Machindranath Kernath Kasar vs D.S. Mylarappa & Ors on 29 April, 2008

Equivalent citations: AIR 2008 SUPREME COURT 2545, 2008 (13) SCC 198, 2008 AIR SCW 3546, 2008 (3) AIR JHAR R 488, 2008 (4) AIR KANT HCR 113, 2008 (4) AIR KAR R 113, (2008) 67 ALLINDCAS 79 (SC), 2008 (7) SCALE 496, 2009 (3) SCC(CRI) 519, 2008 (67) ALLINDCAS 79, (2008) 2 GUJ LH 640, (2008) 72 ALL LR 198, (2008) 3 RECCIVR 790, (2008) 5 KANT LJ 142, (2008) 7 MAD LJ 1155, (2008) 2 TAC 789, (2008) 7 SCALE 496, (2008) 3 ACJ 1964, (2008) 3 ALL WC 2461

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Bench: S.B. Sinha, V.S. Sirpurkar

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           CASE NO.:
Appeal (civil)  3041 of 2008

PETITIONER:
Machindranath Kernath Kasar

RESPONDENT:
D.S. Mylarappa & Ors.

DATE OF JUDGMENT: 29/04/2008

BENCH:
S.B. Sinha & V.S. Sirpurkar

JUDGMENT:
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J U D G M E N T REPORTABLE CIVIL APPEAL NO. 3041 OF 2008 [Arising out of SLP (Civil) No. 17711 of 2006] S.B. SINHA, J :

1. Leave granted.

2. Appellant was a driver of a bus belonging to the Karnataka State Road Transport Corporation. He was driving the said vehicle on 18.4.1995. A collision took place between the said bus and a truck bearing Registration No. CAM 6939. A large number of passengers travelling in the said bus were injured. Appellant herein was also one of them. The passengers of the said bus as also the appellant filed applications for payment of compensation before the Motor Vehicles Accident Claims Tribunal, Belgaum in terms of Section 166 of the Motor Vehicles Act, 1988 (for short "the Act").

Appellant was also prosecuted for rash and negligent driving before a criminal court. No such case was initiated against the driver of the truck. The Corporation denied and disputed the contention of the passengers that the appellant was driving the bus in a rash and negligent manner. Appellant examined himself in the other claim petitions in support of the case of the Corporation. He, however, was not impleaded as a party therein. It is stated that ordinarily drivers are not impleaded as parties in the claim cases in the State of Karnataka, purported to be having regard to the provisions contained in Rule 235 of the Karnataka Motor Vehicle Rules, 1989.

3. Both sets of claim cases were taken up for hearing together by the Tribunal. The awards were also passed on the same day.

4. In the claim applications filed by the passengers, despite the deposition of the appellant to the contrary, a finding of fact was arrived at, that he was driving the bus rashly and negligently.

5. The claim petitions of the passengers were allowed. The Corporation did not challenge the correctness of the said awards. They attained finality. The Tribunal in the case of the appellant also went into the question once over again to hold that the accident was caused owing to the rash and negligent driving of the appellant. It was opined that only because he had been acquitted of the charges by the criminal court in Section 279 or 338 of the Indian Penal Code, the same was not conclusive, stating :

> " .It is the version of the petitioner that there was negligence on the part of the truck driver. But the nature of damage caused to either vehicles does not corroborate the same. On perusal of Ex. P3 it is mentioned that the front show of the KSRTC bus was completely damaged, head light radiator and front right driver door damaged, bonnet damaged in the course of accident. On the other hand Ex. P3 reveals that front right show damaged, front bumper bent, front right head light broken, front right wind shield glass broken, radiator cover damaged. Therefore the nature of damage caused to the truck reveals unequivocally that only right side portion of the truck was damaged. If really the truck driver had come on right side from Belgaum to Kanbargi road and dashed against the KSRTC bus, the middle portion of the truck would have been damaged. On the other hand, the middle portion of KSRTC bus is damaged as per the recitals in Ex. P3. Therefore the nature of damages caused to the bus reveals the fact that it was the bus driver who came towards right side of the Kanbargi Belgaum road while over taking a parked truck. The fact that the bus driver was trying to overtake parked truck is not in dispute."

