

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.R.RAMACHANDRA MENON

&

THE HONOURABLE MR. JUSTICE ANIL K.NARENDRA

THURSDAY, THE 26TH DAY OF NOVEMBER 2015/5TH AGRAHAYANA, 1937

MACA.No. 218 of 2014 ()

(AGAINST THE AWARD IN OPMV 288/2007 of MACT, NORTH
PARAVUR DATED 04-07-2013)

APPELLANT(S)/2ND RESPONDENT IN THE OP:

THE ORIENTAL INSURANCE CO.LTD.
EDAPPALLY, REPRESENTED BY THE AUTHORISED SIGNATORY
THE ORIENTAL INSURANCE CO.LTD, REGIONAL OFFICE
ERNAKULAM, METRO PALACE, ERNAKULAM NORTH
KOCHI-18.

BY ADV. SRI.A.R.GEORGE

RESPONDENT(S)/CLAIMANTS & 1ST RESPONDENT IN THE OP:

1. SANTHA
W/O.GOPINATHAN, PALIYAMPARAMBIL HOUSE, KALAMUKKU
AZHEEKKAL.P.O, PIN-682510.

2. SREEJESH,
S/O.GOPINATHAN, -DO- -DO-

3. SREEJA,
D/O.GOPINATHAN, -DO- -DO-

4. RAJESH,
S/O.RAJU, CHOOTHAMPARAMBU HOUSE, MURUKKUMPADAM
AZHEEKKAL.P.O, PIN-682510.

R1-3 BY ADV. SRI.REJI GEORGE
R1-R3 BY ADV. SRI.GOPAKUMAR G. (ALUVA)
R1-R3 BY ADV. SMT.ANUPAMA JOHNY

THIS MOTOR ACCIDENT CLAIMS APPEAL HAVING COME UP FOR ADMISSION
ON 26-11-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

(CR)

**P.R. RAMACHANDRA MENON
&
ANIL K. NARENDRA, JJ.**

.....
M.A.C.A.No.218 OF 2014
.....

Dated this the 26th November, 2015

JUDGMENT

P.R. Ramachandra Menon, J.

This appeal preferred by the Insurance Company challenges the correctness and sustainability of the award passed by the Tribunal granting a total compensation of Rs.4.42 lakhs, which has been directed to be satisfied with interest at the rate of 8% per annum.

2. The case of the insurance company is that no liability could have been fastened on the shoulders of the Insurance Company by virtue of the law declared by the Apex Court in **2011 (4) KLT 821 (SC) (*National Insurance Company Ltd. vs. V. Sinitha*)** and that of the Full Bench of this Court in **2012 (2) KLT 132(FB) (Oriental Insurance Co. Ltd. v. Joseph)**, it being a case of self accident. The accident was on 30.04.2006. The deceased, aged about 24 years was driving a Goods

Autorickshaw bearing No.KL.7/AZ-1613 owned by the first respondent before the Tribunal and insured by the appellant herein. While so, on seeing a vehicle which was coming from the opposite side, the Autorickshaw was suddenly swerved to the left, when it was overturned, causing fatal injuries leading to death of the driver, which was sought to be compensated by filing the claim petition before the Tribunal. In fact, the claim was preferred before the Tribunal under Section 163A of the Motor Vehicles Act, where there was no obligation for the claimants to plead or prove negligence. Based on the available facts and figures, the Tribunal awarded amounts under different heads with reference to the second schedule of the Motor Vehicles Act and granted a total compensation of Rs.4.42 lakhs as aforesaid, which is under challenge at the instance of the Insurer.

3. Heard the learned Counsel for the insurance company as well as the learned Counsel for the claimants.

4. The learned Counsel for the claimants submits that the idea and understanding of the appellant Insurance Company is thoroughly wrong and misconceived, it being a case filed under

Section 163 A of the M.V Act, which stands on a different footing and that the amount payable to the claimants under no circumstance could be reduced, adding that the decisions sought to be relied on by the appellant are not applicable. It is stated that the said verdicts have been rendered without taking note of the verdict passed by a Three Member Bench of the Supreme Court reported in **2004 (2) KLT 395(SC) (Deepal Girishbhai Soni vs. United India Insurance Co. Ltd)** explaining the particular nature of the provisions and scheme of the Statute.

