhay Kumar was the only son of the claimants. According to the applicants appellants on 7.1.1986 at about 12.15 p.m. when Abhay Kumar, was going with his school-mates from his school to Argada play field for attending some function, bus No. MPF 7789 belonging to respondent No. 1 and being driven by the respondent No. 2 at a high speed rashly and negligently, dashed against Abhay Kumar and crushed him under the rear and front wheels as a result of which Abhay Kumar received injuries and succumbed to them. Abhay Kumar was immediately taken to the Sitamau hospital where he was declared dead. The incident was reported at the police station Sitamau by Kailashchand (P.W.2) who is the solitary eye witness in the case. According to the claimants the deceased was a very intelligent child and they had high hopes of the boy setting in high position. Because of the sudden death of their son they have lost all hopes of the future and have

undergone great suffering and mental agony. Therefore, on the count of mental agony and suffering, loss of future expected earning from the deceased, the applicants made a claim of Rs. 1, 00, 000/- to be awarded as compensation.

3, The Respondent No. 1 admitted that bus No. MPF-7789 belonged to him on the date of the accident and it was being driven by the respondent No. 2 and that the bus was insured with the respondent No. 3. However, it was denied that the bus was being driven rashly and negligently by the driver. According to respondent No. 1, the deceased was auther of his own misfortune and it was due to his negligence that he met with the accident. The respondent No. 2, the driver, has denied the claim on the ground that on the relevant date he was neither driving the bus nor he was in the employment of respondent No. 1. According to him he has been falsely implicated in a criminal case. The respondent No. 3 Insurance Company took a defence that on 7.1.1986 when the accident took place Nasir Hussain, the owner of the bus was not the person insured with the company. The bus formerly belonged to one Hastimal Kothari and it was insured in his name. The insurance was valid for a period of one year from 29.1.85. During the continuance of this insurance Hastimal transferred the vehicle to the present respondent No. 1 and it was after the accident at about 3 p.m. on 7.1.1986 that the respondent No. 1 applied to the Insurance Company for the transfer of the insurance in his name and accordingly the insurance was transferred in his name at 3p.m. The fact of the accident was suppressed from the respondent No. 3 and, therefore, the transfer certificate is void because of the suppression of the material fact. It has also been pleaded that Nasir Hussain has given in writing to the Insurance Company that he would be liable for all the acts prior to the insurance. It was also pleaded that the vehicle was not being driven by a person holding a valid license and the driver was also not in the employment of respondent No. 1.

4. Four issues were framed by the lower Tribunal for deciding the claim petition. The Learned Tribunal held that on the date of the accident the deceased died due to the negligent driving of the driver of the vehicle. It was also held that the bus was insured on the date of the accident with the respondent No. 3 and that the compensation in the claim case would be Rs. 36, 500/-. However, the claim petition was dismissed on the ground that it has not been proved that the vehicle was being driven by an authorised driver, the respondent No. 2. The appellants aggrieved by the dismissal of the petition have preferred this appeal.

5. The Insurance company has filed a cross objection challenging the finding of the learned Tribunal holding that the vehicle was insured on the date of the accident with the Insurance Company. According to the respondent No. 3 the court should have held that the insurance having been obtained by the respondent No. 1 by suppressing the material facts, the insurance was void and the Insurance Company was, therefore, not liable for any compensation.

6. The learned Counsel for the appellants Shri Kirtane has argued that the learned Tribunal has erred in dismissing the petition only on the basis of the written statement filed by the respondent No. 2. Actually the respondent No. 2 did not enter the witness box to say that he was not driving the vehicle on the date of the accident, where as this fact that it was the respondent No. 2 who was driving the vehicle while in the employment of respondent No. 1 on the relevant date has been admitted by the respondent No. 1 himself. Therefore, the learned Tribunal could not go beyond the pleadings in the case and give a finding that the vehicle was not being driven by an authorised driver holding a valid license.