6. The Tribunal expressly negatived the contention of the appellant that it was the truck driver who was driving the truck rashly and negligently, stating:

> "There was no reason for the petitioner being a driver of the KSRTC bus to take the same to the extreme right side of the Belgaum Kanbargi road as to cause accident. It is also admitted by the petitioner as well as in the petition itself that the KSRTC driver was trying to overtake a parked lorry. At that time the petitioner being a driver

> of the KSRTC should have seen whether there was any vehicle which were coming on opposite direction at the time of overtaking a parked lorry. It appears that there was negligence on the part of the KSRTC driver himself, and as such it has to be held that the accident took place due to the negligence of the petitioner himself. For all these reasons, there is no oral and documentary evidence on record to prove the fact that the accident took place due to the negligence of the driver of the truck No. CAM.6939. On the other hand the oral evidence of RW.1 coupled with panchanama and photos produced at Ex. R2 and R3 clearly proves the fact that the accident was due to rash and negligence of the petitioner himself "

Inter alia on the aforementioned finding the claim petition was dismissed.

7. He preferred an appeal thereagainst in terms of Section 173 of the Act. A Division Bench of the Karnataka High Court dismissed the said appeal opining that as the appellant did not question the correctness of the earlier awards passed by the Tribunal although he was a party aggrieved, he is bound thereby, as regards to the question of negligence. The High Court, thus, affirmed the views of the Tribunal.

8. Mr. Kiran Suri, learned counsel appearing on behalf of the appellant submitted;

(i) The High Court erred in holding that although the appellant was not a party in the proceeding, he was an aggrieved person.

(ii) The Awards passed by the Tribunal in the cases of the passengers were not binding on the appellant.

(iii) The Tribunal and consequently the High Court committed a serious error insofar as they failed to take into consideration the panchnama drawn by the police personnel from a perusal whereof it would be evident that it was the driver of the truck who was rash and negligent.

9. Mr. D. Varadarajan, the learned counsel appearing on behalf of the respondent Insurance Company, on the other hand, would submit:

> (a) Even in this claim petition, the driver of the truck has not been impleaded as a party.
>
> (b) Both the Tribunal as also the High Court arrived at a finding of fact that the appellant alone was negligent, and as such the same should not be interfered by this Court with particularly when no evidence was adduced on behalf of the appellant or Corporation to prove contra.

10. Chapter II of the Act provides for licensing of drivers of motor vehicles. The Central Government as also the State Government have been conferred powers to make rules under various provisions of the said Act.

Chapter 11 of the Act provides for insurance of motor vehicles against third party risks.

Section 146 providing for necessity of insurance against third party risks is in the following terms.

> "146. Necessity for insurance against third party risk (1) No person shall use, except as a passenger, or cause or allow any other person to use, a motor vehicle in a public place, unless there is in force in relation to the use of the vehicle by that person or that other person, as the case may be, a policy of insurance complying with the requirements of this Chapter:
>
> Provided that in the case of a vehicle carrying, or meant to carry, dangerous or hazardous goods, there shall also be a policy of insurance under the Public Liability Insurance Act, 1991"

Section 147 provides for the requirements of policies and limits of liability.

Section 149 imposes duties on insurers to satisfy judgments and awards against persons insured in respect of third party risks.

The insurer having regard to sub-Section (2) of Section 149 of the Act would be entitled to avoid its liability in one of the contingencies specified therein.

Section 149(2)(a) reads thus;

> "149(1) ***** ***** 149(2) ***** ******
>
> (a) that there has been a breach of a specified condition of the policy, being one of the following conditions, namely:-
>
> (i) a condition excluding the use of the vehicle-
>
> (a) for hire or reward, where the vehicle is on the date of the contract of insurance a vehicle not covered by a permit to ply for hire or reward, or
>
> (b) for organised racing and speed testing, or
>
> (c) for a purpose not allowed by the permit under which the vehicle is used, where the vehicle is a transport vehicle, or
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> (d) without side-car being attached where the vehicle is a motor cycle; or
>
> (ii) a condition excluding driving by a named person or persons or by any person who is not duly licensed, or by any person who has been disqualified for holding or obtaining a driving licence during the period of disqualification; or

(iii) a condition excluding liability for injury caused or contributed to by conditions of war, civil war, riot or civil commotion; or

(b) that the policy is void on the ground that it was obtained by the nondisclosure of a material fact or by a representation of fact which was false in some material particular."

