Rentala Kesavulu Vs Deputy Chief Mechanical Engineer and Another

None

Court: Andhra Pradesh High Court

Date of Decision: June 23, 2004

Citation: (2004) 3 ACC 947

Hon'ble Judges: T. Ch. Surya Rao, J

Bench: Single Bench

Judgement

T. Ch. Surya Rao, J.
The unsuccessful claimant seeks to assail the order and decretal order dated 20.7.1998 passed by the learned

Chairman, Motor Accident Claims Tribunal-cum-III Additional District Judge, Tirupati, in M.V.O.P. No. 599 of 1990.

2. According to the appellant, on 19.9.1990 at about 4.00 p.m., when he was travelling in the vehicle bearing No. ATC-9242 belonging to the first

respondent Railways, due to rash and negligent driving of the driver of the vehicle it dashed against the roadside electric pole near Subbanaidu

Kandriga Village on Nagalapuram-Uthukotai Main Road on Account of which the appellant sustained injuries. He was hale and healthy and aged

20 years by the date of Accident and was studying in 10th class. In the accident, the appellant sustained multiple fractures to his both legs which

resulted in permanent disability and hence he sustained loss physically and economically. He laid the claim for Rs. 1,12,060/-.

3. The respondents resisted the claim on the premises that the vehicle in question was Allwyn Cabstar and on the date of Accident the driver was

enstrusted with 23 empty oxygen cylinders and 6 acetylene cylinders to be carried to Madras so as to get them filled at IOL filling station and to

bring back. Two Kalasis, by name Mr. D. Thomas and Mr. A.V. Madhusudhan were sent along with the driver to assist him in loading and

unloading of the cylinders. The seating capacity of the vehicle is three inclusive of the driver and the driver has been forbidden and not authorized to

give any lift to any person either in the cabin or in the body of the vehicle. Even if the driver had permitted any person to board the vehicle, it was

outside the scope of the employment and, therefore, the respondents were not vicariously liable to pay the compensation to the appellant.

According to the driver of the vehicle, while he was negotiating the curve at Subbanaidu Kandriga the clutch was not in condition and with great

difficulty he took the vehicle to the roadside to save the cylinders from being fallen and there was no rash and negligent act on his part. The

respondents further pleaded that the compensation claimed was barred by limitation.

On the above pleadings, the following issues were settled for trial:

(1) Whether the petitioner received injuries due to rash and negligent driving of the vehicle bearing No. ATC-9242 by its driver?

(2) Whether the petitioner is entitled to compensation and if so to what amount and from whom?

(3) To what relief?

The following additional issues were framed on 3.6.1998:

(1) Whether the accident took place when the driver acted outside the scope of the employment of respondent?

(2) Whether the petition is barred by limitation?

4. During the course of inquiry, the claimant examined himself as P.W. 1 and got Exs. A.1 to A.5 marked. On behalf of the respondents two

witnesses were examined including the driver and got Exs. B.1 to B.4 marked.

5. Analyzing the evidence adduced on either side and appreciating the same, the Tribunal below was of the view that the accident in this case was

due to rash and negligent driving of the driver of the vehicle in question. A clear-cut finding was given in regard thereto by the learned Judge.

Inasmuch as the appellant sustained injuries in the accident which resulted in the petitioner sustaining the permanent disability to the extent of 20%,

having regard to the age and other indicia, it assessed the compensation at Rs. 65,000/-, However, the Tribunal was of the view that the appellant

being an unauthorized passenger in a vehicle which was not authorized to transport any passengers, the respondents were not liable to pay any

compensation and having thus reached the conclusion, eventually the Tribunal dismissed the claim of the claimant.

6. The learned Counsel appearing for the appellant seeks to contend that the railway authorities are liable to pay compensation inasmuch as the

accident occurred when the driver was in the course of his employment.

7. Per contra, the learned Standing Counsel appearing for the respondents represents that the appellant, being an unauthorized passenger in a

vehicle which cannot carry passengers and the driver having been forbidden cannot permit any person to board the vehicle, there cannot be any

vicarious liability on the part of the respondents.

8. In view of the rival contentions, the only point that arises for my determination in this appeal is ""whether the respondents are vicariously liable for

the tortious act of its driver committed during the course of his employment""?

9. There has been no gainsaying that the appellant sustained permanent disability to the extent of 20% in the motor Accident. As per the finding

given by the Tribunal, the accident was due to rash and negligent driving of the driver of the vehicle in question, which is a mini lorry. The finding of

the Tribunal is quite impeccable in view of Ex. A-1-FIR; Ex. A-5 charge-sheet; and the oral testimony of the claimant as P.W. 1. The rebuttal

evidence adduced on the side of the respondents was besides the oral testimony of R.W. 2, the driver, Ex. B. 1-line report and Exs. B.2 and B.3-

statements of two persons who travelled along with the driver in the vehicle and Ex. B.4-the judgment in C.C. No. 141/1990 whereunder the

driver was eventually acquitted from the criminal charge of rash and negligent driving. Ex. B.1 line report is of no consequence and cannot be used

except to corroborate the testimony of the person who has given it. Exs. B.2 and B.3 statements of the two persons being the previous statements

of the witnesses, their use is limited. The findings given by the Criminal Court under Ex. B.4 judgment are not binding upon the Tribunal and Ex.

