

Rajasthan State Road Transport ... vs Kailash Nath Kothari & Ors. Etc. Etc on 3 September, 1997

Equivalent citations: AIR 1997 SUPREME COURT 3444, 1997 (7) SCC 481, 1997 AIR SCW 3531, 1997 (5) SCALE 680, 1997 (2) UJ (SC) 669, 1997 UJ(SC) 2 669, 1998 (1) ALL CJ 108, (1997) 7 JT 673 (SC), (1997) ILR (KANT) 3108, (1997) 3 SCJ 81, (1997) 3 MAD LW 502, (1997) 3 RAJ LW 421, (1998) 1 TAC 42, (1997) 8 SUPREME 171, (1997) ACJ 1148, (1998) 1 ALL WC 508, (1997) 2 ACC 370, (1997) 5 SCALE 680, (1997) 3 APLJ 57, (1998) 1 CIVLJ 866, (1998) 1 BOM CR 466

Author: K. Venkataswami

Bench: K. Venkataswami

PETITIONER:

RAJASTHAN STATE ROAD TRANSPORT CORPORATION

Vs.

RESPONDENT:

KAILASH NATH KOTHARI & ORS. ETC. ETC.

DATE OF JUDGMENT:

03/09/1997

BENCH:

A. S. ANAND, K. VENKATASWAMI

ACT:

HEADNOTE:

JUDGMENT:

J U D G M E N T DR. A.S. ANAND, J.

Common questions of law and fact are involved in this batch of appeals failed by the Rajasthan State Road Transport Corporation (hereinafter referred to as the 'RSRTC') against the (common) judgment of the High Court dated 22.1.1991 upholding composite awards made by the Motor

Accidents Claim Tribunal (hereinafter the Tribunal) on 13.3.1989 and are, therefore, being disposed of by this common order.

Bus No.RSB 3945, besides some other buses, was hired by the RSRTC from its owner Shri Sanjay Kumar - respondent, to ply on the routes specified by the RSRTC. An agreement was executed between the RSRTC and the owner of the bus containing the terms of hiring the bus.

Bus No RSB 3945 was, on the fateful day, 17.7.1981, being driven by Gopal and was plying on the route Kekri to jaipur, for which route RSRTC had the route permit. At about 9.30 p.M. when the bus was near Renwal, it was noticed that water was flowing over the bridge of Bandi river, due to heavy rains. The passengers travelling in the bus requested the driver not to drive the bus over the bridge because of overflowing water but their request had no effect and the driver, despite the warning by the passengers, drive the bus over the bridge and as a result of flood in the river, the bus was swept away. As a result 23 passengers travelling in the ill fated bus died due to the accident. The legal representatives/heirs of the 23 passengers who had died as a result of the accident, filed separate claim petitions under Section 110-A of the Motor Vehicles Act, 1939 (hereinafter referred to as the 1939 Act) claiming compensation from the RSRTC and the insurance company. The claim petitions were resisted and the RSRTC in its written statement denied its liability on the ground that though it had hired the bus in question from Shri Sanjay Kumar and the bus was playing on the route specified by it, the driver of the bus, Gopal, due to whose negligence and rashness the accident had taken place, was not an employee of the RSTRC but of the bus owner, Shri Sanjay Kumar, and therefore it was not vicariously responsible for his negligence and rashness. It was also pleaded that liability to pay compensation in case of an accident was that of the "owner" and not of the hirer. Reliance in this behalf was placed on condition No.15 of the agreement to disown its liability. The insurance company took the plea, in its reply to the claim petitions, that the bus at the time of the accident was under the control of the RSRTC, therefore it was the liability of the RSRTC to pay compensation and the insurance company was not liable. It was further pleaded by the insurance company that the liability of the insurance company, any event, was limited and its liability could not exceed Rs. 75,000/- in respect of all the claim petitions arising out of one accident. The owner of bus, Shri Sanjay Kumar, though party to the claim petitions did not file any reply. The following issues were framed by the Tribunal from the pleadings of the parties:

"(1) Whether on 17.7.81 opposite party Gopal was driving bus No R.S.B. 394 negligently and he drove the bus in the flooded river and the same was swept away, as a result of which Vijay Kumar, Ram Kishori Devi, Ram Pal, Prahlad, Galli Devi, Bhanwar Lal, Mohan Lal, Tabalya, Babli, Jayana, Kanahya Lal, Champa Devi, Sewa Ram, Laxmi Narain, Kamal Kishore, Miwal Kishore, Kumari Seema, Vimla Devi, Ram Pyari Devi, Shakuntala Devi.