Section 163A provides for special provision as to payment of compensation on structured formula basis in the event an accident arising out of the use of motor vehicle has taken place.

11. Chapter XII provides for constitution of Claims Tribunal. Section 166 envisages filing of an application for grant of compensation. An application may be filed for payment of compensation arising out of an accident of the nature specified in sub-Section (1) of Section 165.

Sub-section (2) of Section 166 reads as under:

"Section 166.***** (1) ********** (2) Every application under sub-section (1) shall be made, at the option of the claimant, either to the Claims Tribunal having jurisdiction over the area in which the accident occurred, or to the Claims Tribunal within the local limits of whose jurisdiction the claimant resides or carries on business or within the local limits of whose jurisdiction the defendant resides, and shall be in such form and contain such particulars as may be prescribed:

Provided that where no claim for compensation under section 140 is made in such application, the application shall contain a separate statement to that effect immediately before the signature of the applicant."

12. The State of Karnataka in exercise of its rule making power has made Karnataka Motor Vehicles Rules, 1989, Rule 235 whereof reads as under:

"235. Notice to the parties involved (1) The Claims Tribunal shall on an application made to it by the applicant send to the owner or the driver of the vehicle or both from whom the applicant claims relief and the insurer, a copy of the application, together with the notice of the date on which it will dispose of the application, and may call upon the parties to produce on that date any evidence which they may wish to tender.

(2) Where the applicant makes a claim for compensation under Section 140 the Claims Tribunal shall give notice to the owner and insurer if any, of the vehicle involved in the accident directing them to appear on the date not later than 10 days from the date of issue of such notice. The date so fixed for such appearance shall also be not later than fifteen days from the receipt of the claim application filed by the claimant. The Claims Tribunal shall state in such notice that in case they fail to appear on such appointed date, the Tribunal will proceed ex-parte on the presumption that they have no contention to make against the award of

compensation.

13. Rule 232 provides that every application for compensation is to be made by a person specified in Section 166(1) to the Claims Tribunal in Form KMV 63.

14. Ms. Suri submitted that the Act and the Rules as also the prescribed forms do not require the driver to be made a party and in that view of the matter, Rule 235 should be read disjunctively. Our attention in this behalf has been drawn to a decision of the Division Bench of the Karnataka High Court in Patel Roadways and Another Vs. Manish Chhotalal Thakkar and Others [ILR 2000 Kar. 3286].

15. The learned Judges in Patel Roadways (supra) opined that when the form of the claim petition does not require a claimant to even name the driver, a claim petition would be maintainable even without impleading the driver.

The Bench proceeded to consider the general law of tort and the liability of joint tort feasers as contained in various text books. The Bench also noticed the decision of this Court in Minu B. Mehta and Another Vs. Balkrishna Ramchandra Nayan and Another [AIR 1977 SC 1248], wherein it was held:

> "The liability of the owner of the car to compensate the victim in a car accident due to the negligent driving of his servant is based on the Law of Torts. Regarding the negligence of the servant the owner is made liable on the basis of vicarious liability. Before the master could be made liable it is necessary to prove that the servant was acting during the course of his employment and that he was negligent This plea ignores the basic requirements of the owner's liability and the claimants right to receive compensation. The owners' liability arises out of his failure to discharge a duty cast on him by law. The right to receive compensation can only be against a person who is bound to compensate due to the failure to perform a legal obligation. If a person is not liable legally he is under no duty to compensate anyone else. The Claims Tribunal is a Tribunal constituted by the State Government for expeditious disposal of the motor claims. The general law applicable is only common law and the Law of Torts. If under the law a person becomes legally liable then the person suffering the injuries is entitled to be compensated and the Tribunal is authorised to determine the amount of compensation which appears to be just. The plea that Claims Tribunal is entitled to award compensation which appears to be just when it is satisfied on proof of injury to a third party arising out of the use of a vehicle on a public place without proof of negligence if accepted would lead to strange results."