B.4 can be used only to see the result of the criminal case and to prove the identity of the accused. Righlty, therefore, the Tribunal placed reliance

upon Exs. A1 and A4 vis-a-vis Exs. B.1 to B.4. The oral and documentary evidence adduced on the side of the claimant clearly establishes that

the accident in this case was due to rash and negligent driving of the driver. What is more required than the very fact that the vehicle dashed against

an electric pole on the side of the road. In the absence of any evidence to show that there has been a mechanical defect in the vehicle at the

relevant time, the fact that the vehicle dashed against an electric pole speaks for itself. In that view of the matter, I see that there are no compelling

reasons for this Court to interfere with the finding of the Tribunal that the accident in this case was due to rash and negligent driving of the driver.

10. Even as regards the assessment of compensation, there has been no serious dispute on either side. Having regard to the nature of injuries

sustained by the appellant, the assessment appears to be just in the circumstances of the case. In my considered view, there are no compelling

circumstances to interfere with the said assessment.

11. Turning to the crucial question of vicarious liability of the respondents. Confessedly, the driver was driving the vehicle in question laden with

empty cylinders under an errand to get them filled up at Madras and to bring them back. Obviously, therefore, the driver was in the course of his

employment when the accident occurred on the way. It is discernible from the evidence that the appellant boarded the vehicle as an unauthorized

passenger. Although the driver denied of having allowed the appellant to travel by sitting on the cylinders in the body of vehicle and even the

accident, the fact remains that the appellant did travel in the vehicle as an unauthorized passenger having been allowed by the driver who was in the

course of his employment. Evidence has been let in on the side of the respondents to show that the cabin admits two persons apart from the driver

to sit, and two persons had been travelling in the lorry along with the driver for the purpose of loading and unloading of the cylinders and, therefore,

there was no room for any other person to travel in the cabin, nor could he be allowed to travel by sitting on the cylinders in the body of the

vehicle. Therefore, it was the case of the respondents that the driver had been prohibited from allowing any other person to travel in the vehicle.

Except the oral testimony of R.W. 1, Production Engineer, South Central Railways, to the effect that the vehicle in question was not permitted to

carry any passengers except those who were required to load and unload the goods being transported therein and they too would be permitted to

sit in the cabin but not in the body of the vehicle, no documentary evidence was adduced to show that express instructions have been given to the

driver forbidding him to permit any third person to travel in the vehicle. The fact that having regard to the nature of the vehicle and more so being a

Government vehicle, the driver in the ordinary course cannot allow any passenger to travel either on hire or as gratuituous passenger, is of no

consequence in this case to decide the moot question. In this back drop, it is to be seen whether the respondents are vicariously liable or not?

12. In Pushpabai Purshottam Udeshi and Others Vs. Ranjit Ginning and Pressing Co. (P) Ltd. and Another, , the Apex Court considered the

vicarious liability of the owner of the vehicle. That was a case where the manager of the company was driving the car of the company on the

business of the respondents and on the way the manager allowed a passenger to board the vehicle. On Account of his rash and negligent driving,

the car dashed against a tree with great violence. Consequently the passenger who was allowed to travel in the car died instantaneously.

Dependents of the deceased made a claim against the owner of the vehicle. Repelling the contention that the manager who was driving the car was

neither in the course of his employment, nor under any authority whatsoever to permit a passenger to board the vehicle of his employer and,

therefore, the owner of the vehicle was not aware that the passenger who being taken in the car by the manager and, therefore, there could not

have been any vicarious liability; the Apex Court was of the view that having regard to the position held by the manager in the company and in the

absence of any evidence to the contrary, it must be held that the manager had the necessary authority to carry the passenger and was acting in the

course of his employment. Placing reliance upon the judgment in Young v. Edward and Co. Ltd. (1951) 1 T.L.R. 789, wherein its was held by

Lord Justice Denning that the first question to be seen was whether servant was liable and if the answer for any reason was yes, the second

question to be seen was whether the employer must shoulder the servant"s liability and so far as the driver I was concerned, his liability depended

on whether the plaintiff was on the lorry with his consent or not; and that even if the passenger was a trespasser insofar as the employer was

concerned but nevertheless the driver was acting in the course of his employment and that was sufficient to make the employer liable; the Supreme

Court held that the driver was acting in the course of his employment.

