IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on :24.09.2018

Delivered on : 15.03.2019

CORAM:

THE HONOURABLE MR.JUSTICE M.V.MURALIDARAN

Civil Miscellaneous Appeal No.1399 of 2015

D. Soundarajan @ Johnson, … Appellant/Petitioner

-Vs-

1.Ebenezer Marcus Kinder Garden School,
No.5, Ebenezer Street,
West Banu Nagar, First Floor,
Ambattur, Chennai 600 053.

2.ICICI Lombard General Insurance Co. Ltd.,
Aarthi Chambers, First floor,
No.189, Anna Salai,
Chennai- 600 063. … Respondents/Respondents

Civil Miscellaneous Appeal filed under Section 173 of the Motor Vehicles Act, 1988, against the judgment and decree made in MCOP.No.885 of 2009 on the file of the Motor Accident Claims Tribunal, III Judge, Small Causes Court, Chennai, dated 30.07.2013.

For Appellant : Mr.T.G.Balachandran

For Respondent : Mr.S.V.Subramani (for R1)
M/s.R.Sreevidhya (for R2)

JUDGMENT

This Civil Miscellaneous Appeal has been filed against the award dated 30.07.2013 passed in M.C.O.P.No. 885 of 2009 on the file of the learned Motor Accident Claims Tribunal (Small Causes Court), Chennai, wherein and whereby the Tribunal dismissed entire claim petition.

2. Brief facts are that on 10.12.2008 at about 7.00 hours, the clamant injured was proceeding in his motorcycle bearing registration No.TN 01 AB 4645 from west to east at Sakthinagar near Deepika Gas agency , Thirumullaivoil at that time a van bearing Registration No: TN 20 AK 1197 was driven by its driver in rash and negligent manner from opposite direction and hit the motor cycle , thereby the petitioner sustained grievous and the driver of van is responsible for accident . taking advantage of grievous injury in the accident, a criminal case in Crime No. 805 of 2008 has been registered against injured was registered by Poonamallee Traffic investigation. At the time of accident, the injured was aged 35 years and was working as Tabella player and was earning Rs.3,300/- per month. Stating that the accident occurred only because a driver of van crossed the road, the respondents, who are insured and insurer are liable to pay compensation, hence injured have filed claim petition under Section 163 A of Motor Vehicles Act claiming compensation of Rs.5,28,340/-.

3.Denying the accident, the 1st Respondent/owner and insurance company filed counter stating that the accident occurred only due to the rash and negligent riding of the rider of the motorcycle i.e., the injured. It is stated that no extra premium was paid by the owner to cover the risk of the rider of the motorcycle. The claimant being the rider of the motorcycle, and he himself tort only due to the rash and negligent rider FIR has been registered against him, so the respondents is not liable to pay compensation. The age, occupation and monthly income of the deceased are denied by the Respondents. The compensation claimed by the petitioner under various heads is on the higher side and prayed for dismissal of the claim petition.

4. Before the Tribunal, the petitioner examined himself as P.W.1 and doctor was examined as P.W.2. Exs.P1 to P6 were marked. One Mr. Elango, Sub Inspector of police, was examined as R.W.1 and Ex.R1 to R4 was marked on the side of the 2nd Respondent.

5. Upon considering the oral and documentary evidence, the Tribunal held that the claimant tort-fester and FIR has been registered against and charge sheet also filed against him and examined Sub Inspector of police and dismissed claim petition on the ground that petitioner’s bike skidded and motor cycle hit the front right side of the van, so the accident happened due to petitioner mistake. Challenging the findings, the appellant claimant has filed the present appeal.

6. The learned counsel for the appellant submitted that the Tribunal erred in relying the criminal court records and rough

sketch Ex P -3, and without considering injured statements and failed to note that if claim petition filed Under section 163 A inter alia negligent need not pleaded and proved in absence any concrete evidence let by respondent as held in the recent judgment of Apex court. He would submit that the Tribunal has ignored the correct legal position and instead referred on a decision which was not correct at all.