The Kerala, Bombay, Madras, Allahabad, Patna, Punjab and Haryana and Delhi High Courts, on the one hand, noticing a large number of decisions held that drivers are not necessary parties, the Madhya Pradesh High Court, on the other hand, in New India Assurance Co. Vs Munni Devi [1993 ACJ 1066 (M.P.)] and Madhya Pradesh State Road Transport Corporation Vs. Vaijanti [(1995 ACJ 560 (M.P.)] held that the driver of the offending vehicle would be a necessary party. The Division

Bench of the Karnataka High Court further held that under the Madhya Pradesh Motor Vehicle Rules, the driver was required to be impleaded as a party. It was, however, stated:

> " .We do not however agree with the said two decisions, if they were to be read as laying down a general principle that under Law of Torts, the master cannot be sued to enforce his vicarious liability for the negligence of the servant, without impleading the servant."

On the aforementioned finding, the following law was laid down.

> "(a) Neither the Motor Vehicles Act nor Rules thereunder require the driver to be impleaded as a party to the claim petition, (b) Under Law of Torts, the owner and driver of the Motor Vehicle being joint tortfeasors, who are jointly and severally liable for the negligence of the driver, the claimant can sue either the owner or the driver or both. But, whether driver is impleaded or not, a owner (master) can be made vicariously liable for the acts of his driver (servant), only by proving negligence on the part of the driver (servant), (c) Therefore a claim petition can be maintained against the owner and insurer of the vehicle causing the accident, without impleading the driver. However proving the negligence of the driver is a condition precedent to make the owner vicariously liable for the act of the driver, (d) But where the driver is not impleaded as a party, no decree or award can be made against him. A driver can be held liable personally only when he is impleaded as a party and notice of the proceedings is issued to him."

16. Motor Vehicles Act was enacted to consolidate and amend the law relating to motor vehicles. When a law is enacted to consolidate and amend the law, the Legislature not only takes into consideration the law as it has then been existing but also the law which was prevailing prior thereto. A suit for damages arises out of a tortuous action. For the purpose of such an action, although, there is no statutory definition of negligence, ordinarily, it would mean omission of duty caused either by omission to do something which a reasonable man guided upon those considerations, who ordinarily by reason of conduct of human affairs would do or be obligated to, or by doing something which a reasonable or prudent man would not do. See Municipal Corporation of Greater Bombay Vs. Laxman Iyer and Another [(2003) 8 SCC 731, para 6]

17. When a damage is caused upon act of negligence on the part of a person, the said person is primarily held to be liable for payment of damages. The owner of the vehicle would be liable as he has permitted the use thereof. To that effect only under the Motor Vehicles Act, both driver and owner would be jointly liable.

This, however, would not mean that they are joint tort feasers in the strict sense of the term. There exists a distinction between the liability of the owner of a vehicle which was used in commission of the accident and that of the driver for whose negligence the accident was caused, but the same would not mean that the owner and the driver are joint tort feasers in the sense as it is ordinarily understood.

18. The Karnataka Rules, therefore, were required to be construed having regard to the appropriate interpretative principles applicable thereto. Common law principles were therefor required to be kept in mind. In this case, we are not required to lay down a law that even in absence of any rule, impleadment of the driver would be imperative.

It is however, of some interest to note the provisions of Section 168 of the Motor Vehicles Act. In terms of this aforementioned provision, the Tribunal is mandatorily required to specify the amount which shall be paid by the owner or driver of the vehicle involved in the accident or by or any of them. As it is imperative on the part of the Tribunal to specify the amount payable inter alia by the driver of the vehicle, a fortiori he should be impleaded as a party in the proceeding. He may not, however, be a necessary party in the sense that in his absence, the entire proceeding shall not be vitiated as the owner of the vehicle was a party in his capacity as a joint tort feaser.

19. Appellant not only made averments as regards absence of negligence on his part; he made specific allegations against the driver of the truck. The driver of the truck alone would have been competent to depose. In a given case, like the present one, the owner of the truck may not defend the action at all keeping in view the fact that the vehicle was an insured one. There are some decisions of this Court, where even a plea has been raised that the insured company would not be an aggrieved person in such an extent although such a contention has been negatived by this Court.