13. A three-Judge Bench of the Apex Court in State Bank of India (Successor to The Imperial Bank of India) Vs. Shyama Devi, , laid down the

principles governing vicarious liability thus:

(1) The relevant legal principles governing vicarious liability of an employer for the loss causes to a customer are: (a) the employer is not liable for

the act of the servant if the cause of the loss or damage arose without the employer''s actual fault or privity and without the fault or neglect of his

agents or servants in the course of their employment; (b) before the employer is made liable, it must be shown that the damage complained of was

caused by the wrongful act of his servant or agent done within the scope or course of the servant''s or agent''s employment even if the wrongful act

amounted to a crime; and (c) the master is liable for his servant''s fraud perpetrated in the course of his master''s business whether the fraud was

for the master''s benefit or not if it was committed by the servant in the course of his employment. There is no difference in the liability of a master

for wrongs whether for fraud or any other wrong committed by a servant in the course of his employment and it is a question of fact in each case

whether it was committed in the course of employment.

According to the facts, that was a case where the respondent opened Savings Bank Account with State Bank of India and she was introduced to

the Bank by one Kapil Dev Shukla, an employee of the Bank and friend of respondent''s husband, time to time she deposited certain amounts with

the bank which were entered in a passbook by the employee of the Bank. When confirmation of the deposits was sought for by addressing a

notice to the Bank, the Bank inter alia in its reply affirmed the balance to the tune of Rs. 1,932/- and denied four items of deposit on the premise

that no such amounts in fact were deposited and it was a case of embezzlement by its employee. In that connection, the Apex Court enunciated the

above principles on vicarious liability. We are concerned with the principle of law enunciated by the Apex Court.

14. In Mohd. Abdul Raheem v. C. Parvatamma 1986 A.C.J. 785, a learned Single Judge of this Court held that the owner is vicariously liable

even if carrying of passenger in the vehicle for hire or reward was an unauthorized act prohibited under the permit.

15. Again a learned Single Judge of this Court in R. Venkatappa Naidu and Another Vs. Thammivevi Sugunamma and Others, was of the view

that the owner of the vehicle was vicariously liable for the tortious act of the driver for the reason that the passenger, the victim of the accident, did

not aware of the authority of the driver or the instructions given by the owner to him. In such circumstances, this Court held ""that the owner might

proceed against the driver to recover the damages suffered due to his acts unauthorisedly and that the master''s liability to pay the compensation

vicariously for the acts of servant could not be doubted.

16. In Machiraju Visalakshi v. Treasurer, Council of India 1978 A.C.J. 314, a Division Bench of this Court, however had taken a divergent view

to the effect that when the driver was not atithorized by the master to pick up passengers en route, master was not vicariously liable for the tort

committed by the driver inasmuch as the act of the driver in picking up passengers was not within the scope of his employment. In fact this

judgment was distinguished by the learned Single Judge of this Court in Venkatappa hlaidu''s case on the ground that According to the facts in

Visalakshi''s case, there had been an express instruction given by the master to the driver not to pick up any passenger en route but contrary to the

direction, the driver picked up the passengers and, therefore, that case was distinguished. In Visalakshi''s case, two former judgments of the Apex

Court had not been referred to and considered. Pushpabai''s case is an authority on the point. The principles laid down therein have been

reiterated by the Apex Court in Shyama Devi''s case. Having due regard to the fact that the Apex Court clearly laid down the law in both the

judgments, the judgment of the Division bench of this Court cannot hold the field.

17. From the above, the legal position seems to be obvious that the master is liable vicariously for the wrongful act of his servant. The sine qua nan

for fixing the liability on the master is that it must be shown like any other question of fact that the servant has committed the wrongful act within the

scope or course of his employment, no matter whether wrongful act amounted to a crime and whether * the wrongful act was for the master''s

benefit or not. It is quite inconsequential whether or not the wrongful act committed by the servant amounts to a fraud; crime or any other wrong if

it has been committed in the course of his employment. However, it is always open to the master who has been constrained to pay compensation

for the wrong committed by his servant to proceed to recover the same from his servant or to take appropriate action against him.

18. Coming to the instant case, as discussed hereinabove, there has been no clear-cut evidence available on record to show that the driver in this

case has been expressly prohibited from allowing a person to travel in the vehicle and specific instructions have been given to him in regard thereto.

Having regard to the nature of the vehicle and the seating capacity in the cabin that no person can be permitted to travel in the body of the lorry by

allowing him to sit on the goods is of no consequence. Though the appellant in this case was not unauthorized passenger, the fact remains that he

was permitted to travel in the vehicle by the driver who was in the course of his employment proceeding on the master''s business. Therefore, the

owner cannot escape from the liability. It may be mentioned here that the respondents are at liberty to take action against the driver departmentally

or may proceed to recover the loss sustained by the respondents/Railway Authorities having been constrained to pay the compensation to the

victim of the accident. In view of the clear-cut law on the point, the appeal is got to be allowed.

19. In the result, the civil miscellaneous appeal is allowed with costs. Consequently, the total compensation as assessed by the Tribunal below at

Rs. 65,000/- (Rupees sixty five thousand) is hereby awarded to the appellant which shall be paid to him with interest at the rate of 9% (nine

percent) per annum from the date of petition till the date of realization.