5. In view of the the submission made by the learned Counsel for the claimants across the Bar, with reference to the above decision, we have gone through the said judgment meticulously. The point considered by the Apex Court in the said decision is entirely a different one, as discernible from the issue referred to in paragraphs 2 and 3, which came to be referred for consideration of the Bench. The factual position discussed reveals that, in the said case, the parties had proceeded by filing two separate applications in respect of the very same cause of action,

one under Section 163A and the other one under Section 166 of the MV Act. Both the said petitions were entertained by the Tribunal as well as the High Court, under the impression that the amount of compensation payable under Section 163A was to be by way of an interim award and that the same would not preclude the claimant to proceed with his claim under Section 166 of the M.V. Act. The reference made also referred to the circumstances under which the earlier judgments were rendered by the concerned Benches and as to the scope of Section 163A, based on the structured formula. In one of the cases, the admitted version of the party concerned was that they were having an annual income above Rs.40000/-, but as per the second Schedule to the Motor Vehicles Act, which was to be the basis for granting compensation under Section 163A, the maximum annual income could only be Rs.40000/-. In the said circumstance, the Tribunal adopted a view that anything in excess , i.e. over and above Rs.40000/- could be scaled down and the maximum annual income could be fixed as Rs.40000/-. Award was passed accordingly, granting the benefit to the

claimants, who had preferred the claim petition under Section 163A. Whether such a course is possible was examined by the Apex Court in the above decision in **2004 (2)KLT 395 (SC) (cited supra)**. After a detailed discussion and threadbare analysis of the relevant provisions of law, the Apex Court held that the scheme of the statute contemplates granting of compensation under Section 163A based on the structured formula to determine the rights and obligations of the parties 'finally' and that the same could never be as an interim measure. It was also observed in paragraph '51' of the said verdict, that Section 163A does not contain any provision providing for set off against a higher compensation, unlike Section 140. In the very next paragraph, it was observed that Section 166 provides for a complete machinery for laying a claim on 'fault liability' and as such, the question of giving an option to the claimants to pursue their claim either under Section 163A or under Section 166 does not arise; adding that if the submission of the learned Counsel was to be accepted, the same would lead to an incongruity. The position was asserted in paragraph '57', where it was categorically held

that the Bench was of opinion that the remedy for payment of compensation, both under Section 163A or under Section 166 of the Act being final and independent of each other, as statutorily provided, a claimant cannot pursue his remedies thereunder simultaneously and as such, one must opt/elect to go either for a proceeding under Section 163A or under Section 166 of the Act, but not under both. It was accordingly, that the finding in **Oriental Insurance Co.Ltd vs. Hansrajhai v. Kodala & ors** **(2001 (2)KLT 235)(SC)** was arrived at, whereby the contention of the claimant, that the right to get compensation under Section 163A of the Act was in addition to no fault liability, was rightly rejected.

6. In the course of further discussion, a passing observation was made in paragraph '66' of the above judgment that Section 163 A of the Act covers the cases where negligence is even on the part of the victim and it is by way of an exception to Section 166 of the Act, whereby the concept of 'social justice' has been duly taken care of. The conclusion is given in the

subsequent paragraphs as to the question considered and referred to, particularly as to the contention mooted on behalf of the claimants that they could pursue the remedy both under Section 163A and under Section 166, which in fact has been rejected. Similarly, it was held that the Tribunal or the High Court was not justified in reckoning the annual income (in cases where the annual income was more than Rs.40000/-) by providing a cap at the stage of Rs.40000/-, working out the compensation accordingly, under Section 163A. The Bench made it clear that the scheme of the statute was only to extend benefit to the persons of a particular category having annual income only upto the level of Rs.40000/- and never in respect of persons who were having annual income above Rs.40000/-. It was held that, but for the case which clearly falls within the purview of the stipulated annual income, **all other cases were required** to be considered under Section 166 of the Act.

7. After declaring the law as above, the Apex Court came back to the factual position involved in the concerned case and it was held in paragraph '71' that the relief was to be moulded in

the said case, invoking the power of the Apex Court under Article 142 of the Constitution of India. The said paragraph reads as follows:

“71. So far as civil appeal Nos.3126/2002 and 3127/2002 are concerned, we in exercise of our jurisdiction under Art.142 of the Constitution direct that the claim applications of the appellants under S.163-A of the Act be treated to be applications under S.140 thereof. The amount invested by the Tribunal may be allowed to be withdrawn by the respondent-Insurance Company. The appellants shall refund the excess amount withdrawn by them after adjusting the amount payable in terms of S.140 of the Act and the interest which would have accrued thereon shall be adjusted towards the compensation received by the claimant within four weeks from the date of communication of this order thereafter; the Motor Vehicles Accident Claims Tribunal shall proceed to determine their claim petitions filed under S.166 of the Act in accordance with law. This order shall not be treated as a precedent.

It is quite evident that the scope of the provision, by virtue of Sub Section (5) of Section 140 and the conscious omission of similar provision under Section 163A with regard to the circumstances under which the quantum of compensation could be reduced or not reduced was never discussed by the Apex Court in the above

decision.