Km. Bela, Pawan Kumar and Mahesh Kumar died?

(2) Whether on the basis of the preliminary objections the insurance company opposite party is not liable to pay the amount of compensation?

- (3) Whether due to the terms and conditions of the contract, the Rajasthan State Road Transport Corporation is not liable?
- (4) Whether petition No.51/82 having been filed beyond limitation is not liable to be heard?
- (5) Whether this incident comes within the definition of negligence?
- (6) Relief."

A number of witnesses were examined by the parties and after considering, both oral and documentary evidence, the Tribunal held that the bus driver (non applicant No.3) drove Bus No. 3945 on 17.7.1981 carelessly and negligently and caused the accident which resulted in the death of 23 persons. Issue No.1 was decided accordingly in favour of the claim petitioners. issue No.2 was also decided in favour of the petitioners but it was held that in the light of the terms of the policy of insurance and relevant provisions of the Act, the liability of the insurance company was limited, in respect of the accident, to a total amount of Rs. 75,000/- only Insofar as issue No.3 is concerned, the Tribunal noticed condition No.15 of the contract of hire executed between the RSRTC and the owner Shri Sanjay Kumar and joined that the same was against 'public policy' and therefore could not discharge the RSRTC from its liability. It was noticed that the bus was plying on the route specified by the RSRTC and the passengers had paid their fares to the conductor who was admittedly an employee of RSRTC, and as such the RSRTC could not escape from its liability. Accordingly, issue No.3 was also decided in favour of the claim petitioners and the RSRTC was held liable to pay compensation to the claimants. On issue No.4 the Tribunal found that claim petitions were filed within time, after condoning the delay which had been properly explained. Issue No.5 was also decided in favour of the claim petitioners and different amounts were awarded in each of the claim petitions by a composite award while granting relief under issue No.6.

Aggrieved, by the composite award dated 13.3.1989 of the Tribunal, the appellant filed appeals against each of the award in the High Court. The High Court also negated the plea of RSRTC that since it was only a hirer and not the owner of the bus, it could not be fastened with any liability for payment of compensation, relying upon its earlier judgments in RSRTC V. Onkar & Ors. (ACC Vol. II 1990-497); Mohd. Raffiq V. Mohd. Sadi & Ors. (unreported SB Civil Misc. Appeal No. 243 of 1983; RSRTC V. Murlidhar & ors. besides a Division Bench decision reported in D.B.Spl. Appeal No.391 of 1990 RSRTC v Rukmani Devi decided on 41.4.1991. The High Court also rejected the plea raised on behalf of the insurance company that the liability of the insurance company could not extend to an accident of the type which had occurred in the present case and found that the Tribunal had rightly decided issue No.2. The composite award made by the Tribunal in respect of various claim petitions was accordingly upheld by the High Court vide common judgment dated 22.1.1991. The RSRTC has approached this Court by Special Leave in all the cases. At the time of hearing, the controversy in this court has been confined to the findings on issue No.3 and no other finding has been called in question.

The thrust of argument of learned counsel for the appellant, was that the appellant not being the owner of the bus was not liable to pay any compensation arising out of the accident because the

driver, who was driving the bus at the relevant time, was in the employment of the owner of the bus, Shri Sanjay Kumar and not of RSRTC and as such it could not be held vicariously liable for the rash and negligent act of the driver. Reference was also made to condition No.15 of the agreement, to urge that the RSRTC was not liable to pay compensation to the heirs of the deceased passengers and that the liability to pay compensation to them was of the owner of the bus, Sanjay Kumar. Learned counsel appearing for the insurance company, did not question the finding on issue No.2 and submitted that the specified amount had since been paid by the insurance company. He did not dispute the correctness of the findings recorded by the Tribunal and the High Court on issue No.3. The claimant respondents remained unrepresented, despite service before us.

We have given our careful consideration to the submissions made at the bar by learned counsel for the appellant and for what follows we are not able to appellant and for what follows we are not able to persuade ourselves to agree with him and take a view different than the one taken by the Tribunal and the High Court. Let us first look at some of the relevant statutory provisions.

