

THE HIGH COURT OF TRIPURA
A G A R T A L A

MAC App. No. 126 of 2011

Appellant:

National Insurance Company Ltd.

Dharmanagar Branch, P.O, P.S & Sub-Division-Dharmanagar, District-North Tripura.

Represented by –The Divisional Manager,
National Insurance Co. Ltd. Agartala Divisional
Office, Akhaura Road, P.O-Agartala, P.S-West
Agartala, Sub-Division-Agartala, District-West
Tripura, PIN-799001.

By Advocate :

Mr. S. Lodh, Adv.

Respondents :

1. Smti Shibani Das,

Wife of Late Kartik Das.

2. Smti. Riya Das (minor),

Daughter of Late Kartik Das;

Both residents of Deocherra, P.O & PS-Panisagar, Sub-Division-Dharmanagar, District-North Tripura, PIN-799260;

(The respondent No.2 being minor is represented by her natural guardian, mother, respondent No.1.)

3. Shri Sushil Nath,

Son of Shri Subal Nath, resident of Kanchanpur, PO, PS & Sub-Division-Kanchanpur, District-North Tripura, PIN-799270, (Owner of Vehicle No. TR-02-B-1753, Tractor);

By Advocate :

Mr. A. Das, Adv.

B E F O R E
HON'BLE THE CHIEF JUSTICE MR. DEEPAK GUPTA

Date of hearing &
Judgment & Order : **28th July, 2015.**

Whether fit for reporting :

Yes	No
✓	

JUDGMENT & ORDER (ORAL)

This appeal by the insurance company is directed against the award dated 01.08.2011 delivered by the learned Motor Accident Claims Tribunal, North Tripura, Dharmanagar in T.S(MAC) No.54 of 2009 whereby the learned Tribunal awarded a sum of Rs.5,52,000/- as compensation in favour of the claimants.

[2] The claimants filed the petition under Section 166 of the Motor Vehicles Act, 1988 (for short, the Act) and the allegation is that the deceased one Kartik Das on whose account the compensation is claimed was himself driving the vehicle in question. No negligence of any other party is alleged. The only allegation was that the steering was locked. That would also not be the negligence of any other party and therefore, the insurance company contested the claim petition on the ground that a petition filed under Section 166 of the Act negligence has to be attributed to the some other person. That negligence neither having been attributed nor proved, the claim petition was not maintainable by the heirs of the driver of the vehicle which itself met with the accident. The claim petition in my view was not even maintainable and should have been rejected at the outset. The learned Tribunal gravely erred in awarding compensation because to award compensation under Section 166 of the Act negligence has to be proved. The Tribunal has not decided this question at all. He has only held since accident took place the claimants are entitled to compensation. This is not the spirit of Section 166 of the Act.

[3] The main issue which arises is whether a claim petition under Section 166 by the legal heirs of the person who was driving the vehicle himself

is maintainable under the Motor Vehicles Act when there is no negligence of any other party. Mr. S. Lodh, learned counsel has placed reliance on the judgment of the Apex Court in ***Oriental Insurance Company Limited Vs. Rajni Devi and others : (2008) 5 SCC 736***. In that case, the deceased was the owner of the vehicle. The Supreme Court held that there is no liability under the Motor Vehicles Act to cover the owner of the vehicle under Section 163A, but it found that in the policy in question, the insurance company had agreed to pay accident insurance to the owner to the extent of Rs.1,00,000/- and therefore, Rs.1,00,000/- was awarded as not under 163A, but as per the terms of the policy of insurance. In my view, this judgment does not help the petitioners at all.

[4] The next judgment relied upon by Mr. Lodh is ***Ningamma & anr. Vs. United India Insurance Co. Ltd. : 2009 AIR SCW 4916***. In the case before the Apex Court, the deceased was not the owner of the vehicle. He had borrowed the vehicle from the owner and was driving the vehicle. A claim petition was filed under Section 163A and the question which arose for decision by the Apex Court was whether any compensation was liable to be paid to the person, who had borrowed the vehicle from the owner. The Apex Court answered this question in the following terms:-