7. Now, it cannot be disputed that the vehicle with which the deceased met with the accident was owned by the respondent No. 1 and this fact was in the special knowledge of the owner as to who was driving the vehicle on the date of the accident and whether he had a license to drive the vehicle. The respondent No. 1 has admitted that the vehicle was being driven by the respondent No. 2, who was in the employment of respondent No. 1 There is nothing on the record to show that the respondent No. 2 did not have a valid license at the time of the accident. It was for the party who alleged that the respondent did not have a valid driving license, to prove that he did not possess the valid driving license. The claimants had no means to prove this fact. Therefore, if the Insurance company wanted itself to be absolved of the liability on this ground it had to prove by leading cogent evidence that Rattan Singh was not holding a valid driving license. Therefore, the finding of the lower Tribunal on this point is not supported by any evidence on record. On the contrary the admission of respondent No. 1 supports the case of the claimants-appellants.

8. P.W.2 Kailashchand who is an eye witness of the accident stated that he had seen the incident and he had lodged the report Ex.P.1 at police Station Sitamau. The report Ex.P. Us a part of the record in criminal case No. 132 of 86 in the Court of JMFC S itamau. In that case the respondent No. 2 is an accused in respect of the incident in question The respondent No. 2 has not entered the witness box to say that he was not driving the vehicle at the time of the incident. According to P.W.2 he had not properly seen the driver who was driving the vehicle. Therefore, he had named Salim, but later on the came to know that it was Ratan S ingh who was driving the vehicle. As such the statement of P.W2 Kailashchand does not help the case of the claimants on the point that it was Ratan Singh who was driving the vehicle. But the averments in the petition have been accepted by the respondent No. 1 who was the owner of the bus and who had the knowledge as to who was driving the vehicle at the time of the accident. There is no rebuttal of this admission by any evidence on the record. Therefore, the learned Tribunal had clearly erred in dismissing the claim case of the appellants on that ground. When a vehicle is being driven rashly and negligently and dashes against a victim, then it is not necessary for the victim to prove as to who was the driver of the vehicle. The only requirement for holding the owner vicariously liable is that the driver should be in the employment of the owner of the vehicle. The owner has admitted this fact.

Therefore, the lower Tribunal could not ignore the admission of the owner and hold that the vehicle was not being driven by a person in the employment of the owner at the time of the accident.

9. The Allahabad High Court had an occasion to consider this question in the case of Jaddoo Singhand Anr. v. Mahi Deviand Anr. 1983 ACJ 747. In para 12 of the aforesaid judgment the court has held that when the ownership of the bus was admitted by the owner and the accident having been proved to have been caused by the bus he must be held liable unless he is able to show that the bus was being driven by some unauthorised person without his con sent or permission. Whosoever was driving the bus whether A or B, both were licensed drivers and, therefore the owner cannot escape the liability. In the light of the aforesaid ratio, with which I respectfully agree, it has to be held that the vehicle was being driven at the time of the accident by a person authorised to drive the vehicle and the owner of the vehicle is vicariously liable to pay the compensation to the claimants.

10. As discussed above, the owner has admitted that it was the Respondent No. 2 who was driving the vehicle and no evidence has come on record to show that the vehicle was not being driven by the respondent No. 2-Ratan Singh and it has also not come on record that he was not holding a valid license. Ratan Singh has not entered the witness box to deny this fact that he was not driving the vehicle. Therefore, in the circumstances the Tribunal should have held that it was Ratan Singh who was driving the vehicle at the relevant time and had a valid license to drive the vehicle.

11. Now, the question which remains for decision is whether the transfer of the insurance in the name of respondent No. 1 by the Insurance Company is not binding on the Insurance Company.being void-due to suppression of material facts. The Insurance Company has examined P.W. 1 Sudesh Kilewala, the Development Officer of the Insurance Company to prove that the transfer of the Insurance was made after the accident. This witness says that the insurance was transferred in the name of respondent No. 1 at 3 P.M. on 7.1.1986 and the accident had taken place before the actual transfer. It has also been stated by this witness that the respondent No. 1 had given in writing that he is responsible for any thing which happened before 3 P.M.. This document is a letter dated 7.1.1986 in addition to the application for transfer of the insurance. The letter for transfer of the insurance Ex.D-5C does not mention at what time this application was made and there is no endorsement from the office of the Insurance Company also about the time at which it was received. However, the letter Ex.D. 6C shows that at 3 p.m. this letter was issued on the letter head of respondent No. 1 showing that for all the acts done before 3 p.m. the responsibility shall be of the owner and thereafter another letter dated 30th July 1986 was also obtained herein the responsibility of any accident has been taken by the owner of the vehicle. On the basis of these statements and documents Shri Dandwate, learned Counsel for the Insurance Company argued that the transfer of