Section 2-c(3) defines "contract carriage":

"Sec.2 - C (3) "contract carriage" means a motor vehicle which carries a passenger or passengers for hire or reward under a contract expressed or implied for the use of the vehicle as a whole at or for a, (fixed or agreed rate or sum-

(i) on a time basis whether or not with reference to any route or distance or

(ii) from one point to another, and in either case without stopping to pick up).

or set down along the line of route passengers not included in the contract, and includes a motor cab notwithstanding that the passengers may pay separate fares;"

.....

Section 2(9) defines an owner in the following terms:-

"Sec.2(9) - "owner" means, where the person in possession of a motor vehicle is a minor, the guardian of such minor, and in relation to a motor vehicle which is the subject of a hire purchase agreement, the person in possession of the vehicle under that agreement."

By Section 2(29) the "STAGE CARRIAGE" has been defined as-

"Sec.2(29) - "stage carriage"

means a motor vehicle carrying or adapted to carry more than persons excluding the driver which carries passengers for hire or reward at separate fares paid by for individual passengers, either for the whole journey or for stages of the journey."

Section 42 deals with the "necessity for permits" and lays down:

"Sec.42 - Necessity for permits. - (1) No owner of a transport vehicle shall use or permit the use of the vehicle in any public place (whether or not such vehicle is actually carrying any passenger or goods) save in accordance with the conditions of a permit granted or countersigned by a Regional or State Transport Authority (or the Commission) authorising the use of the vehicle in that place in the manner in which the vehicle is being used:

Provided that a stage carriage permit shall, subject to any conditions that may be specified in the permit, authorise the use of the vehicle as a contract carriage:

.....

Section 110-A provides that an application for compensation arising out of an accident may be made by the person who has sustained the injury or if death has resulted from the accident, by all or any of the legal representatives of the deceased or by the owner of the property damaged by the accident or by any agent duly authorised by the person injured or by the legal representatives of the deceased, as the case may be.

Having noticed the relevant provisions of the 1939 Act, which admittedly apply to the instant case, we now address ourselves to test the correctness of the submission that since the RSRTC was not the owner of the vehicle, as such the liability to pay compensation for an accident caused by the bus hired by it, cannot be fastened on the appellant and the effect of condition No.15 of the agreement. Certain admitted facts need a notice at this stage.

It is not disputed that the bus in question was hired by the RSRTC and was running on the route for which a permit had been granted in favour of the RSRTC by the competent authority. It is also not disputed that the permit to ply the bus was in the name of RSRTC for the specified route and that the bus could not have plied on that route except by the RSRTC, which had the permit. It is also an admitted position that the conductor of the bus was an employee of the RSRTC and that passengers were being carried in that bus on paying the prescribed fare to the bus conductor, an employee of the RSRTC. The fares paid by the passengers were received by the conductor for and on behalf of the RSRTC. The bus was given on hire to RSRTC along with the driver, who, however, was to ply the bus under the instructions of RSRTC. That an agreement had been executed between RSRTC and the bus owner. Shri Sanjay Kumar, incorporating various conditions of contract.

Conditions 4 to 7 and 15 of the agreement executed between the RSRTC and the owner read: "4. The corporation shall appoint the conductor for the operation of the bus given on contract by the second party and the conductor of the corporation shall do the work of issuing tickets to the passengers, to receive the fare, to all the

passengers to get in and get out of the bus, to help the passengers to load and unload their goods, to stop the bus at the stops fixed by the Corporation and to operate the bus according to time table.

5. The tickets, way-bills and other stationery shall be supplied by the Corporation to the said conductor of the corporation."

6. The driver of the bus shall have to follow all such instructions of the conductor, which shall be necessary under the rules for the operation of the bus."

7. The driver of the bus shall comply with all the orders of the corporation or of the officers appointed by the corporation."

15. Upon the accident of the bus taking place the owner of the bus shall be liable for the loss, damages and for the liabilities relating to the safety of the passengers. The Corporation shall not be liable for any accident. If the Corporation is required to make any payment or incur any expenses through some court or under some mutual compromise, he Corporation shall be able to recover such amounts from the owner of the bus after deducting the same from the amounts payable to him."

