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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 27.04.2019

CORAM:

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

C.M.A(MD)No.864 of 2014

Judgment reserved on 01.11.2018	Judgment pronounced on 27.04.2019
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Brinks Arya India Private Ltd.,
Having Office at 3/85-C,
Arun Nagar Vadavalli,
Coimbatore District,
Tamilnadu

... Appellant/Respondent 1

Vs.

1.G.Bama

2.G.Thulasi

3.Minor G.Lenin
(rep. By his mother and
next friend 1st respondent)

4.Rengappa Reddi

5.Rukkumani ...Respondents 1 to 5/Petitioners 1 to 5

6.National Insurance Co. Ltd.,
Through its Divisional Manager,
Having office at North Veli Street,
Madurai 625 001.

... Respondent No.6/Respondent No.2

PRAYER: Civil Miscellaneous Appeal filed under Section 173 of the Motor Vehicles Act, 1988 against the award dated 02.11.2009 made in M.C.O.P.No.830 of 2005 on the file of the Principal District Court, (Motor Accident Claims Tribunal), Madurai.

For Appellant : Mr.D.Sivaraman

For R1 to R5 : Mr.K.Murugesan



J U D G M E N T

This Civil Miscellaneous Appeal has been filed by the appellant against the award dated 02.11.2009 made in M.C.O.P.No.830 of 2005 on the file of the Principal District Court, (Motor Accident Claims Tribunal), Madurai.

2.The appellant is the 1st respondent in M.C.O.P.No.830 of 2005 on the file of the Principal District Court, (Motor Accident Claims Tribunal), Madurai. The respondents 1 to 5 are the claimants who filed the said claim petition under Section 163-A, 163-B, 166 and 182-A of the Motor Vehicles Act read with Rule 3(1) claiming a sum of Rs.10,00,000/- as compensation for the death of one R.Gunasekaran who died in the accident that took place on 27.09.2004.

3.The 1st respondent is the wife, respondents 2 and 3 are the daughter and son and respondents 4 and 5 are the parents of the deceased. The appellant was the employer of the deceased and owner of the offending vehicle. The 6th respondent is the insurer of the offending vehicle.

Facts of the case :

4. According to the respondents 1 to 5, the appellant asked the deceased to drive the offending vehicle from Madurai to Dindigul to load the cash in ATM cash box of ICICI Bank, Dindigul Branch. The deceased was driving the van with care and caution. While the vehicle was nearing Sanampatti, the van lost control and got capsized on the right side of the road and was dragged upto 50 metres. The said Gunasekaran died on the spot. Even though there is no negligence on the part of the deceased, Vadipatti Police registered a case in Crime No.329 of 2004. The deceased was aged 40 years at the time of accident and he was working as Operations Assistant II in the appellant's Company and was earning a sum of Rs.6,000/- per month. The appellant as owner and 6th respondent as insurer of the offending vehicle are liable to pay the compensation.

5.The appellant filed counter statement and contended that the claim petition is not maintainable on the ground that the deceased was an insured employee under the provisions of Employees State Insurance Act (hereinafter referred to as 'ESI Act'). Subsequent to the death of said Gunasekaran, the 1st respondent/wife of the deceased is receiving Employees State Insurance monthly benefit of Rs.1,600/-, the respondents 2 and 3 who are the daughter and son of the deceased are receiving Rs.1,090/- per month. The respondents 1 to 3 are prohibited under ESI Act from getting compensation from any other Act. The appellant paid a total sum of Rs.5,24,844/- to the 1st respondent, out of which Rs.1,76,752/- alone was paid to the 1st respondent from voluntary contribution. The appellant admitted the manner of the accident. The accident was purely an inevitable one as it was raining at the time of accident. The 6th respondent who is the insurer of the offending vehicle alone is liable to pay the compensation. The appellant denied that the respondents 1 to 5 are

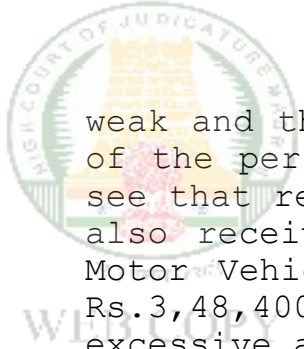


the legal heirs of the deceased and also the age of the deceased and contended that the amounts claimed by the respondents 1 to 5 are excessive and prayed for dismissal of the claim petition.