7. The learned counsel then submitted that the Tribunal erred in not fixing the earnings/dependency and multiplier without any basis and as such the ultimate award is far in excess of what may be just and prayed for setting aside the award of the Tribunal. In support, the learned counsel relied upon the following decisions:

1) United India Insurance Co. Ltd. –Vs- Sunil Kumar and another, reported in 2017 (2) TN MAC 753 (SC)

2) Deepal Girishbhai Soni and others –Vs- United India Insurance Co. Ltd., Baroda, reported in 2004(1) TN MAC (SC) 193,

3) Shivaji & Another –Vs- Divisional Manager, United India Insurance Co. Ltd. & Others reported in CDJ 2018 SC 817.

8. Per contra, reiterating findings of the Tribunal, the learned counsel for the respondents submitted that since the entire negligence against rider of the motorcycle in question, the insurance company not liable to pay compensation and praying for dismissal of the appeal.

9.The points that arise for consideration is whether the Tribunal was right in dismissing the claim petition even which is filed under section 163 A of M V Act in the accident in question and whether the compensation could be awarded.

10.The appellant have filed the claim petition under Section 163A of the M.V. Act claiming compensation for the injuries sustained by use of the motorcycle bearing registration bearing registration No.TN 01 AB 4645 from west to east at Sakthinagar near Deepika Gas agency , Thirumullaivoil at that time a van bearing Registration No.TN 20 AK 1197 was driven by its driver in rash and negligent manner from opposite direction and hit the motor cycle , thereby the petitioner sustained grievous and the driver of van is responsible for accident.

11. Section 163 A of the M.V. Act under which compensation has been claimed by the respondents provides as follows:-

"Section 163 A. Special provisions as to payment of compensation on structured formula basis.

(1) Notwithstanding anything contained in this Act or in any other law for the time being in force or Instrument having the force of law, the owner of the motor vehicle or the authorized insurer shall be liable to pay in the case of motor vehicle or

the authorized insurer shall be liable to pay in the case of death or permanent disablement due to accident arising out of the use of motor vehicle, compensation, as indicated in the Second Schedule to, the legal heirs or the victim, as the case may be.

Explanation : For the purpose of this sub- section, "permanent disability" shall have the same meaning and extent as in the Workmen's Compensation Act, 1923 (8 of 1923).

(2) In any claim for compensation under sub section (1), the claimant shall 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 or vehicles concerned or of any other person.

(3) The Central Government may, keeping in view the cost of living by notification the Official Gazette, from time to time amend the Second Schedule."

12. Section 163 A of the M.V. Act was introduced in the Act by way of social security scheme. It is a Code by itself. It appears from the objects and reasons of the Motor Vehicles (Amendment) Act, 1994 that after enactment of the 1988 Act, several representations and suggestions were made from the State Governments, transport operators and members of public in relation to certain provisions thereof. Taking note of the observations by various Courts and the difficulties experienced in implementing the various provisions of the Motor Vehicles Act, the Government of India appointed a Review Committee. The Review Committee in its report made the following recommendations:

"The 1988 Act provides for enhanced compensation for hit and run cases as well as for no fault liability cases. It also provides for payment of compensation on proof of fault basis to the extent of actual liability incurred which ultimately means an unlimited liability in accident cases. It is found that the determination of compensation takes a long time. According to information available, in Delhi alone there are 11214 claims pending before the Motor Vehicle Accidents Tribunals, as on 31 . 03 .1990. Proposals have been made from time to time that the finalisation of compensation claims would be greatly facilitated to the advantage of the claimant, the vehicle owner as well as the Insurance Company if a system of structured compensation can be introduced. Under such a system of structured compensation that is payable for different clauses of cases depending upon the age of the deceased, the monthly income at the time of death, the earning potential in the case of the minor, loss of income on account of loss of limb etc., can be notified. The affected party can then have the option of either accepting the lump sum compensation as is notified in that scheme of structured compensation or of pursuing this claim through the normal channels.

