Pushpabai Purshottam Udeshi and Others

Vs

M/S. Ranjit Ginning & Pressing Co. (P) Ltd. and Another

Civil Appeal No. 2071 of 1968

(CJI M. H. Beg, P. S. Kailasam, JJ)

25.03.1977

JUDGMENT

KAILASAM, J. –

1. This is an appeal by certificate under Article 133(1)(a) of the Constitution granted by the High Court of Madhya Pradesh. The appellants filed a claim for compensation of a sum of rupees one lakh under Section 110 of the Motor Vehicles Act before the Claims Tribunal, Jabalpur. The first claimant is the wife and the claimants 2 to 8 are the children of one Purshottam Tulsidas Udeshi who met with his death in a motor car accident on December 18, 1960 when he was travelling in the car which was driven by Madhavjibhai Mathuradas Ved, the Manager of the first opponent company, M/s. Ranjit Ginning and Pressing Co. Private Ltd., in a rash and negligent manner near a village called Chincholi-Vad which was 16 miles from Saoner. The car which was a Hindustan Ambassador Saloon was insured with second opponent, Union Fire Accident and General Insurance Co. Ltd. The deceased was aged 58 years at the time of his death and according to the petitioners was earning annually about Rs. 9000. They claimed a compensation of rupees one lakh. The opposite parties, the owner and the insurance company, opposed the claim. While admitting that the vehicle was proceeding from Nagpur on its way to Pandhurna for the purpose mentioned by the applicants they denied that the vehicle was driven in a rash and negligent manner and pleaded that the vehicle was at the time of accident in perfectly sound condition. It was submitted that the husband of applicant 1 was travelling in the said vehicle on his own responsibility and for his own purpose and absolutely gratis and not on behalf of or at the instance of the opposite party 1, or the driver of the vehicle and therefore the claimants are not entitled to any compensation. The opposite parties pleaded that the incident was as a result of inevitable accident and not due to any act of rashness or negligence on the part of the driver. They opposed the claim of the compensation as highly exaggerated.

2. The Motor Accidents Claims Tribunal, Jabalpur, found that the accident of the motor vehicle was as a result of negligent driving of the vehicle by the Manager, Madhavjibhai Mathuradas Ved, the driver of the vehicle. It also found that the first respondent, the owner of the company, is liable to pay compensation to the claimants on account of the negligence of their employee Madhavjibhai which caused the death of Purshottam Tulsidas Udeshi. Regarding the compensation payable, the Tribunal fixed Rs. 31,209.15 as general damages in addition to Rs. 2000 as special damages for funeral and post-funeral expenses. The owner, first opponent, preferred an appeal to the High Court impleading the claimants and the insurance company as respondents against the award passed by the Claims Tribunal. The High Court did not decide the question as to whether the accident was due to the rash and negligent driving or the quantum of compensation to which the claimants were entitled to as it allowed the appeal by the owner on the ground that the owner cannot be held vicariously

liable for the act of Madhavjibhai in taking Purshottam as a passenger as the said act was neither in the course of his employment nor under any authority whatsoever and that there was no evidence that the owners of the vehicle were aware that Purshottam was being taken in the car as a passenger by their Manger, Madhavjibhai. Holding that so far as the owners are concerned Purshottam was no better than a trespasser the High Court held that the owners were not vicariously liable. On an application by the claimants the High Court granted a certificate and thus this appeal has come before this Court.

3. The questions that arise for consideration are whether on the facts of the case the claimants have established (1) that the accident was due to the rash and negligent driving of Madhavjibhai Mathuradas Ved, the Manager of the company, and (2) whether the incident took place during the course of the employment of the driver. In the event the claimants succeed on these two points the amount of compensation to which they are entitled would have to be determined.

4. The High Court relying on three decisions in Sitaram Motilal Kalal v. Santanuprasad Jaishankar Bhatt ((1966) 3 SCR 527 : AIR 1966 SC 1967), Canadian Pacific Railway Company v. Leonard Lockhart (AIR 1943 PC 63 : 209 IC 616 : 1943 AWR PC 7), and Conway v. George Wimpey & Co. Ltd. ((1951) 1 All ER 363), came to the conclusion that the rash and negligent driving by the Manager was not in the course of his employment. The learned Counsel for the respondent relied on some other decisions which will be referred to in due course.