6. The 6th respondent filed counter statement and contended that the claim petition is not maintainable as the deceased was a tort-feasor. The manner of the accident clearly proves that the accident occurred only due to rash and negligent driving by the deceased. The deceased had lost control over the vehicle and before he could regain control, the accident has occurred. The Motor Vehicle Inspector reported that the accident was not due to any mechanical defect. After investigation, the police closed the case as charge abated. The respondents 1 to 5 must prove that they are the only legal heirs of the deceased entitled to claim compensation. The compensation claimed under various heads are excessive and prayed for dismissal of the claim petition.

7. Before the Tribunal, the 5th respondent examined herself as P.W.1 and marked 5 documents as Exs.P1 to P5. The appellant examined R.W.1 and R.W.2, its employees and 6th respondent summoned official from Employees State Insurance Corporation who was examined as R.W.3. The appellant and 6th respondent marked 5 documents as Exs.R1 to R5. Based on the pleadings, oral and documentary evidence, the Tribunal framed necessary points for consideration. Considering the pleadings, oral and documentary evidence and the judgments relied on by the learned counsel appearing for the respondents 1 to 5 and 6th respondent, the Tribunal held that the petition under Section 163-A is maintainable and rejected the contention of the appellant that the respondents 1 to 5 are not entitled to maintain claim petition as the deceased was insured employee under ESI Act on the ground that the respondents 1 to 3 are paid only dependent benefits and respondents 1 to 5 are entitled to maintain claim petition under Motor Vehicles Act. The Tribunal awarded total sum of Rs.3,48,400/- and directed both the appellant and 6th respondent to pay the amounts jointly and severally. Against the said award dated 02.11.2009 made in M.C.O.P.No.830 of 2005, the appellant has come out with the present appeal.

8. The learned counsel appearing for the appellant contended that the Tribunal erred in directing the appellant to pay compensation to the respondents 1 to 5. The Tribunal failed to note that the accident has occurred only due to negligence of the deceased himself who was driving the vehicle at the time of accident and lost control and the vehicle got capsized. The Tribunal failed to see that as per the pleadings in the claim petition, the evidence of P.W.1 and Ex.P4, the deceased was earning more than Rs.40,000/- per annum and claim petition under Section 163-A is not maintainable. The Tribunal erred in holding that income of the deceased was less than Rs.40,000/- per annum, contrary to the judgment of the Hon'ble Apex Court. The Tribunal failed to note that Section 163-A of the Motor Vehicles Act was inserted with a view to grant speedy remedy to the persons who are socially and financially



weak and the said provision cannot be allowed to be taken advantage of the person to whom it is not applicable. The Tribunal failed to see that respondents 1 to 3 are receiving benefits under ESI Act and also received from the appellant and therefore the petition under Motor Vehicles Act is not maintainable. In any event, the sum of Rs.3,48,400/- awarded by the Tribunal as compensation is highly excessive and prayed for setting aside the award of the Tribunal.

8(a) In support of his contentions, the learned counsel appearing for the appellant relied on the following Judgments:

(1) 2012 ACJ 2292 [Regional Manager, New India Assurance v. Vijay Balshiram Walunj and others] (also relied on by the learned counsel for the respondents 1 to 5).

10. Having heard the learned counsel for the parties, the following points are to be considered by us in these appeals:

(i) In view of Section 163-A of the Motor Vehicles Act, whether Section 53 of the E.S.I Act can be pressed into service?

(ii) Whether the claimants are entitled for enhanced compensation under the head medical expenditure?

(iii) Whether the interest awarded by the Tribunal from the date of lodging a claim petition by the injured-claimant claiming compensation in favour of his legal representatives who have converted the petition after he succumbed to injuries?

12. From a reading of both sections, it is clear that Section 163-A of the Motor Vehicles Act has been inserted by Act 54 of 1994 w.e.f. 14.11.1994, whereas Section 53 of the E.S.I. Act was substituted w.e.f. 28.01.1968. When the provision of Section 163-A of the Motor Vehicles Act says that there is no bar under any other law, the petition filed under Section 163-A of the Motor Vehicles Act has to be held as maintainable, since Section 163-A has been introduced long after the provisions of Section 53 of the E.S.I. Act. Therefore, point No.1 has to be answered in favour of the claimants and against the Insurance Company.

