

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.R.RAMACHANDRA MENON

&

THE HONOURABLE MR. JUSTICE ANIL K.NARENDHAN

TUESDAY, THE 22ND DAY OF DECEMBER 2015/1ST POUSHA, 1937

MACA.No. 2828 of 2015 ()

(AGAINST THE AWARD IN OPMV 214/2011 of M.A.C.T., PALAKKAD
DATED 13-02-2015)

APPELLANT(S)/2ND RESPONDENT:

NEW INDIA ASSURANCE CO.LTD
2ND FLOOR, JEEWAN DEEP BUILDING, 8
PARLIAMENTSTREET
NEW DELHI - 110001 REP. BY THE MANAGER
REGIONAL OFFICE, KOCHI.

BY ADV. SRI.RAJAN P.KALIYATH

RESPONDENT(S)/CLAIMANTS & R1:

1. RAJIV, AGED 25 YEARS
S/O.LATE MURALI MOHAN, SREE RASHMI, NAGARIPURAM POST
MANNUR, PALAKKAD - 678 642.

2. RASHMI, AGED 20 YEARS
D/O.LATE MURALI MOHAN, --DO--

3. SARALA, AGED 53 YEARS
W/O.LATE MURALI MOHAN, --DO--

R1-R3 BY ADV. SRI.JACOB SEBASTIAN

THIS MOTOR ACCIDENT CLAIMS APPEAL HAVING COME UP FOR ADMISSION
ON 22-12-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

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

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M.A.C.A.No.2828 OF 2015
.....

Dated this the 22nd December, 2015

JUDGMENT

P.R. Ramachandra Menon, J.

The challenge raised by the appellant Insurance Company is against the award passed by the Tribunal granting a total compensation of Rs.213500/- in respect of the death of a person who was driving a car bearing No.KL.9/U-4744, which belonged to his wife, (who was the first respondent before the Tribunal) and insured by the appellant. The claim was preferred by the children of the deceased and the first respondent as aforesaid.

2. The accident occurred was on 26.03.2007. The car was being driven by the deceased. When he reached the place of occurrence, he lost control over the vehicle and it dashed against a culvert on the side of the road, resulting in serious injuries leading to his death, which was sought to be compensated by filing a claim petition under Section 163A of the M.V.Act, by the grown-up children of the deceased, arraying their mother/the owner of the car as the first respondent and the appellant as the insurer

of the vehicle. The wife of the deceased, i.e. owner of the car did not contest the matter and was declared as ex parte. The resistance made by the appellant insurance company was that the vehicle, though was covered by a 'package policy', it was an instance of 'self accident' and as such, there was no liability for covering the risk. It was also pointed out that, Ext.B2 policy covered only the risk of the owner-cum-driver, that too, for an extent of Rs.2 lakhs, which could not be pressed into service as the vehicle was not driven by the owner-cum-driver at the relevant time.

3. The Tribunal, however awarded compensation under different heads and fixed the total amount payable as Rs.2,13,500/-, which was directed to be satisfied with interest at the rate of 9% per annum; the correctness and sustainability of which is sought to be challenged by way of this appeal.

4. Heard the learned Counsel for the appellant as well as the learned Counsel for the respondents 1 and 2. (The learned Counsel submits that she is appearing for the respondents 1 to

3). The appeal was filed with a petition to condone the delay, wherein urgent notice was ordered on 16.10.2015 and the service is complete. But the fact remains that the claim petition was filed by respondents 1 and 2 against the owner of the vehicle, who was arrayed as first respondent before the Tribunal. How such claimants could join hands with the first respondent/owner of the vehicle and contest the matter jointly by filing a 'joint vakalath' in the appeal, is a matter of mystery, though the third respondent herein/insured happened to be the mother of the claimants 1 and 2, who pursued the proceedings against the owner/mother before the Tribunal. This Court however does not intend to proceed with any further steps in this regard, in view of the verdict proposed to be passed.

5. Coming to the merits of the case, the point to be considered is whether any liability could have been fastened on the shoulders of the Insurance Company, though the claim was preferred under Section 166 of the Act. The accident, admittedly is a self invited accident. Under such circumstance, whether the

liability could be mulcted upon the Insurance Company had come up for consideration before the Apex Court in **National Insurance Company Ltd. vs. Sinitha (2011 (4) KLT 821(SC))**. The Apex Court made it clear that, though there is no burden to plead or establish negligence under Section 163A of the Act, in view of conspicuous absence of the provisions like sub-section (4) of Section 140, it was quite possible for the Insurance Company to plead or establish that negligence was on the part of the parties concerned. Under such circumstance, the liability could not be ordered to be satisfied by the Insurance Company. The matter was subsequently considered by a Full Bench of this Court as well, as borne by the decision in **Oriental Insurance Co.Ltd. vs. Joseph [2012 (2) KLT 132 (FB)]**(to which one of us was also a member).

6. The first point to be considered is whether the accident was caused due to any other reason or was it invited by the deceased himself. Going by the admitted/undisputed facts and figures, no reference is seen made as to any mechanical defect;

and so also, no insinuation is made against anybody else. But it is discernible that, while driving the vehicle, the deceased lost control over the vehicle and it dashed against a culvert, which by itself is a pointer to the fact that the deceased was not in a position to control the vehicle and that the accident was a self invited one. That apart, Reference is also made to the case registered by the police against the rider, attributing negligence on his side. The factual sequence itself is enough to hold that, no other party/circumstance is involved with regard to the cause of accident and as such, this Court finds that the award passed by the Tribunal fixing liability upon the appellant is not correct or sustainable.

7. However, this Court is aware of the fact that correctness of the decision rendered by the Supreme Court in Sinitha's case was subsequently doubted by another Bench, as per the decision reported in **2013 (4) KLT 488(SC)[United India Insurance vs. Sunil Kumar]**. The matter is stated as still pending. 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. Reference order may be answered either in the positive or negative and that will depend upon the facts, circumstances and the relevant provisions of law. As far as the present case is concerned, the law as now stands declared is the verdict rendered by the Apex Court in **2011 (4) KLT 821** (cited supra), which by virtue of Article 141 Constitution of India is the law of the land.

8. In the above circumstance, this Court finds that there is no alternative but to intercept the verdict passed by the Tribunal. It is ordered accordingly and the award stands set aside, in so far as the appellant is concerned and the appellant stands absolved. However, we make it clear that, if for any reason, the reference as per the order reported in [**2013(4) KLT 488(SC)**] comes to

be answered in favour of the persons like the claimants before the Tribunal, the right to approach this Court again by way of appropriate proceedings is left open.

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

**ANIL K. NARENDRA,
JUDGE**

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