5. The High Court has not gone into the question as to whether the car was being driven rashly and negligently by the owner's employee as it held that the act was not in the course of his employment. We feel that the question as to whether the car was being driven rashly and negligently would have to be decided on the facts of the case first for, if the claimants fail to establish rash and negligent act no other question would arise. We would therefore proceed to deal with this question first. The claimants did not lead any direct evidence as to how the accident occurred. No eye-witness was examined. But PW 1, the younger brother of the deceased Purshottam Udeshi, who went to the spot soon after the accident was examined. He stated that he went with one of his relatives and an employee of his brother's employer and saw that the car had dashed against a tree while proceeding from Nagpur to Pandhurna. The tree was on the right hand side of the road, four feet away from the right hand side of the main metalled road. The vehicle will have to proceed on the left hand side of the road. The road was 15 feet wide and was a straight metalled road. On either side of the road there were fields. The fields were of lower level. The tree against which the car dashed was uprooted about 9 to 10 inches from the ground. The car dashed so violently that it was broken in the front side. A photograph taken at that time was also filed. According to the witness the vehicle struck so violently that the machine of the car from its original position went back about a foot. The steering wheel and the engine of the car receded back on driver's side and by the said impact the occupants died and front seat also moved back. The witness was not cross-examined on what he saw about the state of the car and the tree. It was not suggested to him that the car was not driven in a rash and negligent manner. In fact there is no cross-examination on the aspect of rash and negligent driving. The Claims Tribunal on this evidence found that "it was admittedly a mishap on the right side of the road wherein the vehicle had dashed against a tree beyond the payment so violently as not only to damage the vehicle badly but also entailing death of its three occupants, maxim 'res ipsa loquitur' applies" (see Ellor v. Selfridge ((1930) 46 ITR 236)). The Tribunal proceeded to discuss the evidence of PW 1 and found on the evidence that it cannot help concluding that the dashing of the car against the tree was most violent and that it was for the respondents to establish that it was a case of inevitable accident. They have led no evidence. It may at once be stated that though the opposite parties had pleaded that this is a case of inevitable accident they have not led any evidence

to establish their plea. The burden rests on the opposite party to prove the inevitable accident. To succeed in such a defence the opposite party will have to establish that the cause of the accident could not have been avoided by exercise of ordinary care and caution. "To establish a defence of inevitable accident the defendant must either show what caused the accident and that the result was inevitable, or he must show all possible causes, one or more of which produced the effect, and with "regard to each of such possible causes he must show that the result could not have been avoided". (Halsbury's Laws of England, Third Ed. Vol. 28, p. 81). No such attempt was made and before us the plea of inevitable accident was not raised. We have therefore to consider whether the claimants have made out a case of rash and negligent driving. As found by the Tribunal there is no eye-witness and therefore the question is whether from the facts established the case of rash and negligent act could be inferred. The Tribunal has applied the doctrine of "res ipsa loquitur". It has to be considered whether under the circumstances the Tribunal was justified in applying the doctrine.

6. The normal rule is that it is for the plaintiff to prove negligence but as in some cases considerable hardship is caused to the plaintiff as the true cause of the accident is not known to him but is solely within the knowledge of the defendant who caused it, the plaintiff can prove the accident but cannot prove how it happened to establish negligence on the part of the defendant. This hardship is sought to be avoided by applying the principle of res ipsa loquitur. The general purport of the words res ipsa loquitur is that the accident "speaks for itself" or tells its own story. There are cases in which the accident speaks for itself so that it is sufficient for the plaintiff to prove the accident and nothing more. It will then be for the defendant to establish that the accident happened due to some other cause than his own negligence. Salmond on the Law of Torts (15th Ed.) at p. 306 states : "The maxim res ipsa loquitur applies whenever it is so improbable that such an accident would have happened without the negligence of the defendant that a reasonable jury could find without further evidence that it was so caused". In Halsbury's Laws of England, 3rd Ed., Vol. 28, at p. 77, the position is stated thus : "An exception to the general rule that the burden of proof of the alleged negligence is in the first instance on the plaintiff occurs wherever the facts already established are such that the proper and natural inference arising from them is that the injury complained of was caused by the defendant's negligence, or where the event charged as negligence 'tells it own story" of negligence on the part of the defendant, the story so told being clear and unambiguous". Where the maxim is applied the burden is on the defendant to show either that in fact he was not negligent or that the accident might more probably have happened in a manner which did not connote negligence on his part. For the application of the principle it must be shown that the car was under the management of the defendant and that the accident is such as in ordinary course of things does not happen if those who had the management used proper care. Applying the principles stated above we have to see whether the requirements of the principle have been satisfied. There can be no dispute that the car was under the management of the company's manager and that from the facts disclosed by PW 1 if the driver had used proper care in the ordinary course of things the car could not have gone to the right extreme of the road, dashed against a tree and moved it a few inches away. The learned Counsel for the respondents submitted that the road is a very narrow road of the width of about 15 feet on either side of which were fields and that it is quite probable that cattle might have strayed into the road suddenly causing the accident. We are unable to accept the plea for in a country road with a width of about 15 feet with fields on either side ordinary care requires that the car should be driven at a speed in which it could be controlled if some stay cattle happened to come into the road. From the description of the accident given by PW 1 which stands unchallenged the car had proceeded to the right extremity of the road which is the wrong side and dashed against a tree uprooting it about 9 inches from the ground. The car was broken on the front side and the vehicle struck the tree so violently that the engine of the car was displaced from its original position