(2) 2008 (1) TNMAC 166 (SC) [National Insurance Company Ltd., v. Indira Srivastava & others]

11. We may furthermore notice that apart therefrom, superannuation benefits, contributions towards gratuity, insurance of medical policy for self and family and education scholarship were beneficial to the members of the family.



12. We have, however, no doubt in mind that medical reimbursement which provides for a slab and which keeping in view the terminology used, would mean reimbursement for medical expenses on production of medical bills and, thus, the same would not come within the purview of the aforementioned category.

17. The amounts, therefore, which were required to be paid to the deceased by his employer by way of perks, should be included for computation of his monthly income as that would have been added to his monthly income by way of contribution to the family as contra distinguished to the ones which were for his benefit. We may, however, hasten to add that from the said amount of income, the statutory amount of tax payable thereupon must be deducted.

(3) Judgment of this Court in CMA (MD) No.558 of 2017 dated 20.12.2017 [Tamil Nadu State Transport Corporation v. K.Archunan & others]

2. The Transport Corporation has filed this appeal questioning the impugned award on the ground that the claim petition itself was not maintainable. One Balasubramanian, son of the respondents 1 and 2 died in an accident on 03.08.2010 involving the bus belonging to the appellant Corporation. M.C.O.P.No.2061 of 2010 was filed by the respondents herein for seeking compensation. In the claim petition it has been mentioned that the monthly income of the deceased was Rs.3,500/-. Therefore, the annual income would obviously be at Rs.42,000/-. The claim petition was filed under Section 163(A) of the Motor Vehicles Act. The Tribunal chose to restrict the annual income to Rs.39,600/- and awarded compensation. It is true that the question of fault or negligence cannot be gone into in an enquiry under Section 163(A) of the Motor Vehicles Act. But for the claimant to invoke Section 163(A) of the Motor Vehicles Act, the annual income should be Rs.40,000/- or less per annum. The annual income of the deceased was clearly above Rs.40,000/-. Therefore, the claim petition under Section 163(A) of the Motor Vehicles Act was not maintainable.

(4) 2013 (9) SCC 65 [Reshma Kumari & Others v. Madan Mohan and another]



compensation notwithstanding anything contained in the 1988 Act or in any other law for the time being in force or instrument having the force of law, that the owner of a motor vehicle or authorised insurer shall be liable to pay compensation on structured formula basis as indicated in the Second Schedule in the case of death or permanent disablement due to accident arising out of the use of motor vehicle.

13.3 The peculiar feature of Section 163A is that for a claim made thereunder, the claimants are not 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 or owners of the vehicle concerned. The scheme of Section 163A is a departure from the general principle of law of tort that the liability of the owner of the vehicle to compensate the victim or his heirs in a motor accident arises only on the proof of negligence on the part of the driver. Section 163A has done away with the requirement of the proof of negligence on the part of the driver of the vehicle where the victim of an accident or his dependants elect to apply for compensation under Section 163A. When an application for compensation is made under Section 163A the compensation is paid as indicated in the Second Schedule. The table in the Second Schedule has been found by this Court to be defective to which we shall refer at a little later stage.

(5) 2009 (2) TNMAC 169 (SC) [Ningamma & another v. United India Insurance Co. Ltd.]

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.

19. We have already extracted Section 163-A of the MVA 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 Section 163-A. 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 Section 163-A of the MVA. 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 Section 163-A of the MVA.

20.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. In this context reference could be made to relevant paras of Section 147 of the MVA.....

(6) 2004 (5) SCC 385 [Deepal Girishbhai Soni and others v. United India Insurance Co. Ltd.]

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67. We, therefore, are of the opinion that Kodala (supra) has correctly been decided. However, we do not



agree with the findings in Kodala (supra) that if a person invokes provisions of Section 163-A, the annual income of Rs. 40,000/- per annum shall be treated as a cap. In our opinion, the proceeding under Section 163-A being a social security provision, providing for a distinct scheme, only those whose annual income is upto Rs. 40,000/- can take the benefit thereof. All other claims are required to be determined in terms of Chapter XII of the Act.