20. The principles of natural justice demand that a person must be given an opportunity to defend his action.

There are cases and cases. In a given situation, the owner of a vehicle may take the plea that the driver had used the vehicle without his authority or permission and in that view of the matter, he is not liable for the tortuous acts of the driver at all. There are innumerable instances where the insurance Company had been held to be absolved of its liability to compensate the owner of the vehicle inter alia on the premise that the driver did not hold a valid license. The legal principle was evolved on the premise that the owner had a duty to see that the person authorized to drive the vehicle is otherwise eligible to do so or entitled to do so in law.

21. In Sitaram Motilal Kalal Vs. Santanuprasad Jaishanker Bhatt [AIR 1966 SC 1697] this Court opined that the master is vicariously liable for the acts of his servants acting in the course of his employment stating:

> "27. 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 authorized 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 ..."

In Minu B. Mehta (supra), this Court noticed:

> "28. In Halsbury's Laws of England, 3rd Edn., Vol. 32, at para 751 at p. 366 the nature of insurance required is stated as follows:
>
> "The conditions to be fulfilled in order to render the use of a motor vehicle lawful are (1) that there must be a policy of insurance in force in relation to the use of the vehicle on a road, and (2) that it must be a policy complying with the relevant statutory requirements."

At para 752 at p. 366 the general nature of liabilities required to be covered are stated as under:

> "In order to comply with the statutory requirements, a policy must provide insurance cover in respect ot any liability which may be incurred by such person, persons or classes of persons as are specified in the policy, in respect of the death of, or bodily injury to, any person (subject to specific exceptions) caused by or arising out of, the use of the vehicle on a road."

The authorised insurers issuing a policy pursuant to the statutory requirements are obliged to indemnify the person specified in the policy in respect of any liability which the policy purports to cover in the case of that person or classes of persons. . . . (Para 758 at p. 369). These passages clearly indicate that the nature of the liability required to be covered is the liability which may be incurred by or arising out of the use of a vehicle on a road by the person."

Thus, in appropriate cases, the liability of the driver would be primary.

22. Appellant was fully aware of his legal liability. He was involved in the criminal case. He deposed in the claim applications filed by the injured persons who were travelling in the bus. He was fully aware that unless he proves his innocence in regard to the charge of rash and negligent driving, he would be held liable therefor, particularly when he himself had filed the claim petition. It might have been a matter of sharing of liability between him and the driver of the truck. He was aware that his plea that he was not negligent has been negatived. He, for all intent and purport, therefore, was a party to the earlier proceedings. If he intended to get rid of the findings recorded by the Tribunal, he could have preferred an appeal thereagainst. He did not choose to do so.

23. This case gives rise to an anomalous situation. The Corporation has been found to be liable to pay the amount of compensation claimed by the passengers of the bus only because the appellant was found to be rash and negligent in driving. The law cannot be construed in such a manner so as to lead to such a conclusion as the same court in this case which was being heard simultaneously held that he was not negligent and the driver of the truck was negligent so as to fasten the liability also on the owner of the truck. When an accident has taken place, the court was required to hold either the driver of the bus or the truck responsible; no case of contributory negligence having been made out. The result would be that the Corporation would be liable to pay compensation in both the cases although findings in each of them were contradictory to or inconsistent with each other.

Similar would be the position of the driver of the truck. In one case, he for the same act would stand exonerated and in another case, liability to pay compensation would be fastened on him. Precisely that was the purpose for which the Tribunals heard both the matters together and also delivered judgments one after the other. It was necessary to apply the comity or amity or the principles analogous thereto.

The issue to be examined herein is whether in the claims cases before the Motor Vehicles Accident Claims Tribunal, the driver of a vehicle who has been accused of negligence is a necessary party to the proceedings or whether the owner alone can be impleaded.

In this case, two sets of claims cases were heard together, one filed by the passengers of the KSRTC bus and the other filed by the driver of the said bus. In short, unless the finding of negligence in the claim cases of the passengers was negatived, in the claim cases filed by the driver himself, the said finding of negligence on the part of the driver could not have been varied.