one foot on the back and the steering wheel and the engine of the car had receded back on the driver's side. The car could not have gone to the rights extremity and dashed with such violence on the tree if the driver had exercised reasonable care and caution. On the facts made out the doctrine is applicable and it is for the opponents to prove that the incident did not take place due to their negligence. This they have not even attempted to do. In the circumstances we find that the Tribunal was justified in applying the doctrine. It was submitted by the learned Counsel for the respondents that as the High Court did not consider the question this point may be remitted to the High Court. We do not think it necessary to do so for the evidence on record is convincing to prove the case of rash and negligent driving set up by the claimants.

7. The second contention that was raised by the counsel for the appellants is that the High Court was in error in holding that the incident did not take place in the course of the employment or under the authority of the company. The High Court found that there is no evidence that the owner of the vehicle was aware that Purshottam was being taken in the car as a passenger by Madhavjibhai and in the circumstances the owner cannot be held liable for the tortious act of the servant. The High Court found that the car was going from Nagpur to Pandhurna on the business of the company and it may also be that Madhavjibhai, the Manager of the owner's car, was also going on the business of the owner and it may also be that he had the implied authority to drive the vehicle. Having agreed with the contentions of the claimants so far, the High Court came to the conclusion that there were no pleadings on material on record to establish that Purshottam was travelling in the vehicle either on some business of the owner of the vehicle or under any ostensible authority from them to their manager Madhavjibhai to take Purshottam as a passenger in the vehicle. Before dealing with the right of Purshottam as a passenger, we will consider the question whether the accident took place during the course of the employment of Madhavjibhai by the company. It is admitted in the written statement by the owner that Madhavjibhai was the Manager of opposite party 1 and that the vehicle was proceeding from Nagpur on its way to Pandhurna for purpose of delivering an amount of Rs. 20,000 to the Ginning and Pressing factory at Pandhurna. The Tribunal found on the pleadings that Madhavjibhai was the employee of the company and during the course of employment by driving the motor car he negligently caused the death of Purshottam. The High Court also confirmed the findings and found that Madhavjibhai, the Manager of the owner of the car, was going on the business of the said owner and that it may be that the Manager had the implied authority to drive the vehicle. On such a finding which is not disputed before us, it is difficult to resist the conclusion that the accident was due to the negligence of the servant in the course of his employment and that the master is liable. On the facts found the law is very clear but as the question of the company's liability was argued at some length, we will proceed to refer to the law on the subject.

8. It is now firmly established that the master's liability is based on the ground that the act is done in the scope or course of his employment or authority. The position was stated by Lord Justice Denning in Young v. Edward Box and Co. Ltd. ((1951) 1 TLR 789, 793). The plaintiff and fellow workmen were given a lift on one of the defendants' lorries with the consent of his foreman and of the driver of the lorry. On a Sunday evening the plaintiff, in the course of that journey, was injured by the negligence of the driver of the lorry and the plaintiff brought an action against the defendants claiming damages for his injuries. The defence was that the plaintiff, when on the lorry, was a trespasser. The traffic manager of the defendants pleaded that he had never given instructions to the foreman that he should arrange for lifts being given to the plaintiff and his fellow-workmen on Sundays and that the foreman had no authority to consent to the plaintiff's riding on the lorry. While two learned Judges held that the right to give the plaintiff leave to ride on the lorry was within the ostensible authority of the foreman, and that the plaintiff was entitled to rely on that authority and in that respect was a licensee, Lord Denning held that although the plaintiff, when on the lorry, was a

trespasser, so far as the defendants were concerned, the driver was acting in the course of his employment in giving the plaintiff a lift and that was sufficient to make the defendants liable and that he did not base his judgment on the consent of the foreman. Lord Justice Denning stated the position thus :