(7) 2009 (1) TN MAC 680 (SC) [National Insurance Company Limited v. Hamida Khatoon and others]

12. In this background and context we have to consider the effect of the bar created by Section 53 of the ESI Act. Bar is against receiving or recovering any compensation or damages under the Workmen's Compensation Act or any other law for the time being in force or otherwise in respect of an employment injury. The bar is absolute as can be seen from the use of the words shall not be entitled to receive or recover, "whether from the employer of the insured person or from any other person", "any compensation or damages" and "under the Workmen's Compensation Act, 1923 (8 of 1923), or any other law for the time being in force or otherwise". The words "employed by the legislature" are clear and unequivocal. When such a bar is created in clear and express terms it would neither be permissible nor proper to infer a different intention by referring to the previous history of the legislation. That would amount to bypassing the bar and defeating the object of the provision. In view of the clear language of the section we find no justification in interpreting or construing it as not taking away the right of the workman who is an insured person and an employee under the ESI Act to claim compensation under the Workmen's Compensation Act. We are of the opinion that the High Court was right in holding that in view of the bar created by Section 53 the application for compensation filed by the appellant under the Workmen's Compensation Act was not maintainable.

(8) 2017 (2) TNMAC 753 (SC) [United India Insurance Co. Ltd. v. Sunil Kumar and another]

"7.....Section 163-A, on the other hand, was introduced in the New Act for the first time to remedy the situation where determination of final Compensation on fault basis under Section 166 of the Act was progressively getting protracted. The Legislative



intent and purpose was to provide for payment of final compensation to a class of Claimants (whose income was below Rs.40,000 per annum) on the basis of a Structured Formula without any reference to fault liability. In fact, in *Hansrajbhai Vs. Kodala* (supra), the Bench had occasion to observe that:

"Compensation amount is paid without pleading or proof of fault, on the Principle of Social Justice as a Social security measure because of ever-increasing Motor Vehicle accidents in a fast-moving society. Further, the law before insertion of Section 163-A was giving limited benefit to the extent provided under Section 140 for no fault liability and determination of compensation amount on fault liability was taking a long time. That mischief is sought to be remedied by introducing Section 163-A and the disease of delay is sought to be cured to a large extent by affording benefit to the victims on Structured-Formula basis. Further, if the question of determining Compensation on fault liability is kept alive it would result in additional litigation and complications in case claimants fail to establish liability of the Owner of the defaulting vehicles."

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 thereunder 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 163-A(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 an unduly long time. In fact, to understand Section 163-A of the Act to 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. Per contra, the learned counsel appearing for the respondents 1 to 5 contended that the petition filed by the respondents 1 to 5 under Section 163-A is maintainable. It is well settled that in the claim petition filed under Section 163-A of the Motor Vehicles Act, the question of negligence need not be pleaded and proved by the claimants. The Insurance Company or the owner of the offending vehicle cannot raise the issue of negligence on the part of the injured person or deceased in the accident. The Tribunal directed the 6th respondent to deposit the compensation amount awarded within **two months** from the date of the award. The appellant is not aggrieved by the award of the Tribunal directing the 6th respondent to deposit the amount and appeal filed by the appellant is not maintainable and appellant has filed appeal as a proxy of the 6th respondent. The deceased was an employee of the appellant and appellant directed the deceased to drive the vehicle on the date of accident. While the deceased was driving the vehicle, due to rain, the deceased lost his control and the vehicle got capsized and the deceased died on the spot. The deceased drove the vehicle with care and caution. The accident has not occurred due to rash and negligent driving by the deceased. The appellant having taking a stand in the counter statement and before the Tribunal that accident did not take place due to the rash and negligent driving by the deceased, cannot take a contrary stand in the appeal that the accident has occurred only due to rash and negligent driving by the deceased. As per Section 163-A of the Motor Vehicles Act, the respondents 1 to 5 can maintain the claim petition. The respondents 1 to 3 alone received dependent benefits as per the provisions of ESI Act. The moment the 2nd respondent became major, the said benefit was stopped. Similarly, when the 3rd respondent becomes major, the benefit will be stopped. The respondents 4 and 5 did not get any benefit under the ESI Act. The benefit under ESI Act is only a dependent benefit and it will not be a bar for the respondents 1 to 5 to claim compensation under the provisions of the Motor Vehicles Act. Section 163-A of the Motor Vehicles Act being subsequent legislation, the bar under Section 53 of the ESI Act is not applicable when a petition is filed under Section 163-A of the Motor Vehicles Act.

