

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

TUESDAY, THE 31ST DAY OF MARCH 2015/10TH CHAITHRA, 1937

MACA.No. 2688 of 2014 ()

OPMV 612/2009 OF ADDL.MACT - II (ADDL.DISTICT JUDGE-II), PATHANAMTHITTA.

APPELLANT: 2ND RESPONDENT IN OP(MV)NO.612/2009:

BAJAJ ALLIANCE GENERAL INSURANCE COMPANY LTD.
GE-PLAZA, AIRPORT ROAD, YERAWADA, PUNE
REPRESENTED BY ITS MANAGER, 3RD FLOOR, FINANCE TOWER
KALOOR, COCHIN-682017, ERNAKULAM.

BY ADV. SRILAL GEORGE

RESPONDENTS: PETITIONER AND 1ST RESPONDENT IN OP(MV)NO.612/2009:

1. SOMAN NAIR E.N

S/O NARAYANAN NAIR, ERAKKAMALAYIL HOUSE
CHERUKULANJI P.O., RANNY-689673

2. ALEYAMMA YOHANNAN

ANAKKALLIL HOUSE, NANNUVAKKADU, PATHANAMTHITTA-689645.

R1 BY ADV. ARUN B. VARGHESE (B/O)

THIS MOTOR ACCIDENT CLAIMS APPEAL HAVING BEEN FINALLY HEARD ON
31-03-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P.B.SURESH KUMAR, J.

M.A.C.A.No.2688 of 2014

Dated this the 31st March, 2015

JUDGMENT

The insurer in a petition for compensation before the Motor Accidents Claims Tribunal has come up in this appeal challenging the award granting compensation to the claimant in the proceedings.

2. The first respondent filed the petition for compensation invoking Section 163A of the Motor Vehicles Act, alleging that he sustained injuries in an accident while driving a car on 10.12.2008. The case in the petition was that the second respondent who is the owner of the vehicle and the appellant who is the insurer of the vehicle, are liable to compensate him for the injuries sustained by him.

3. The appellant contested the petition contending that the first respondent sustained injuries when the vehicle driven by him hit against an electric post and therefore, the claim petition is not maintainable.

4. The Tribunal, on an appraisal of the materials on record, found that the first respondent is entitled to compensation and accordingly, passed an award permitting him

to recover a sum of Rs.48,880/- from the appellant by way of compensation. The appellant is aggrieved by the said award and hence this appeal.

5. Heard the learned counsel for the appellant and the learned counsel for the respondents.

6. The learned counsel for the appellant contended that the provision in Section 163A of the Act is a provision intended to the benefit of third parties and in so far as the first respondent himself was driving the vehicle with the permission of its owner, he can only be treated as the owner of the vehicle and in such cases, the claim petition for compensation is not maintainable, for, there is no tortfeasor involved. The learned counsel for the appellant has also relied on the decisions of this Court in ***United India Insurance Co. Ltd. v. Vijayarajan*** [2009 (3) KLT 269] and ***National Insurance Company Ltd. v. Sajitha Beegom N. and Others*** [2012 (3) KHC 527], in support of his contention. ***United India Insurance Co. Ltd. v. Vijayarajan*** (supra) is a decision rendered on identical facts. In the said case also, the legal representatives of the person

who was riding the motor cycle involved in the accident filed the application for compensation invoking Section 163A of the Act for the death of their predecessor. In the said case, this Court held that a person who is using a vehicle with the permission of its owner is not entitled to claim compensation for the injuries sustained by him under Section 163A of the Act. The relevant portion of the said judgment reads thus :

"2. We heard learned counsel for the appellant Sri.A.R.George as also learned counsel for the respondents Sri.Jimmy George. Learned counsel for the appellant would submit that being an application under S.163A of the Motor Vehicles Act it is not open to the Tribunal to award compensation to the claimants in a case where the deceased had admittedly borrowed the vehicle from its owner-driver and caused the accident which ultimately culminated in his death. In support of this plea, he relied on the decision of the Apex Court in Civil Appeal Nos.3538/09 and 3540/09. Therein, the Apex Court was considering a case where the deceased was driving a motor cycle which he borrowed from its real owner and it was a case that when it was proceeding on the road, a bullock cart proceeding ahead of the said motor cycle stopped suddenly and consequently the deceased dashed against it sustaining fatal injuries and dying on the way to the hospital. It is apposite to refer paragraphs 16, 17, 18, 19 and 20. They read as follows:

“16. The aforesaid decisions make it quite clear that the Parliament by introducing S.163A in the M.V.A. provided for payment of compensation on structured formula basis by mandating that the owner of a motor vehicle or the authorised insurer would be liable to pay compensation, as indicated in the Second Schedule in the case of death or permanent disablement due to accident arising out of the use of the motor vehicle, to the legal heirs or the victim, as the case may be in a claim made under sub-s. (1) of S.163A of the M.V.A. In order to prove a claim of this nature the claimant would not be required to plead or establish that the death or permanent disablement in respect of which the claim has been made was due to any wrongful act or neglect or default of the owner of the vehicle concerned.