> . . . the first question is to see whether the servant was liable. If the answer is Yes, the second question is to see whether the employer must shoulder the servant's liability. So far as the driver is concerned, his liability depends on whether the plaintiff was on the lorry with his consent or not.........
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> The next question is how far the employers are liable for their servant's conduct. In order to make the employers liable to the passenger it is not sufficient that they should be liable for their servant's negligence in driving. They must also be responsible for his conduct in giving the man a lift. If the servant has been forbidden, or is unauthorized, to give anyone a lift, then no doubt the passenger is a trespasser on the lorry so far as the owners are concerned; but that is not of itself an answer to the claim...... In my opinion, when the owner of a lorry sends his servant on journey with it, thereby putting the servant in a position, not only to drive it, but also to give people a lift in it, then he is answerable for the manner in which the servant conducts himself on the journey, not only in the driving of it, but also in giving lifts in it, provided, of course, that in so doing the servant is acting in the course of his employment.

Lord Justice Denning concluded by observing that the passenger was therefore a trespasser, so far as the employers were concerned; but nevertheless the driver was acting in the course of his employment, and that is sufficient to make the employers liable. It will thus be seen that while two of the learned Judges held that the right to give the plaintiff leave to ride on the lorry was within the ostensible authority of the foreman and the plaintiff was entitled to rely on that authority as a licensee. Lord Denning based it on the ground that even though the plaintiff was a trespasser so far as the defendants were concerned, as the driver was acting in the course of his employment in giving the plaintiff a life, it was sufficient to make the defendants liable. Applying the test laid down there can be no difficulty in concluding that the right to give leave to Purshottam to ride in the car was within the ostensible authority of the Manager of the company who was driving the car and that the Manager was acting in the course of his employment in giving leave to Purshottam. Under both the tests the respondents would be liable.

9. We will now refer to the three cases relied on by the High Court for coming to the conclusion that the accident did not take place during the course of employment. The first case referred to is Sitaram Motilal Kalal v. Santanuprasad Jaishankar Bhatt (supra). The owner of a vehicle entrusted it to A for plying it as a taxi. B who used to clean the taxi was either employed by the owner or on his behalf by A. A trained B to assist him in driving the taxi and took B for obtaining a licence for driving. While taking the test B caused bodily injury to the respondent. A was not present in the vehicle at the time of the accident. On the question whether the owner was liable the majority held the view that the owner was not liable. On the facts the Court found that the person who had borrowed the taxi for taking out a licence and the driver who lent the same was not acting in the course of his business. The Court on an application of the test laid down in various decisions held that there is no proof that the second defendant, the driver, was authorized to coach the cleaner so that the cleaner might become a driver and drive the taxi and that it appeared more probable that the second defendant wanted someone to assist him in driving the taxi for part of the time and was

training the third defendant to share the task of driving. The owner's plea that it had not given any such authority was accepted by the Court. Holding that it had not been proved that the act was impliedly authorized by the owner or to come within any of the extensions, of the doctrine of scope of employment the Court held that the owner is not liable. This Court has held that the test is whether the act was done on the owner's business or that it was proved to have been impliedly authorized by the owner. At page 537 it is stated that the law is settled that master is vicariously liable for the acts of his servants 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 authorized by the master or a wrongful and unauthorized mode of doing some act authorized by the master. The extension of the doctrine of the scope of employment noticed in the judgment refers to the decision of Ormrod v. Crosville Motor Services Ltd. ((1953) 2 All ER 753), where Lord Denning stated : "It has often been supposed that the owner of a vehicle is only liable for the negligence of the driver if that driver is his servant acting in the course of his employment. This is not correct. The owner is also liable if the driver is, with the owner's consent, driving the car on the owner's business or for the owner's purposes". The Supreme Court accepted the test and to that extent this may be taken as an extension of the doctrine of scope of employment. Thus, on the facts as we have found that the accident took place during the course of employment the decision in Sitaram Motilal Kalal (supra) is of no help to the respondents.

