Niranjan Lal Ram Chandra vs Ram Swarup Bhagwan Singh And Anr. on 29 March, 1950

Equivalent citations: AIR1952ALL449, AIR 1952 ALLAHABAD 449

JUDGMENT

Agarwala, J.

This is a defendant's appeal arising out of a suit for recovery of damages. The plaintiff owned a motor lorry which was being used for unloading ballast in the Kharia aerodrome.

On 21-7-1942, a lorry driven by Maqbul Hasan defendant 2 (respondent 3 in the present appeal) while engaged in the business of transporting ballast from a certain village to the Kheria aerodrome struck the plaintiff's lorry and damaged it. The plaintiff had to incur expenses in repairing the lorry and the lorry remained out of use for a period of about one month. The plaintiff's case was that the lorry was owned by the defendant-appellant firm which was arrayed as defendant 1 in the suit and that defendant 2, Maqbul Hasan was its servant working under its directions at the time of the incident. He alleged further that defendant 2 was driving the motor lorry rashly and negligently and it was on account of such rash and negligent driving of defendant 2 that the plaintiff's lorry was damaged. He, therefore, sued both these defendants to recover damages to the extent of Rs. 1500.

2. Defendant 1 pleaded that it was merely a hirer of the lorry and had no control on the action of defendant 2 and that certain other persons who were subsequently impleaded as defendants 3 and 4 were the owners and defendant 2 was their servant and under their control. He, therefore, denied all liability with regard to the damage caused. He also demurred to the amount of the damages claimed and specially to the amount claimed on account of loss sustained by the lorry remaining idle and the amount claimed on account of depreciation. It was also contended that there was no negligence on the part of defendant 2.

3. The Courts below found that the accident was due to the negligence of defendant 2, the driver.

They further found that the plaintiff suffered a loss of Rs. 1300 composed of the following items:

Rs. 465 spent on replacing damaged parts.

Rs. 30 spent on wages of a mechanic.

Rs. 250 on account of loss on account of the lorry remaining idle for a month.

> Rs. 555 on account of depreciation caused to the lorry They further held that defendants 1 and 2 were both liable. The suit was, therefore, decreed for recovery of Rs. 1300 against defendants 1 and 2 and dismissed against defendants 3 and 4.

4. In this Second Appeal by defendant 1 the points urged before me are that the defendant. appellant was not liable to pay any damages because defendant 2 was not under its control and that the lower Court has failed to determine this crucial point in the case and that at any rate, the defendant-appellant was not liable for the damages awarded on account of the loss of business and depreciation.

5. It was found by the Courts below that the lorry was registered in the names of defendants 3 and 4 and that ostensibly they were its owners.

It was, however, not determined by the Courts below, whether defendant 2 was the servant of defendants 3 and 4 or the defendant appellant. It was the admitted case of the parties that the defendant-appellant was, at the time of accident using the lorry for the business of defendant 1.

The case of the defendant-appellant was that he was the hirer merely.

6. Both the Courts below were inclined to the view that the defendant-appellant was "most probably"

> the owner of the lorry, defendants 3 and 4 being mere dummies or figure-heads. Both the Courts below have, however, concurrently found that at the time of the accident, defendant 2 was in the service of defendant 1 and acting under his control. Learned counsel has admitted that this was clearly the finding of the trial Courts but has urged that this has not been so found by the lower appellate Court. The lower appellate Court's finding may here be quoted:
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> "As the Munsif has remarked, no evidence was produced to show that Maqbul Hasan was being paid his wages by defendants 3 and 4 Actually it seems to me that though the lorry was registered in the names of Girish Chandra and Kunwar Bahadur, it was the firm (defendant No. 1) which was using it and in all probability the firm owned the lorry. The conduct of the appellant firm in suppressing the names of the owners in the reply to the notice also lends support to this inference. I, therefore, concur with the learned Munsif that it is proved that the tortious act was committed while Maqbul Hasan was engaged in the service of the appellant firm and that there was no contributory negligence and therefore the appellant firm is responsible for the damage."

7. No doubt the lower appellate Court does not record a finding whether Maqbul Hasan was being paid his wages by defendants 3 and 4 or by defendant 1 but it does record a finding that, for all practical purposes, the lorry was under the complete control of the appellant and defendant 2 was also under their control engaged in their service.