The General Insurance Company with whom the matter was taken up is agreeable in principle to a scheme of structured compensation for settlement of claims on fault liability in respect of third party liability under Chapter XI of M.V. Act, 1988. They have suggested that the claimants should first file their claims with Motor Accident Claims Tribunals and then in insurers may be allowed six months time to confirm their prima facie liability subject to the defences available under Motor Vehicles Act, 1988. After such confirmations of prima facie liability by the insurers the claimants should be required to exercise their option for conciliation under structured compensation formula within a stipulated time.”

13. The recommendations of the Review Committee and representations from public were placed before the Transport Development Council for seeking their views pursuant where to several sections were amended. Section 163 A was inserted in the Act to provide for payment of compensation in motor accident cases in accordance with the second schedule providing for the structured formula which may be amended by the Central Government from time to time.

14. The contention of the appellant is that the claim petition filed by the respondents under Section 163 A of the M.V. Act is not maintainable, as the accident occurred due to the rash and negligent riding of the rider of the motorcycle i.e., the deceased. Therefore, the Tribunal was not right in directing the appellant insurance company to pay the compensation to the respondents.

15. Whether Section 163 A of the M.V. Act founded on fault liability principle or no fault liability principle; came up for consideration before the Honble Supreme Court in a decision in United India Insurance Co. Ltd. v. Sunil Kumar and another, reported in 2013 (2) TN MAC 737 (SC), wherein the Honble Supreme Court has referred to Two Judges Bench decisions in National Insurance Co. Limited v. Sinitha and others, reported in 2012 (1) TN MAC 1 (SC) and Oriental Insurance Co. Ltd. v. Hansrajbha v.Kodala, reported in 2001 (2) CTC 368 (SC). Finding difficult to accept the reasoning expressed in National Insurance Co. Limited v. Sinitha and others, reported in 2012 (1) TN MAC 1 (SC), the Honble Supreme Court in United India Insurance Co. Ltd. v. Sunil Kumar and another, supra, held as under:

“8.We are, therefore, of the view that liability to make Compensation under Section 163 A is on the principle of no fault and, therefore, the question as to who is at fault is immaterial and foreign to an enquiry under Section 163A. Section 163A does not make any provision for apportionment of the liability. If the owner of the vehicle or the Insurance Company is permitted to prove contributory negligence or default or wrongful act on the part of the victim or Claimant, naturally it would defeat the very object and purpose of Section 163A of the Act. Legislature never wanted the Claimant to plead or establish negligence on the part of the owner or the driver. Once it is established that death or permanent disablement occurred during the course of the user of the vehicle and the vehicle is insured, the Insurance Company or the owner, as the case may be, shall be liable to pay the Compensation, which is a statutory obligation.

9.We, therefore, find ourselves unable to agree with the reasoning of the Two Judge Bench in National Insurance Co. Limited v. Sinitha and others, 2012 (1) TN MAC 1 (SC). Consequently, the matter is placed before the learned Chief Justice of India for referring the matter to a Larger Bench for a correct interpretation of the scope of Section 163 A of the Motor Vehicles Act, 1988, as well as the Point Nos.(iii) to (v) referred to in United India Insurance Co. Ltd. v. Shila Datta and others, 2011 (2) TN MAC 481 (SC).?"

16.A Larger Bench of the Honble Supreme Court has taken up the reference in United India Insurance Co. Ltd. v. Sunil Kumar and another, reported in 2017 (2) TN MAC 753 (SC), wherein Three Judges Bench of the Honble Supreme Court answered the reference as under:

"8.From the above discussion, it is clear that grant of Compensation under Section 163;A of the Act on the basis of the Structured Formula is in the nature of a Final Award and the adjudication there under is required to be made without any requirement of any proof of negligence of the Driver/Owner of the vehicle(s) involved in the accident. This is made explicit by Section 163A.