18. In the case of Oriental Insurance Company Ltd. v. Rajni Devi and Others, (2008) 5 SCC 736, wherein one of us, namely, Hon'ble Justice S.B. Sinha is a party, it has been categorically held that in a case where third party is involved, the liability of the insurance company would be unlimited. It was also held in the said decision that where, however, compensation is claimed for the death of the owner or another passenger of the vehicle, the contract of insurance being governed by the contract qua contract, the claim of the claimant against the insurance company would depend upon the terms thereof. It was held in the said decision that Section 163-A of the MVA cannot be said to have any application in respect of an accident wherein the

owner of the motor vehicle himself is involved. The decision further held that the question is no longer res integra. The liability under section 163-A of the MVA is on the owner of the vehicle. So a person cannot be both, a claimant as also a recipient, with respect to claim. Therefore, the heirs of the deceased could not have maintained a claim in terms of Section 163-A of the MVA. In our considered opinion, the ratio of the aforesaid decision is clearly applicable to the facts of the present case. In the present case, the deceased was not the owner of the motorbike in question. He borrowed the said motorbike from its real owner. The deceased cannot be held to be employee of the owner of the motorbike although he was authorised to drive the said vehicle by its owner, and therefore, he would step into the shoes of the owner of the motorbike."

[5] The Apex Court clearly held that the deceased, who had borrowed the vehicle, stepped into the shoes of the owner and therefore, no compensation could be claimed on his behalf under Section 163A. Mr. S. Lodh, learned counsel has placed reliance on the last three lines of Para 18 of the judgment quoted hereinabove wherein the Apex Court held that *the deceased cannot be held to be employee of the owner of the motorbike although he was authorized to drive the vehicle by its owner and therefore, he would step into the shoes of the owner of the motorbike*. Relying upon these lines, it is contended by Mr. Lodh that the Apex Court held that in case of employees, the insurance company would be liable. In my view, that is not the ratio of this judgment. If a borrower of the vehicle steps into the shoes of the owner I see no reason why the employee of the owner would not also step into the shoes of the owner. The relationship of an owner and an employee is much more legal relationship than the relationship between a owner and a borrower. Moreover, the observations of the Apex Court has to be read in the context of Section 147 of the Motor Vehicles Act wherein even in respect of a driver of the vehicle the insurance company would be liable as far as the liability under the Workmen's Compensation Act is concerned. In any event, this question is not in dispute

any longer. The Apex Court in ***National Insurance Company Ltd. v. Sinitha & ors : 2012 AIR SCW 10*** was dealing with a case in which, the deceased Shijo was driving a vehicle and died. A claim petition under Section 163A was filed. While allowing this petition, the Apex Court held that if the insurance company wanted to defeat the claim of the claimants it had to prove that the deceased had stepped into the shoes of the owner and one or the ways proving this was to be show that he was the employee of the owner.

[6] In this regard, reference may be made to Para 19 of the judgment, which reads as follows:-

"19. To substantiate his second contention, it would be essential for the petitioner to establish, that Shijo having occupied the shoes of the owner, cannot be treated as the third party. Only factual details brought on record through reliable evidence, can discharge the aforesaid onus. During the course of hearing, despite our queries, learned counsel for the petitioner could not point out the relationship between Shijo and the owner of the motorcycle involved in the accident. Shijo is not shown to be the employee of the owner. He was not even shown as the representative of the owner. In order to establish the relationship between the Shijo and the owner, the petitioner-Insurance Company could have easily produced either the owner himself as a witness, or even the claimants themselves as witnesses. These, or other witnesses, who could have brought out the relationship between the owner and Shijo, were not produced by the petitioner herein, before the Tribunal. The petitioner has, therefore, not discharged the onus which rested on its shoulders. Since the relationship between the Shijo and the owner has not been established, nor the capacity in which he was riding the vehicle has been brought out, it is not possible for us to conclude, that Shijo while riding the motorcycle on the fateful day, was an agent, employee or representative of the owner. It was open to the petitioner to defeat the claim for compensation raised by the respondents by establishing, that the rider Shijo represented the owner, and as such, was not a third party, in terms of the judgment rendered by this Court in Oriental Insurance Company Limited case (AIR 2001 SC 1832 : 2001 AIR SCW 1602)(supra). The petitioner failed to discharge the said onus. In view of the above, it is not possible for us to accede to the second contention advanced at the hands of the learned counsel for the petitioner.