8. The law on the point is not in doubt. The general rule is that the master is liable for any tort which the servant commits in the course of his employment. A servant, however, must be distinguished from an independant contractor who undertakes to produce a given result but in the actual execution of the work he is not under the order or control of the person for whom he does it and may use his own discretion in things not specified beforehand, vide In Performing Right Society Ltd. v. Mitchell and Booker, Ltd.

(1924) 1 K. B. 762,

9. Where, however, the person concerned is not an independent contractor but is a servant and the servant is loaned to another person, questions of varying difficulty in determining the liability of the master arise. In cases where a machine with its driver is hired by a third person, the rule is that if the servant is still, inspite of the hiring, under the effective control of the master, the master is liable for the tortious acts of the servant. But it the servant is not under the master's effective control, and is under the control of the hirer, the hirer is liable.

What amounts to effective control in a particular case, will have to be decided upon the facts of the case.

10. The mere fact that the hirer has power to order the servant to take the vehicle to a certain place has not been considered to be an effective control over the servant. Prima facie the master who is responsible for the payment of the wages of the servant and is entitled to dismiss him is the person who has effective control on the servant, but circumstances may destroy this presumption.

11. Salmond in his book on Law of Torts. 10th Edn., page 87 states the law as follows:

> "It is not always easy to determine whether this 'transmutation of service' has taken place. It is usually said that control is the real test. But in Century Insurance Co. v. Northern Ireland Road Transport Board, 1942 A. C. 509, Lord Wright pointed out that the word 'control' needs explanation and that the true criterion was laid down by Bowen L. J. in Moore v. Palmer, (1886) 2 Trav L. R. 782 'The great test is this, whether the servant was transferred or only the use and benefit of his work?' There is a presumption against any such transfer of the servant, In order to effect it there must be an agreement or bargain, even if it be only gratuitous, so that an apprentice of A rent for instruction to work under the orders of B's foreman remains the servant of A. But if a master contracts to lend his servants to another and places them under the control of another to do work which he has contracted to do, without retaining the control over the work, they become the servants of that other.
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> In Donovan v. Laing Wharton and Down Construction, Syndicate, (1893) 1 G. B. 629: (63 L. J. Q. B. 25) the defendants contracted to supply a firm of wharfingers with a crane and a man to work it. This man received directions from the wharfingers or their servants as to the working of the crane and the defendants had in that respect no control over him. An accident having happened through the negligent

> management of the crane, it was held that the defendants were not liable, on the ground that the man in charge of the crane was cuoad hoc the servant of the wharfingers, and that they alone were responsible for him."

12. In Dowd v. W. H. Boase and Co. Ltd. (1945) 1 ALL. E. R. 605, the plaintiff was employed by Rea, a firm of stevedores in unloading meat from a ship and loading it into vans. This firm of Rea required more bogies and drivers than they themselves had available at the time and following a common practice at the dock, Boase, another firm of stevedores, arranged to supply Rea with bogies and drivers, as required. There was no written agreement. Owing to the negligent driving of one of the drivers supplied by Boase, the plaintiff, the servant of Rea, was injured in the course of his employment. It was held that the regular employers, Boase, failed to establish that the hirers had such control of the acts of the workmen at the time of the accident as to become liable as employers for his negligence. Although the driver was acting under the directions of the hirers in that they could tell him where to go and what to carry, he was not under their directions in regard to the manner of driving and that in doing the negligent act he was exercising his own discretion as a driver--a discretion vested in him by his regular employers when he was sent out with the vehicle.

13. In the present case, upon the findings recorded by the lower appellate Court, I am quite satisfied that defendants 3 and 4 had withdrawn their control or authority from the driver, Maqbul Hasan, and that he was completely under the control of the appellant in driving the lorry. That being so, the appellant was clearly liable along with the driver.

14. The next point urged is that the plaintiff was not entitled to damages on account of loss of business. The finding of the Court below is that the lorry remained idle on account of the accident for a period of about one month and loss was caused to the plaintiff. In my opinion the loss caused to the plaintiff on account of the lorry standing idle because of the accident is directly referable to the negligent act of the defendant 2. It cannot be said to be a remote damage. The plaintiff is also entitled to damages on account of the depreciation caused to the vehicle. Depreciation in the value of the vehicle was undoubtedly the direct result of the injury caused to the vehicle.

15. I consider that there is no force in this appeal and it is dismissed with costs.