The admitted facts unmistakably show that the vehicle in question was in possession and under the actual control or RSRTC for the purpose of running on the specified route and was being used for carrying, on ire, passengers by the RSRTC. The driver, was to carry out instructions, orders and directions of the conductor and other officers of the RSRTC for operation of the bus on the route specified by the RSRTC.

The definition of owner under Section 2(9) of the Act is not exhaustive. it has, therefore to be construed, in a wider sense, in the facts and circumstances of a given case. The expression owner must include, in a given case, the person who has the actual possession and control of the vehicle and under whose directions and commands the driver is obliged to operate the bus. To confine the meaning of 'owner' to the registered owner only would in a case where the vehicle is in the actual possession and control of the hirer not be proper for the purpose of fastening of liability in case of an accident. The liability of the "owner" is vicarious for the tort committed by its employee during the course of his employment and it would be a question of fact in each case as to on whom can vicarious liability be fastened in the case of an accident. In this case, Shri Sanjay Kumar, the owner of the bus could not ply the bus on the particular route for which he had no permit and he in fact was not plying the bus on that route. The services of the driver were transferred along with complete 'control' to RSRTC, under whose directions, instructions and command the driver was to ply or not to ply the ill fated bus on the fateful day. The passengers were being carried by RSRTC on receiving fare from them. Shri Sanjay Kumar was therefore not concerned with the passengers travelling in that bus on the particular route on payment of are to RSRTC. Driver of the bus, even though an employee of the owner, was at the relevant time performing his duties under the order and command of the conductor of RSRTC for operation of the bus. So far as the passengers of the ill fated bus are concerned, their privity of contract was only with the RSRTC to whom they had paid the fare for travelling in that bus and their safety therefore became the responsibility of the RSRTC

while travelling in the bus. They had no privity of contract with Shri Sanjay Kumar, the owner of the bus at all. Had it been a case only of transfer of services of the driver and not of transfer of control of the driver from the owner to RSRTC, the matter may have been some what different. But on facts in this case and in view of conditions 4 to 7 of the agreement (supra), the RSRTC must be held to be vicariously liable for the tort committed by the driver while plying the bus under contract of the RSRTC. The general proposition of law and the presumption arising therefrom that an employer, that is the person who has the right to hire and fire the employee, is generally responsible vicariously for the tort committed by the concerned employee during the course of his employment and within the scope of his authority, is a rebuttable presumption, of the original employer is able to establish that when the servant was lent, the effective control over him was also transferred to the hirer, the original owner can avoid his liability and the temporary employer or the hirer, as the case may be must be held vicariously liable for the tort committed by the concerned employee in the course of his employment while under the command and control of the hirer notwithstanding the fact that the driver would continue to be on the pay roll of the original owner. The proposition based on the general principle as noticed above is adequately rebutted in this case not only on the basis of the evidence led by the parties but also on the basis of conditions 6 and 7 (supra), which go to show that the owner had not merely transferred the services of the driver to the RSRTC but actual control and the driver was to act under the instructions, control and command of the conductor and other officers of the RSRTC.

Reliance placed by learned counsel or the appellant on condition No.15 of the agreement (supra) in our view is misconceived. Apart from the fact that this clause in the agreement between the owner and the RSRTC, to the extent it shifts the liability for the accident from the RSRTC to the owner, may be against the public policy as opined by the High Court, though we are not inclined to test the correctness of that proposition of law because on facts, we find that RSRTC cannot escape its liability to pay compensation. The second part of condition No.15 makes it abundantly clear that the RSRTC did not completely shift the liability to the owner of the bus because it provided for reimbursement to it in case it has to pay compensation arising out of an accident. The words "If the Corporation is required to make any payment or incur any expenses through some Court or under some mutual compromise, the Corporation shall be able to recover such amounts from the owner of the bus after deducting the same from the amounts payable to him"

in the later part of condition No.15 leave no ambiguity in that behalf and clearly go to show the intention of the parties. Thus, RSRTC cannot escape its liability under condition No.15 of the agreement either. Thus, both on facts and in law the liability to pay compensation for the accident must fall on the RSRTC.

Thus, for the additional reasons noticed by us above, we find that both the Motor Accidents Claim Tribunal and the High Court of Rajasthan, committed no error in fastening the liability to pay compensation to the heirs of the deceased passengers on the appellant. There is no merit in these appeals, which consequently fail and are dismissed but since the claimant respondents have remained unrepresented before us, with no order as to costs.