

In the High Court of Madhya Pradesh
MA 1045/2009
Madhya Pradesh Sadak Parivahan Nigam vs. Smt. Pratima Sharma and Ors
Gwalior, dtd. 26/02/2019

Shri Arvind Kumar Agrawal, counsel for the appellants.

Shri RP Gupta, counsel for the respondents No. 1 to 3.

This Misc. Appeal under Section 173 of Motor Vehicles Act, has been filed against the award dated 9-6-2009 passed by 3rd Additional Judge to the Court of 1st Accident Claims Tribunal, Gwalior in claim Case No.1/2009, by which the appellants have been held to be the owner of the offending bus.

The claimants have also filed the cross-objection, however, as no Court fee has been paid, therefore, the same is rejected.

The necessary facts for the disposal of the present appeal in short are that on 13-4-2007, at about 12 P.M., the deceased Dr. Jairam Sharma was going on his motor cycle with one Pawan Dwivedi. When they reached near Itwah turn, the respondent no. 5/defendant no.2, by driving the bus bearing registration No.M.P. 34-P0108, in a rash and negligent manner, hit the deceased as a result of which, he sustained fatal injuries and died on the spot. The F.I.R. was lodged and criminal case was also registered against the respondent no.5.

The claimants filed their claim petition against the respondent nos. 4, 5 and the appellants, for grant of compensation.

It was the contention of the appellant, that the appellants are not the owner of the bus. The respondent no. 4 is the owner of the bus, and the appellants had taken the bus on lease. The driver of the bus, was the employee of respondent no. 4. Therefore, it is submitted that the Claims Tribunal has wrongly held that the

appellants are also severally and jointly liable to pay compensation.

Per contra, it is submitted by the Counsel for the claimants that the bus was leased out in favor of the appellants by an agreement. The bus was being plied under the control of the appellants, therefore, they are the owners of the offending bus and accordingly, they are also liable to pay the compensation.

Heard the learned Counsel for the parties.

The undisputed fact is that the offending bus was leased out to the appellants by lease deed dated 2-5-2006, Ex.D-1C. Clause 1 and 2 of the lease deed reads as under :

"1. यह कि बस मालिक श्री कमल सिंह ठाकुर द्वारा दी गई बस में स्वयं की ओर से चालक नियुक्त करेगा तथा चालक के पूरे खर्चे जैसे वेतन आदि द्वितीय पक्ष द्वारा देय होंगे। इसके अतिरिक्त वाहन के संचालन से होने वाले संपूर्ण खर्च उदाहरणार्थ डीजल, तेल, मरम्मत, टूट फूट, बीमा यात्रियों की सुरक्षा संबंधी उत्तरदायित्व मोटर यान दुर्घटना अधिनियम के अंतर्गत देय समस्त क्षतिपूर्ति का दायित्व आदि द्वितीय पक्ष द्वारा ही वहन किये जावेंगे।

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2. लीज पर ली गई संबंधित डिपो प्रबंधक के डिपो द्वारा संचालित की जावेगी एवं उसी डिपो के कोषालय में आय जमा होगी।"

Thus, it is clear that the bus was to be operated under the control and direction of the appellants and the income was to be deposited in the accounts section of the said depot.

However, as per clause 1, the liability to pay compensation under the Motor Vehicles Act is of the owner.

The next moot question for determination is that whether the appellants can be said to be the owners of the offending bus and whether they are liable to pay compensation or not?

So far as clause 1 of the lease deed, Ex. D/1 is concerned, it is a contract between the appellants and the owner and the claimants are the third party. Thus, this Court is of the considered opinion, that the appellants are free to enforce the condition of clause 1 of the lease deed against the owner, but the third party is not bound by the clause 1 of the lease deed.

Clause 2 of the agreement clearly speaks that the bus would be operated/plied under the control of the Depot Manager, and the income of the bus was also to be deposited in the accounts section of the respective Depot. Thus, it is clear that the bus was to be operated under the control (Administrative as well as Financial) of the appellants.

The Supreme Court in the case of **Rajasthan State Road Transport Corporation Vs. Kailash Nath Kothari and other etc.** Reported in (1997) 7 SCC 481 has held as under :-

"14. 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 been 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.

15. 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 let all the passengers 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, waybills 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, 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.”

16. The admitted facts unmistakably show that the vehicle in question was in possession and under the actual control of RSRTC for the purpose of running on the specified route and was being used for carrying, on hire, 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.

17. The definition of *owner* under Section 2(19) 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 fare 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 somewhat 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 employee concerned during the course of his employment and within the scope of his authority, is a rebuttable presumption. If 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 employee concerned 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 payroll 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."

The Division Bench of this Court in the case of **Madhya Pradesh State Road Transport Corporation Vs. Wahidan and others** reported in 2008 ACJ

1768 has also held that since the hirer was in actual control and possession of the bus, therefore, he would fall within the definition of “owner” and is vicariously liable to pay compensation for the tort committed by the driver, even if driver was employee of the registered owner.

Thus, it is clear that the bus was being operated on a route for which the permit was required and the only because of the lease agreement, the owner of the bus could ply the bus on the said route. Further, the bus was to be operated under the control of the appellants. Thus, it can be safely said that the appellants were in control and possession of the offending bus as a result of which they the “owners” of the offending bus, and accordingly, they are also liable to pay compensation.

Accordingly, the award dated 9-6-2009 passed by 3rd Additional Judge to the Court of 1st Accident Claims Tribunal, Gwalior in claim Case No. 1/2009 is hereby affirmed.

The appeal fails and is hereby **Dismissed**.

(G.S. Ahluwalia)
Judge