The analysis of our findings aforementioned is:-

> (i) In the first set of claims cases, the driver of the bus was held to be negligent and, therefore, a ruling that the driver is a necessary party would mean that the bus driver must necessarily be involved in these proceedings. However, the driver of the bus had sufficient opportunity to make a representation against the allegation of negligence as he was examined as RW1 in the claim cases filed by the passengers, even though he was not formally impleaded as a Respondent.

Hence, the High Court has correctly held that he was a 'party' to the proceedings.

(ii) In the claims filed by the driver of the bus (namely the Appellant herein), specific allegations were made against the driver of the truck. Hence, the question is whether the driver of the truck must necessarily be made a party to the proceedings. He was not.

Here, one must bifurcate the terms 'party' and 'necessary party'. 'Party' has been correctly defined by the High Court in the impugned judgment in terms of involvement in the proceedings regardless of formal impleadment. However, a necessary party has been defined in the 5th edition of Black's Law Dictionary as follows:-

> "In pleading and practice, those persons who must be joined in an action because, inter alia, complete relief cannot be given to those already parties without their joinder. Fed. R. Civil P. 19 (a) "

First and foremost, as has been stated in the body of the judgment, natural justice would mandate involvement of a driver, as an adverse finding on negligence cannot and should not be made against him without giving him the opportunity to at least make a representation as a witness. More importantly, however, one must look at the kind of evidence which must be led in such cases. Appellants have, as noticed hereinbefore, relied on Patel Roadways (supra) to try and prove that the

driver need not be a party. Firstly, this case only relates to formally impleading the driver as a party. However, the fact that joint tortfeasors have been mentioned in the judgment is relevant.

Joint tortfeasors, as per the 10th edition of Charlesworth & Percy on Negligence, have been described as under:-

> "Wrongdoers are deemed to be joint tortfeasors, within the meaning of the rule, where the cause of action against each of them in the same, namely that the same evidence would support an action against them, individually Accordingly, they will be jointly liable for a tort which they both commit or for which they are responsible because the law imputes the commission of the same wrongful act to two or more persons at the same time. This occurs in cases of (a) agency; (b) vicarious liability; and (c) where a tort is committed in the course of a joint act, whilst pursuing a common purpose agreed between them."

Hence, employer and employee, the former being vicariously liable while the latter being primarily liable are joint tortfeasors and are therefore jointly and severally liable. However, by virtue of the fact that the cause of action is the same and that the same evidence would support an action against either, it follows that this evidence must necessarily include an examination of the driver who is primarily liable. To make a finding on negligence without involving the driver as at least a witness would vitiate the proceedings not only on the basis of the fact that the driver has not been given an opportunity to make a representation, but also because the evidence to make a finding regarding negligence would necessarily be inadequate.

24. On this basis, a driver should be made a 'party' to the proceedings. It was done in the instant case. In the present case, the contention of the counsel for the respondent Insurance Company, namely that without contrary evidence led by the appellant or Corporation, the finding of negligence on the part of the appellant cannot be interfered with, must be upheld. Without a deposition on the part of the truck driver and without his involvement at least as a witness, an adverse finding on negligence cannot be made against him.

In any event, the truck driver was examined as RW1.

Therefore, in the circumstances, the driver of the bus was examined in the first set of claims cases in the same manner as the driver of the truck was examined in the second set of cases (which has been filed by the Appellant).

25. If we accept the contention of Ms. Suri that the Tribunal committed an error, in effect and substance, we will be holding that the Tribunal committed an illegality in awarding compensation to the passengers of the bus. It was in that sense, the High Court cannot be said to have committed any error in holding that the appellant was also an aggrieved person. Furthermore, both the Tribunal and the High Court have rightly arrived at a finding of fact that it was the appellant alone who was rash and negligent in driving of the vehicle. No case had been made out to differ with the said finding of fact.

26. For the reasons aforementioned, the impugned judgment does not suffer from any legal infirmity. It is therefore, dismissed. However, in the facts and circumstances of this case, there shall be no order as to costs.