10. The next case which is referred to by the High Court is Canadian Pacific Railway Company v. Lockhart (supra). In that case one S was employed as a carpenter by the railway company. In the course of his employment he was required to make repairs of various kinds to employer's property. He made a key for use in a lock in the station at N far away from his headquarters at W. He was paid per hour and the railway company kept vehicles to be used by S available for him. S, however, had a car of his own and without communicating his intention to anyone he used it on his way to N. An accident happened on the way owing to S's negligence. It was also in evidence that the railway company had issued notice to its servants particularly to S warning him against using their private cars unless they had got their cars insured against third party risk. On the facts, the Privy Council held that the means of transport used by the carpenter was clearly incidental to execution of that for which he was employed. As what was prohibited was not acting as a driver by using a non-insured car, the prohibition merely limited the way in which the servant was to execute the work which he was employed to do and that breach of the prohibition did not exclude the liability of the master to third party. We do not see how this case would help the respondents. On the other hand it supports the contention of the counsel for the appellants that when the Manager was driving the car for the purposes of the company it was in the course of his employment.

11. The third case that is referred to by the High Court is Conway v. George Wimpey & Co. Ltd. (supra). The defendants, a firm of contractors, were engaged in building work at an aerodrome, and they provided lorries to convey their employees to the various places of their work on the site. In the cab of each lorry was a notice indicating that the driver was under strict orders not to carry passengers other than the employees of the defendants during the course of, and in connection with, their employment, and that any other person travelling on the vehicle did so at his own risk. Further the driver of the lorry had received clear oral instructions prohibiting him from taking other persons. The plaintiff who was employed as a labourer by another firm of contractors at the aerodrome, while on his way to work, was permitted by the driver to ride on one of the defendants' lorries for some distance across the aerodrome and while dismounting the plaintiff was injured owing to driver's negligence. The Court held that on the facts of the case the taking of the defendants' employees on the vehicle was not merely a wrongful mode of performing an act of the class which

the driver in the present case was employed to perform but was the performance of an act of a class which he was not employed to perform at all. The facts stated above are entirely different from those which arise in the present case before us as in the case before the Court of Appeal (62 PLR 463) there was a notice indicating that the driver was under strict orders not to carry passengers and the driver was instructed not to carry others while in the present case a responsible officer of the company, the Manager, had permitted Purshottam to have a ride in the car. Taking into account the high position of the driver who was the Manager of the company, it is reasonable to presume, in the absence of any evidence to the contrary, that the Manager had authority to carry Purshottam and was acting in the course of his employment. We do not see any support for the conclusion arrived at by the High Court that the driver was not acting in the course of his employment.

12. We will now proceed to refer to some cases which were cited by the learned Counsel for the respondents. The learned Counsel placed reliance on the decision in Houghton v. Pilkington ((1912) 3 KB 308). In that case the plaintiff at the request of a servant of the defendant got into the defendant's cart which was then in the charge of the servant, in order to render assistance to another servant of the defendant who had been rendered unconscious by an accident. The plaintiff fell out of the cart and was injured through the negligence of the servant in charge of the cart in causing the horse to start. In an action against the defendant for damages for the injuries sustained by the plaintiff it was held that the existence of an emergency gave no implied authority to the servant to invite the plaintiff into the cart and that the defendant was not liable to the plaintiff. Justice Bankes while agreeing with Justice Bray who delivered the leading judgment expressed his view that the lower court had taken the view that an emergency had arisen which gave the defendant's servant implied authority to invite the plaintiff into the cart for the purpose of rendering assistance to the injured boy. The learned Judge was first inclined to agree with that view but because of the case being governed by Cox v. Midland Counties Ry. Co. (3 Ex. 368) he felt he could not consistently with that decision hold that in the circumstances the driver of the cart had any implied authority to invite the plaintiff to get into the car. The facts of Houghton v. Pilkington are entirely different and the decision was based on the ground that existence of the emergency did not confer on the driver of the cart authority to invite the plaintiff into the cart.