17. However, in the facts of the present case, it was forcefully argued by the counsel appearing for the respondent that the claimants are not the 'third party', and therefore, they are not entitled to claim any benefit under S.163A of the M.V.A. In support of the said contention, the counsel relied on the decision of this Court in the case of *Oriental Insurance Co. Ltd. v. Rajni Devi* (2008 (4) KLT 145 (SC) = (2008) 5 SCC 736) and *New India Assurance Co. Ltd. v. Sadanand Mukhi & Ors.* (2009 (2) KLT SN 21 (C.No.25) SC = (2009) 2 SCC 417).

18. In the case of *Oriental Insurance Company Ltd. v. Rajni Devi & Ors.* (2008 (4) KLT 145 (SC) = (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 S.163A of the M.V.A 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 S.163A of the M.V.A. 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 S.163A of the M.V.A. 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.

19. We have already extracted S.163A of the M.V.A. hereinbefore. A bare perusal of the said provision would make it explicitly clear that persons like the deceased in

the present case would step into the shoes of the owner of the vehicle. In a case wherein the victim died or where he was permanently disabled due to an accident arising out of the aforesaid motor vehicle in that event the liability to make payment of the compensation is on the insurance company or the owner, as the case may be as provided under S.163A. But if it is proved that the driver is the owner of the motor vehicle, in that case the owner could not himself be a recipient of compensation as the liability to pay the same is on him. This proposition is absolutely clear on a reading of S.163A of the M.V.A. Accordingly, the legal representatives of the deceased who have stepped into the shoes of the owner of the motor vehicle could not have claimed compensation under S.163A of the M.V.A.

20. When we apply the said principle into the facts of the present case we are of the view that the claimants were not entitled to claim compensation under S.163A of the M.V.A. and to that extent the High Court was justified in coming to the conclusion that the said provision is not applicable to the facts and circumstances of the present case. However, the question remains as to whether an application for demand of compensation could have been made by the legal representatives of the deceased as provided in S.166 of the M.V.A. The said provision specifically provides that an application for compensation arising out of an accident of the nature specified in sub-s. (1) of S.165 may be made by the person who has sustained the injury; or by the owner of the property; or

where death has resulted from the accident, by all or any of the legal representatives of the deceased; or by any agent duly authorised by the person injured or all or any of the legal representatives of the deceased, as the case may be. When an application of the aforesaid nature claiming compensation under the provisions of S.166 is received, the Tribunal is required to hold an enquiry into the claim and then proceed to make an award which, however, would be subject to the provisions of S.162, by determining the amount of compensation, which is found to be just. Person or persons who made claim for compensation would thereafter be paid such amount. When such a claim is made by the legal representatives of the deceased, it has to be proved that the deceased was not himself responsible for the accident by his rash and negligent driving. It would also be necessary to prove that the deceased would be covered under the policy so as to make the insurance company liable to make the payment to the heirs."

3. This pronunciation of the law runs counter to the dictum of this Court laid down by the Full Bench but being the decision of the Apex Court we are bound to follow the Apex Court by Art.141 of the constitution. Here also like in the facts of the case before the Apex Court, the deceased was not a registered owner of the vehicle. He was using the motor cycle with the permission of its owner. He dashed against an electric post and sustained injuries which culminated in his untimely death. In view of the dictum laid down by the apex court, it is clear that the claimants/respondents 1 to 4 could not have successfully maintained the application

under S.163A of the Motor Vehicles Act."

In ***National Insurance Company Ltd. v. Sajitha Beegom N. and Others*** (supra) also, this Court on an identical factual situation held as follows:-

"12. Regarding the second ground stated above, the learned counsel for the appellant insurance company relied on the decision of Apex Court in Nigamma and Another v. United India Insurance Co. Ltd. In that case, the maintainability of a claim petition filed by the dependents of the deceased under Section 163 of the Act was considered by the Apex Court. In that case, the deceased was riding a motorcycle, which dashed against a bullock cart proceeding ahead, resulting in the death of the motorcyclist. It was in evidence that the deceased had borrowed the motorcycle from its owner. Allowing the claim petition filed by the legal representatives under Section 163A of the Act, the Tribunal awarded compensation and directed the insurance company to pay the amount. When the matter was taken in appeal before the High Court, the High Court held that the claim petition was not maintainable as there was no tortfeasor involved. The said decision was upheld by the Apex Court holding that as the deceased who was the borrower, stepped into the shoes of the owner, he cannot himself be a recipient of compensation as liability to pay the same is on him. The legal representatives of the deceased would not be entitled to claim compensation, especially because, no other vehicle was involved, it was held."

7. In the light of the decisions referred to above, the

impugned award is unsustainable and the same is, accordingly, set aside. The appellant is exonerated from the liability to pay compensation to the first respondent.

The appeal is allowed as above.

Sd/-

**P.B.SURESH KUMAR,
JUDGE**

(true copy)