[7] The Apex Court has clearly held that it was open to the insurance company to defeat the claim for compensation raised by the claimants by establishing that the rider of the motor cycle represented the owner and as such, not a third party. The Apex Court while holding this, further held that the relationship between the driver (Shijo) and the owner was not established nor the capacity in which he was riding the vehicle have been brought out and it was not possible for the Supreme Court to conclude whether he was driving the motor cycle as an agent, employee or representative of the owner. All these words have to be read in conjunction with each other and therefore, the agent, employee or representative of the owner would step into the shoes of the owner.

[8] An employee represents the owner. That is why for the wrongful acts of the employee, the owner is held vicariously liable. If the employee was not to represent the owner then the question of holding the owner vicariously liable in cases of tort would not arise. The employee steps into the shoes of the owner and as such in view of the judgments referred to above, no claim under Section 163A would be maintainable where the driver of the vehicle has stepped into the shoes of the owner and is driving the vehicle under his wish and command.

[9] Lastly, I am of the view that under Section 147 of the Motor Vehicles Act, the insurance company is not liable to cover liability in respect of the employee engaged in driving the vehicle except in so far as the liability is under the Workmen's Compensation Act. Reference may be made to Section 147(1) of the Act, which reads as follows:-

"147 Requirements of policies and limits of liability.
(1) In order to comply with the requirements of this
Chapter, a policy of insurance must be a policy which—
(a) is issued by a person who is an authorised insurer;
and
(b) insures the person or classes of persons specified in
the policy to the extent specified in sub-section (2)—
(i) against any liability which may be incurred by him
in respect of the death of or bodily²⁷ [injury to any
person, including owner of the goods or his
authorised representative carried in the vehicle] or
damage to any property of a third party caused by or
arising out of the use of the vehicle in a public place;
(ii) against the death of or bodily injury to any
passenger of a public service vehicle caused by or
arising out of the use of the vehicle in a public place:
Provided that a policy shall not be required—
(i) to cover liability in respect of the death, arising
out of and in the course of his employment, of the
employee of a person insured by the policy or in
respect of bodily injury sustained by such an
employee arising out of and in the course of his
employment other than a liability arising under the
Workmen's Compensation Act, 1923 (8 of 1923) in
respect of the death of, or bodily injury to, any such
employee—
(a) engaged in driving the vehicle, or
(b) if it is a public service vehicle engaged as
conductor of the vehicle or in examining tickets on
the vehicle, or
(c) if it is a goods carriage, being carried in the
vehicle, or
(ii) to cover any contractual liability.

[10] The proviso to Section 147(1) of the Motor Vehicles Act clearly lays down that the insurance company is not required to cover in the policy, any liability in respect of death arising out of and in the course of employment of the employee of the person insured by the policy or in respect of bodily injury sustained by such employee in the course of his employment other than a liability arising under the Workmen's Compensation Act. The language of the Section is very clear that the insurance company is only liable to pay cover liability which may fall upon it under the Workmen's Compensation Act.

[11] At this stage Mr. Das, learned counsel for the claimant-respondents urged that this petition may be converted to one under the Workmen's Compensation Act, 1923 (Now, Employee's Compensation Act, 1923). I cannot allow this prayer in this petition but liberty is reserved to the claimant to file a petition under the Workman's Compensation Act (Now, Employee's Compensation Act, 1923) since the claim petition filed under the Act is held to be non-maintainable. The question of exercising option under Section 167 of the Act will not apply because one cannot opt to take recourse to a remedy which is not permissible under law. Therefore, the petition, if any, filed for grant of workman's compensation shall not be rejected on the ground that the petitioners had first elected to file the present claim petition. However, the insurance company shall be entitled to defend the claim petition on all other grounds including the ground that the deceased was not an employee and the petition is not maintainable under the Employee's Compensation Act, 1923.

[12] The appeal is accordingly allowed. The award of the learned Tribunal in TS(MAC) No. 54 of 2009 dated 01.08.2011 is set aside. The claim petition under the Motor Vehicles Act is dismissed as not maintainable with liberty reserved to the claimants to file a petition under the Employee's Compensation Act, 1923. No order as to costs.

Send down the LCRs forthwith.

CHIEF JUSTICE