13. The next case that was cited by the learned Counsel for the respondents was Twine v. Bean's Express, Limited ((1945-46) 62 TLR 155). The defendants provided for the use of a bank a commercial van and a driver on the terms that the driver remained the servant of the defendants and that the defendants accepted no responsibility for injury suffered by persons riding in the van who were not employed by them. There were two notices on the van, one stating that no unauthorized person was allowed on the vehicle, and the other that driver had instructions not to allow unauthorized travellers in the van, and that in no event would the defendants be responsible for damage happening to them. One T who was not authorized to ride in the van got a lift in the van with the consent of the driver. Owing to the negligence of the driver the accident occurred and T was killed. The contention that the accident arose while the driver was engaged on a duly authorized journey was negatived and it was held that defendants owed no duty to T to take care. This case was taken up on appeal which confirmed the view of the trial Court holding that the driver in giving the lift to T was clearly not acting within the scope of his employment and his employers were consequently not liable. The facts are totally different. The learned Counsel for the respondents was not able to produce any authority which would support his contention that on the facts of the case found, the company should not be held liable.

14. Before we conclude, we would like to point out that the recent trend in law is to make the master liable for acts which do not strictly fall within the term "in the course of the employment" as

ordinarily understood. We have referred to Sitaram Motilal Kalal v. Santanuprasad Jaishankar Bhatt where this Court accepted the law laid down by Lord Denning in Ormrod v. Crosville Motor Services Ltd. (supra) that the owner is not only liable for the negligence of the driver if that driver is his servant acting in the course of his employment but also when the driver is, with the owner's consent, driving the car on the owner's business or for the owner's purposes. This extension has been accepted by this Court. The law as laid down by Lord Denning in Young v. Edward Box and Co. Ltd. already referred to i.e., the first question is to see whether the servant is liable and if the answer is yes, the second question is to see whether the employer must shoulder the servant's liability, has been uniformally accepted as stated in Salmond Law of Torts, 16th Ed., p. 606, in Crown Proceedings Act, 1947 and approved by the House of Lords in Staveley Iron and Chemical Co. Ltd. v. Jones (1956 AC 627) and I.C.I. Ltd. v. Shatwell (1965 AC 656). The scope of the course of employment has been extended in Navarro v. Moregrand Ltd. ((1951) 2 TLR 674) where the plaintiff who wanted to acquire the tenancy of a certain flat, applied to the second defendant, a person with ostensible authority to conduct the business of letting the particular flat for the first defendant, the landlord. The second defendant demanded from the plaintiff a payment of Pound 225 if he wanted the flat and the plaintiff paid the amount. The plaintiff south to recover the sum from the landlord under the Landlord and Tenant (Rent Control) Act, 1949. The Court of Appeal held that the mere fact that the second defendant was making an illegal request did not constitute notice to the plaintiff that he was exceeding his authority and that, though the second defendant was not acting within his actual or ostensible authority in asking for the premium, as the landlord had entrusted him with the letting of the flat, and as it was in the very course of conducting that business that he committed the wrong complained of; he was acting in the course of his employment. Lord Denning took the view that though the second defendant was acting illegally in asking for and receiving a premium and had no actual or ostensible authority to do an illegal act, nevertheless, he was plainly acting in the course of his employment, because his employers, the landlords, had entrusted him with the full business of letting the property, and it was in the very course of conducting that business that he did the wrong of which complaint is made. This decision has extended the scope of acting in the course of employment to include an illegal act of asking for and receiving a premium though the receiving of the premium was not authorized. We do not feel called upon to consider whether this extended meaning should be accepted by this Court. It appears Lord Goddard, Chief Justice, had gone further in Barker v. Levinson (66 TLR (Pt. 2) 717) and stated that "the master is responsible for a criminal act of the servant if the act is done within the general scope of the servant's employment". Lord Justice Denning would not go to this extent and felt relieved to find that in the authorized Law Reports (1951) 1 KB 342, the passage quoted above was struck out. We respectfully agree with the view of Lord Denning that the passage attributed to Lord Chief Justice Goddard went a bit too far.

15. On a consideration of the cases, we confirm, the law as laid down by this Court in Sitaram Motilal Kalal v. Santanuprasad Jaishankar Bhatt (supra) and find that in this case the driver was acting in the course of his employment and as such the owner is liable. We therefore set aside the finding of the High Court that the act was not committed in the course of employment or under the authority of the master, and allow the appeal.