(2).Though the aforesaid section of the Act does not specifically exclude a possible defence of the Insurer based on the negligence of the Claimant as contemplated by Section 140 (4), to permit such defence to be introduced by the Insurer and/or to understand the provisions of Section 163 A of the Act to be contemplating any such situation would go contrary to the very legislative object behind introduction of Section 163 A of the Act, namely, final Compensation within a limited time frame on the basis of the Structured Formula to overcome situations where the claims of Compensation on the basis of fault liability was taking permit the Insurer to raise the defence of negligence would be to bring a proceeding under Section 163 A of the Act at par with the proceeding under Section 166 of the Act, which would not only be self contradictory but also defeat the very legislative intention.

9.For the aforesaid reasons, we answer the question arising by holing that in a proceeding under Section 163 A of the Act, it is not open for the Insurer to raise any defence of negligence on the part of the victim.?”

17. Thus, from the aforesaid decision of the Larger Bench of the Honble Supreme Court, it is clear that it is not open for the insurer to raise any defence of negligence on the part of the victim in a proceeding under Section 163 A of the M.V. Act.

18.In Shivaji and another v. Divisional Manager, United India Insurance Co. Ltd. and others, supra, reported in 2018 (2) TN MAC 149 (SC), the Three Judges Bench of the Honble Supreme Court held as under:

“5. The issue which arises before us is no longer res integra and is covered by a recent Judgment of the Three Judges of this Court in United India Insurance Co. Ltd. v. Sunil Kumar and another, 2017 (2) TN MAC 753 (SC) : AIR 2017 SC 5710, wherein it was held that to permit a defence of negligence of the Claimant by the Insurer and/or to understand Section 163 A of the Act as contemplating such a situation, would be inconsistent with the legislative object behind introduction of this provision, which is ?final compensation within a limited time frame on the basis of the Structured Formula to overcome situations where the claims of Compensation on the basis of fault liability was taking an unduly long time. The Court observed that if an Insurer was permitted to raise a defence of negligence under Section 163 A of the Act, it would ?bring a proceeding under Section 163 A of the Act at par with the proceeding under Section 166 of the Act which would not only be self contradictory but also defeat the very legislative intention. Consequently, it was held that in a proceeding under Section 163 A of the Act, the Insurer cannot raise any defence of negligence on the part of the victim to counter for Compensation.?”

19. Thus, it is clear from the decisions of the Honble Supreme Court that the appellant, who is rider of the motorcycle bearing registration No.TN 01 AB 4645 used at the time of accident, and offending vehicle in TN 20 AK 1197 insurer cannot raise any defence of negligence on the part of the deceased/rider to counter for compensation.

20.The expression used in Section 163 A of the M.V. Act, is accident arising out of the use of the motor vehicle and not accident caused by the motor vehicle or accident in which the motor vehicle is involved. The adoption of the expression accident arising out of the use of the motor vehicle in preference to accident caused by the motor vehicle or accident in which the motor vehicle is involved is, therefore, important and clearly indicates that a much wider meaning was intended by adoption of that expression. The Courts have consistently adopted a beneficial construction in such situations and held that the expression arising out of the use of the vehicle be given a liberal and wide interpretation.

21. The claim under Section 163 A of the Motor Vehicles Act can be invoked even in cases when negligence is on the part of the victim. At this juncture, it is pertinent to refer the decision of the Three Judges Bench of the Honble Supreme Court in Deepal Girishbhai Soni and others Vs United India Insurance Co. Ltd., Baroda, reported in 2004(1) TN MAC (SC) 193, wherein, it has been held as under:

? “46. Section 163 A has an overriding effect and provides for special provisions as to payment of compensation on structured formula basis. Sub section (1) of Section 163 A contains a non obstante clause, in terms whereof the owner of the motor vehicle or the authorised insurer is liable to pay, in the case of death or permanent disablement due to accident arising out of the use of motor vehicle, compensation, as indicated in the Second Schedule, to the legal heirs or the victim, as the case may be.”