the insurance policy has been obtained by suppressing material facts and, therefore, the policy is void. In support of his argument he has cited the case of Mithoolal Nayak Vs. Life Insurance Corporation of India, wherein in view of the statutory provision contained in Section 45 of the Insurance Act, 1938 the court had held that when a policy is obtained by the fraudulent suppression of material facts the policy is vitiated. Attention has also been drawn to the judgment in the case of the The British India General Insurance Co. Ltd. Vs. Seth Ramnath and Others, wherein it was held that the Insurance Company was entitled to disown its liability under the policy by reason of failure of defendant No. 1 to disclose the fact that he had parted with the possession of the vehicle in pursuance of an agreement to sell, to be used by the defendant no, 2 in any manner he liked at the time when he secured renewal of the policy in his name.

12. In the instant case, however, it is manifest that when the application for transfer of the policy was made another application on the letter pad was subsequently given by the respondent No. 1 wherein he took the responsibility for any event before 3 p.m. Nobody had entered the witness box to disclose to why this letter was obtained from the respondent No. 1 or why the respondent No. 1 had given this letter. When the policy was to come in force from 3 P.M. onwards it should have been endorsed in the policy or the policy could have been issued with effect from the next date 8.1.86. Despite this fact the policy was issued being effective from 7.1.1986 with no reference to time. Therefore, it cannot be said to be a case of suppression of any material fact because after 3 p.m. no accident occurred and, therefore, the owner himself took the responsibility of any incident up to 3 p.m. on 7.1.1986. Now, despite this letter from the owner of the vehicle if the Insurance Co. instead of issuing the policy being effective from 7, 1.1986.at 3 p.m. issued a policy effective from 7.1.1986. then it cannot be said that the policy was obtained by suppressing any material fact. On the contrary the submission of another letter in addition to the application for transfer clearly shows that the insured did not want a policy to be issued covering the risk for a period before 7.1.1986 3 p.m. However, when despite the request of the respondent No. 1, the respondent No. 3 issued the policy being effective from 7.1.1986, they cannot now escape the liability on the ground that the policy has been obtained by suppression of facts. The issuing officers have not even cared to put an endorsement of time either on the application or on the policy. The learned Tribunal has, therefore, rightly held that the vehicle being insured with the Insurance Company is liable to pay the compensation. Therefore, in my opinion, the aforesaid authorities cited by Shri Dandwate do not help the Insurance Company.

13. In a recent case-New India Assurance Co. Ltd. v. Ram Dayal and Ors. 1990 ACT, 545 the Supreme Court has held that when the policy has been obtained on the date of the accident and the Insurance Company repudiates its liability on the ground that the policy had been taken after the accident, still when a policy is taken on a particular date its effectiveness is from the commencement of that date. Therefore

the Insurance Company cannot escape its liability on the ground that the policy having been obtained after the accident the Insurance Company is not liable. As such the lower Tribunal has rightly held that the Insurance in favour of respondent No. 1 had become operative from the previous mid-night of the date of the accident and there is no case for interferring with the finding of the learned lower Tribunal on this issue.

14. As regards the negligence of the driver and the quantum of the compensation, nothing has been demonstrated to show that the finding of the lower Tribunal on these two issues is against the record or based on improper appreciation of the evidence. The finding on these two issues is based on the evidence of P.W.1 Radheyshyam Trivedi, P.W.2 KailashchandandP.W.3 Dr. B.L. Chaturvedi taking into consideration the age of the victim, the status of the applicants and other factors. The statement of P.W. 2 Kailashchand about the rash and negligent driving of the vehicle which caused the death of the deceased is also unrebutted. Therefore, the findings of the lower Tribunal on these issues is confirmed.

15. In the result the appeal of the appellants is allowed. The Award of the lower Tribunal, dismissing the claim petition of the appellants is set aside. Instead Award of Rs. 36, 500/- as compensation is given in favour of the appellants against the respondents. The claimants-appellants are also entitled to get interest on the Award amount from the date of the claim application till the recovery of the same at the rate of 12 percent per annum. The cross-objection filed by the respondent No. 3 is disallowed. The parties shall bear their own costs as incurred.