10. The learned counsel appearing for the 6th respondent contended that the vehicle got capsized only due to rash and negligent driving by the deceased and it stopped after 50 metres from the place where it got capsized. The 6th respondent is not liable to pay compensation as the deceased himself was the tort-feasor and also an insured employee as per the provisions of ESI Act and the respondents 1 to 3 are receiving amounts from Employees State Insurance Corporation. The respondents 1 to 5 are not entitled to receive benefits under both ESI Act as well as Motor Vehicles Act. The Tribunal erred in holding that the petition under Section 163-A of the Motor Vehicles Act is maintainable and that the claim petition under Motor Vehicles Act is not a bar by provisions of ESI Act and prayed for allowing the appeal.



11. The learned counsel appearing for the appellant, in reply to the arguments made by the learned counsel for the respondents 1 to 5 contended that the Tribunal held that both the appellant as well as the 6th respondent are jointly and severally liable to pay compensation. As the liability is fastened on the appellant also, the appeal filed by the appellant is maintainable as he is an aggrieved person and prayed for allowing the appeal. The learned counsel for the appellant relied on the following judgments:

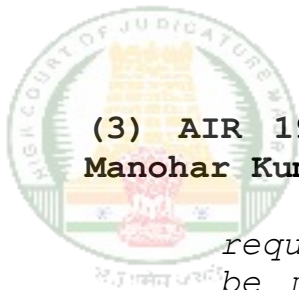
(1) 1982 ACJ 251 [Vellayya Gounder v. N. Ramnathan and others]

6. On that ground the High Court held that the Owner is not an aggrieved party. With respect we are unable to accede to that view. It is a well settled principle of law that insurance is an indemnity contract and unless the owner is made liable, there is no liability on the insurer to indemnify the owner. Hence, it would not be correct to say that the owner cannot have any grievance because there is no award against him. In fact the award is against the owner and the insurer; it is joint and several. It is under s. 110B of the Motor Vehicles Act that we direct further the insurer to pay the amount if it is within its liability. That does not mean that there is no liability on the owner. Hence, we are unable to agree with the view of the Calcutta High Court. We hold that unless the owner is liable the liability of the insurance company does not arise for consideration. Hence, we are unable to accede to the submission made before us by the learned counsel for the respondent that no appeal lies by the owner under s. 110B of the Motor Vehicles Act.

(2) AIR 1987 Madhya Pradesh 244 [New India Assurance Co. Ltd., and others v. Tmt. Shakuntalabai and others]

5. If he has right to appeal, he must act in his own right. If there is no award against him, in other words, if no amount is specified due payable by him in the award in terms of Section 110-B, he cannot be considered to be a "person aggrieved" so as to give him the right of appeal as no burden or obligation of any nature has to be discharged by him. He cannot, therefore, have any grievance against the award which does not specify any amount as liability to be discharged by him personally. Unless a person was saddled with any liability in any manner under Section 110-B, he would not be a "person aggrieved" within the meaning of the term employed in Section 110-

D.



(3) AIR 1993 Jammu and Kashmir 69 [Nahar Singh and another v. Manohar Kumar and others]:

6. In the light of the contention raised, it requires to be seen whether this appeal can be held to be maintainable on the part of appellants jointly or severally. Appellant No. 1 is the owner of the vehicle involved in the accident and it is to be conceded that but for him the other appellant would not have incurred the liability. It is primarily the judgment passed against the owner, that has made the Insurance Company liable. Even so can it be said that owner is the person aggrieved within the meaning of Section 110-D and competent to maintain the appeal. Going by the preponderance of judicial opinion on the point, the answer is in the negative. This is so because the expression has to be given a restricted meaning in the context of the content and intent of the Motor Vehicles Act. The owner, obviously, does not qualify the test for his grievance against the award can be only consequential and not immediate. His interests cannot be said to adversely and prejudicially affected, nor is he deprived of anything which was otherwise due to him. The award does not direct him to pay any compensation. It does not affect any of his interests directly and immediately. Viewed thus, it is difficult to declare appellant No. 1 as "person aggrieved" and, as such, he is not competent to maintain this appeal.

(4) 1995 ACJ 416 [New India Assurance Co. Ltd., and another v. Saraswati Samantha Singhar and others]:

5.The 'person aggrieved' is a person who is given a right to raise a contest in a certain matter and his contention is negatived. He is certainly aggrieved by the order disallowing his contention. Any person who makes an application to a Court for a decision, or any person who is brought before a Court to submit to a decision is, if the decision goes against him, thereby a 'person aggrieved' by that decision. Persons whom the Court was bound to hear if they wished to be heard, on the validity of a case and the decision has been against them, it can be said that they are 'persons aggrieved'. It means a person injured or damaged in a legal sense; (See *Re Riviere*, 26 Ch. D. 48). In *A. G. of the Gambia v. N. Jio* : (1961) AC 617, it was observed that the expression 'person aggrieved' includes any person who has a genuine grievance because an order has been made prejudicially affecting his interests.....