22. In Section 163 A, the expression ?notwithstanding anything contained in this Act or in any other law for the time being in force? has been used, which goes to show that the Parliament intended to insert a non obstante clause of wide nature which would mean that the provisions of Section 163 A would apply despite the contrary provisions existing in the said Act or any other law for the time being in force. Thus, Section 163 A of the M.V. Act covers cases where even negligence is on the part of the victim.

23. As stated supra, it can easily be decided that the accident was arising out of the use of motorcycle bearing registration No.TN 20 AK 1197. Section 163 A of the M.V. Act covers cases where even negligence is on the part of the victim.

24. No contra documents and contra decisions have been produced by the appellant insurance company that the claim petition filed by the respondents under Section 163 A of the M.V. Act is not maintainable and cannot be entertained. In a catena of decisions, it has been held that Section 163 A of the M.V. Act applies to all victims of motor accident whether they are inside or outside of the vehicle.

25. Though the respondents denied the manner of accident, they have not produced any material to establish that the accident occurred due to the rash and negligent riding of the

injured except criminal court records. In cross examination, R.W.1 nothing has been elucidated any negligence on the part of injured and moreover it cannot be inferred that the accident occurred due to rash and negligent driving of the rider of the motorcycle in absence of any independent evidence much less to examine driver of offending vehicle. However, the 1st respondent admits that the Van involved in the accident was duly insured with 2nd Respondent insurance company at the time of accident from 17.03.2008 to 16.03.2009. Hence the Respondents liable to pay compensation to injured claimants being third part to the Respondents. Therefore, the Respondents cannot escape from their liability. Therefore, the finding of the Tribunal dismissing claim petition is liable to set aside and the Respondent insurance company is liable to pay compensation to the Claimant.

26. As far as the quantum of compensation is concerned, from the record it shows that the appellant suffers Fracture of both pubic rami, Disruption of right sacroiliac joint and fracture of right illium and sciatic nerve palsy and the doctor was examined as PW-2 assessed disability of 70% and discharge summary was marked as Ex.P-1 and Ex.P-2, from the discharge summary it shows that the injured was taking treatment and he was in patient for more than 22 days, considering the nature of injury and evidence this court taken 50% as partial permanent disability and grants compensation under the followings heads:

1. Permanent Disability at 50% x Rs. 3000/-	: Rs.1,50,000/-
2. Loss of income for 2 months	: Rs. 8,000
3. Transportation charges	: Rs. 5,000
4. Extra Nourishment	: Rs. 10,000
5. Medical expenses	: Rs. 15,000
6. Pain and sufferings	: Rs. 25,000
TOTAL	Rs.2,13,000/-

27. In the result, the Civil Miscellaneous Appeal is partly allowed by setting aside the order of dismissal passed by tribunal in M.C.O.P.No.885 of 2009 on the file of the learned Motor Accident Claims Tribunal (Small Causes Court), Chennai, and granting a sum of Rs.2,13,000/- as compensation to the appellant and the Respondents are jointly and severally liable to pay compensation with interest at the rate of 7.5% per annum

from the date of claim petition till the date of deposit. The 2nd respondent insurance company is directed to deposit the amount within 6 weeks from the date of receipt of a copy of this order and on such deposit, the appellant/claimant is permitted to withdraw the award amount with interest on filing application before the Tribunal. No costs.

Sd/-
Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

To

1.The Motor Accident Claims Tribunal,
III Judge, Small Causes Court, Chennai.

2.The Section Officer,
VR Section, High Court, Madras.(2 Copies)

+1cc to Ms.R.Sree Vidhya, Advocate Sr.25248

+1cc to Mr.T.G.Balachandran, Advocate Sr.24480

C.M.A.No.1399 of 2015

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srg 27/08/2019