16. The only point that remains is the determination of the quantum of compensation to which the appellants are entitled to. The High Court did not go into this question but the Tribunal after taking into consideration the various facts fixed the compensation at Rs. 33,209.15 with costs and directed that the insurance company shall indemnify the owner to the extent of Rs. 15,000. The Tribunal fixed special damages for funeral and post-funeral expenses including transport charges at Rs. 2000. This item is not disputed. The second item is a sum of Rs. 31,209.15 which according to the

Tribunal would have been the amount which the deceased would have earned by continuing to work for a period of 5 years. The Tribunal accepted the documents produced by the claimants regarding the income of the deceased and fixed it at Rs. 9316.83 per annum. Out of this amount the Tribunal rightly excluded a sum of Rs. 1875 which is the bonus the deceased would have got as it cannot be taken into account and fixed the net amount of earning at Rs. 7441.83 per year and Rs. 37,209.15 for 5 years. After deducting Rs. 6000 which the deceased might have spent on himself the Tribunal arrived at a figure of Rs. 31,209.15 under this head. The learned Counsel for the respondents referring to item 27 pointed out that the pay of the deceased was only Rs. 425 per month and that the Tribunal was in error in including the dearness allowance, conveyance allowance and other expenses and that the income of the deceased should have been taken as only Rs. 425 per month. The learned Counsel for the appellants accepts this figure. Taking Rs. 425 being the monthly income the annual income totals upto Rs. 5100 and for 5 years to Rs. 25,500. Adding to this Rs. 2000 which was given as special damages the total amount will come to Rs. 27,500. We accept this calculation as correct and restore the award passed by the Claims Tribunal but restrict it to an amount of Rs. 27,500.

17. As the Union Fire Accident & General Insurance Co. Ltd., Paris, carrying on business at Nagpur has been nationalised, though the second respondent before the Tribunal was represented by a counsel, we have directed notice to the nationalised insurance company so that they would also be heard.

18. The nationalised insurance company has taken notice and appeared through Mr. Naunit Lal, Advocate. The insurance company had nothing further to add except as to the quantum of liability of the insurance company so far as injuries to the passengers are concerned. Mr. Naunit Lal submitted that the scope of the statutory insurance does not cover the injury suffered by the passengers and as the owner has specifically insured under the insurance policy the risk to passengers to the extent of Rs. 15,000 only the liability of the insurance company should be limited to Rs. 15,000. On behalf of the owner it was submitted that the insurance cover under the Act extended to the injury to the passengers also and sought to support his contention by referring to Section 95(1)(b)(i) which provides against any liability to the owner which may be incurred by him in respect of death of or bodily injury to any person or damage to any property of a third party caused by or arising out of the use of the vehicle in a public place.

19. As Section 95 of the Motor Vehicles Act, 1935 as amended by Act 56 of 1969 is based on the English Act it is useful to refer to that. Neither the Road Traffic Act, 1960, or the earlier 1930 Act required users of motor vehicles to be insured in respect of liability for death or bodily injury to passengers in the vehicle being used except a vehicle in which passengers were carried for hire or reward or by reason of or in pursuance of a contract of employment. In fact, sub-section 203(4) of the 1960 Act provided that the policy shall not be required to cover liability in respect of death of or bodily injury to persons being carried in or upon, or entering or getting on to or alighting from, the vehicle at the time of the occurrence of the event out of which the claims arise. The provisions of the English Act being explicit the risk to passengers is not covered by the insurance policy. The provisions under the English Road Traffic Act, 1960, were introduced by the amendment of Section 95 of the Indian Motor Vehicles Act. The law as regards general exclusion of passengers is stated in Halsbury's Laws of England, Third Edition, Vol. 22, at p. 368, para 755 as follows :

Subject to certain exceptions a policy is not required to cover liability in respect of the death of, or bodily injury to, a person being carried in or upon, or entering or getting into or alighting from, the vehicle at the time of the occurrence of the event out of which the claim arises.

It is unnecessary to refer to the subsequent development of the English law and as the subsequent changes have not been adopted in the Indian statute, suffice it to say that the Motor Vehicle (Passenger Insurance) Act 1971, made insurance cover for passenger liability compulsory by repealing paragraph (a) and the proviso of sub-section 203(4). But this Act was repealed by Road Traffic Act, 1972 though under Section 145 of 1972 Act the coming into force of the provisions of Act 1971 covering passenger liability was delayed under December 1, 1972. (Vide Bingham's Motor Claims Cases, 7th Ed., p. 704).