8. Sub section (3) of Section 140 says that it is not obligatory for the claimants to plead or prove negligence so as to get 'no fault claim'. Sub Section (5) says that even if the same is proved, it shall have no consequence so as to result in any reduction in compensation payable under the said provision. Coming to Section 163A, similar provision as it exists by way of sub-section (5) of Section 140 is conspicuously absent therein. This conscious exercise made by the law makers, in having two different courses, was discussed and explained by the Apex Court in the decision in **National Insurance Company Ltd. vs. Sinitha (2011 (4) KLT 821(SC)]**. This was considered by a Full Bench of this Court as well, while rendering the judgment in **2012 (2) KLT 132(FB) (cited supra)** (to which I was also a member). This Court is aware of the fact that the judgment rendered by the Supreme Court in **National Insurance Company Ltd. vs. Sinitha (2011 (4) KLT 821(SC)]** was subsequently doubted by another co-ordinate Bench and the same stands

referred to a Larger Bench as per the order passed in **United India Insurance Co.Ltd. vs. Sunil Kumar**(2013(4)KLT 488 (SC)). It is settled law that, an 'Order of Reference' doubting any judgment, resulting in reference, will not operate as a stay of the judgment in existence. This is more so, since the judgment rendered by the Supreme Court is the law of the land by virtue of Article 141 of the Constitution of India which status cannot be claimed by an 'Order of Reference'. The judgment stands, unless and until it is set aside, varied or modified by the Larger Bench. This being the position, there is considerable force in the contention taken by the appellant company as to their liability to meet their claim.

9. However, another important aspect requires to be considered in this case. The deceased herein was admittedly driving an autorickshaw/(a **Goods carriage**) owned by the first respondent and insured by the second respondent. In so far as there is no dispute as to the status of the deceased or the context when the accident was occurred, i.e. while driving the goods autorickshaw by the deceased, the factum of employer-

employee relationship is established. The extent of statutory liability under Section 147 of the Motor Vehicles Act cast upon the insurance company is wide enough to meet the claim on behalf of the insured/owner of the vehicle, in respect of an employee of the insured engaged for driving the goods carriage as well. This is evident from the mandate of the Statute particularly Section 147(1), which is reproduced below:

“147. (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 bodily injury to any person including owner of the goods or his authorized 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 a conductor of the vehicle or in examining tickets on the vehicle, or

© if it is a goods carriage, being carried in the vehicle, or

(ii) to cover any contractual liability.” (emphasis is supplied)

10. By virtue of the above provision, the extent of liability which could be mulcted upon the shoulders of the insurance company under the statutory insurance coverage in respect of an employee engaged for driving the goods carriage of the insured/ employer is to the extent as payable under the Workmen's Compensation Act (renamed now, as the Employees Compensation Act). It is true that there is an option for the party to move the authority/Tribunal, either under the Employees Compensation Act or Motor Vehicles Act, if the cause of action arises under both the streams, as provided under Section 167 of the Motor Vehicles

Act. In so far as statutory liability exists to the extent as payable under the Workmen's Compensation Act(now Employees Compensation Act), such extent of liability automatically flows from the insurance policy issued by the appellant to cover the statutory liability. For working out compensation payable under such circumstances, the factual data made available before the Tribunal and those reckoned by the Tribunal could be made use of. It is brought on record that the monthly income of the deceased was reckoned as Rs.3000/-, which is well within the limits under Workmen's Compensation Act as well. Considering the age of the deceased as 24 years, the relevant factor as per the Schedule under the Workmen's Compensation Act is '218.47' and the extent of liability to be worked out is 50%. On effecting calculation as per the said statute, the actual compensation payable comes to **Rs.3,27,705/-** $((3000 \times 218.47 \times 50/100)$. This amount requires to be paid with interest at the rate of 12% per annum from the date of the accident.

11. In the above circumstance, this Court finds that the award passed by the Tribunal in the instant case granting a total

compensation of Rs.4,42,000/- with interest at the rate 8% per annum from the date of petition i.e. 14.05.2007, requires to be modified. We substitute the figures as **Rs.3,27,705/-** (Rupees three lakhs twenty seven thousand seven hundred and five only) in place of Rs.4,42,000/-, which shall be satisfied with interest at the rate of **12%** per annum from the date of the accident, i..e **30.04.2006**. Since the policy is admitted, the Insurance Company is required to deposit the said amount within one month. The appeal stands allowed to the said extent. No cost.

**P.R. RAMACHANDRA MENON,
JUDGE**

**ANIL K. NARENDRAN,
S JUDGE**