20. Section 95(a) and 95(b)(i) of the Motor Vehicles Act adopted the provisions of the English Road Traffic Act, 1960, and excluded the liability of the insurance company regarding the risk to the passengers. Section 95 provides that a policy of insurance must be a policy which insures the persons against any liability which may be incurred by him in respect of death or bodily injury to any person or damage to any property of a third party caused by or arising out of the use of the vehicle in a public place. The plea that the words "third party" are wide enough to cover all persons except the person and the insurer is negatived as the insurance cover is not available to the passengers made clear by the proviso to sub-section which provides that a policy shall not be required :

> (ii) except where the vehicle is a vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment, to cover liability in respect of the death of or bodily injury to persons being carried in or upon or entering or mounting or alighting from the vehicle at the time of the occurrence of the event out of which a claim arises.

Therefore it is not required that a policy of insurance should cover risk to the passengers who are not carried for hire or reward. As under Section 95 the risk to a passenger in a vehicle who is not carried for hire or reward is not required to be insured the plea of the counsel for the insurance company will have to be accepted and the insurance company held not liable under the requirements of the Motor Vehicles Act.

21. The insurer can always take policies covering risks which are not covered by the requirements of Section 95. In this case the insurer had insured with the insurance company the risk to the passengers. By an endorsement to the policy the insurance company had insured the liability regarding the accidents to passengers in the following terms :

> In consideration of the payment of an additional premium it is hereby understood and agreed that the Company undertakes to pay compensation on the scale provided below for bodily injury as hereinafter defined sustained by any passenger........

The scale of compensation is fixed at Rs. 15,000. The insurance company is ready and willing to pay compensation to the extent of Rs. 15,000 according to this endorsement but the learned Counsel for the insured submitted that the liability of the insurance company is unlimited with regard to risk to the passengers. The counsel relied on Section II of the Policy which relates to liability to third parties. The clause relied on is extracted in full :

> Section II - Liability to Third Parties
>
> 1. The Company will indemnify the insured in the event of accident caused by or arising out of the use of the Motor Car against all sums including claimant's costs and

expenses which the insured shall become legally liable to pay in respect of

(a) death of or bodily injury to any person but except so far as is necessary to meet the requirements of Section 95 of the Motor Vehicles Act, 1939, the Company shall not be liable where such death or injury arises out of and in the course of the employment of such person by the insured.

It was submitted that the wording of clause 1 is wide enough to cover all risks including injuries to passengers. The clause provides that the Company will indemnify the insured against all sums including claimant's costs and expenses which the insured shall become legally liable. This according to the learned Counsel would include legal liability to pay for risk to passengers. The legal liability is restricted to clause 1(a) which states that the indemnity is in relation to the legal liability to pay in respect of death of or bodily injury to any person but except so far as is necessary to meet the requirements of Section 95 of the Motor Vehicles Act, the Company shall not be liable where such death or injury arises out of and in the course of the employment of such person by the insured. Clause 1 and 1(a) are not very clearly worded but the words "except so far as is necessary to meet the requirements of Section 95 of the Motor Vehicles Act, 1939", would indicate that the liability is restricted to the liability arising out of the statutory requirements under Section 95. The second part of clause 1(a) refers to the non-liability for injuries arising in the course of employment of such person. The meaning of this sub-clause becomes clear when we look to the other clauses of the insurance policy. The policy also provides for insurance of risk which are not covered under Section 95 of the Act by stipulating payment of extra premium. These clauses would themselves indicate that what was intended to be covered under clause 1 and 1(a) is the risk required to be covered under Section 95 of the Motor Vehicles Act.

22. On a construction of the insurance policy we accept the plea of the insurance company that the policy had insured the owner only to the extent of Rs. 15,000 regarding the injury to the passenger. In the result we hold that the liability of the insurance company is restricted to Rs. 15,000. There shall be a decree in favour of the claimants/appellants to the extent of Rs. 27,500 against the respondents out of which the liability of the insurance company will be restricted to Rs. 15,000. The appeal is allowed with the costs of the appellant which will be paid by the respondents in equal share.

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