**(5) 1995 ACJ 690 [K.K.Kurian v. K.N.Santha and others]**

18. The driver was a party not only to the original petition, but there is a decree against him with an impending fear of its execution. The appellant, who is a driver, has approached this court by this appeal. The decree or the award creates joint and several liability both of the driver and the owner. It is not possible to accept the submission that the appeal is not maintainable on the ground that in certain situations the original petition does not fall down as bad for non-joinder of necessary parties.

(6) 1997 ACJ 520 [Oriental Insurance Co. Ltd. v. Anitha and others]

11. We would further add that it is open to the insured too to file an appeal against the award of the Tribunal even though the entire liability for payment of the compensation awarded is fastened upon the insurer.

(7) 1998 ACJ 244 [Narendra Kumar and another v. Yarenissa and others]

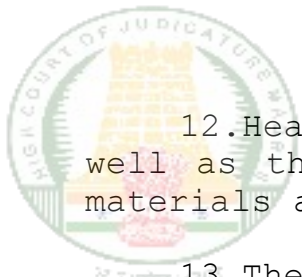
6. The question, however, is if such a joint appeal is preferred must it be dismissed in toto or can the tortfeasor, the owner of the offending vehicle, be permitted to pursue the appeal while rejecting or dismissing the appeal of the insurer. If the award has gone against the tortfeasors it is difficult to accept the contention that the tortfeasor is not "an aggrieved person" as has been held by some of the High Courts vide *Kantilal & Bros. v. Ramarani Debi*, 1980 ACJ 501 (Cal), *New India Assurance Co. Ltd. v. Shakuntla Bai*, 1987 ACJ 224 (MP), *Nahar Singh v. Manohar Kumar*, (1993) 1 ACJ 269 (J&K), *Radha Kishan Sachdeva v. Fit, Lt. L.D. Sharma*, (1993) 27 DRJ 18 (Del) merely because under the scheme of Section 96 if a decree or award has been made against the tortfeasors the insurer is liable to answer judgment "as if a judgment-debtor". That does not snatch away the right of the tortfeasors who are jointly and severally liable to answer judgment from preferring an appeal under Section 110-D of the Act. If for some reason or the other the claimants desire to execute the award against the tortfeasors because they are not in a position to recover the money from the insurer the law does not preclude them from doing so and, therefore, so long as the award or decree makes them liable to pay the amount of compensation they are aggrieved persons within the meaning of Section 110-D and would be entitled to prefer an appeal. But merely



because a joint appeal is preferred and it is found that one of the appellants, namely, the insurer was not competent to prefer an appeal, we fail to see why the appeal by the tortfeasor, the owner of the vehicle, cannot be proceeded with after dismissing or rejecting the appeal of the insurer. To take a view that the owner is not an aggrieved party because the Insurance Company is liable in law to answer judgment would lead to an anomalous situation in that no appeal would lie by the tortfeasors against any award because the same logic applies in the case of a driver of the vehicle. The question can be decided a little differently. Can a claim application be filed against the Insurance Company alone if the tortfeasors are not the aggrieved parties under Section 110-D of the Act? The answer would obviously be in the negative. If that is so, they are persons against whom the claim application must be preferred and an award sought for otherwise the insurer would not be put to notice and would not be liable to answer judgment as if a judgment-debtor. Therefore, on first principle it would appear that the contention that the owner of a vehicle is not an aggrieved party is unsustainable. That is the view taken by the High Court of Allahabad in *United India Fire & General Insurance Co. Ltd. v. Gulab Chandra Gupta*, and *Oriental Fire & General Insurance Co. Ltd. v. Rajendra Kaur*, 1989 ACJ 961 (All) as well as the High Court of Kerala in *K.R. Visalakshi v. Pookodan Hamza*, 1989 ACJ 600 (Ker) commends us.

(8) 1993 ACJ 828 [United India Insurance Co. Ltd. v. Member, Motor Accidents Claims Tribunal, Lakshmpur and others]

13.The insurer who is actually made liable to pay also has a right of appeal, but the right is circumscribed by the provisions of the Act, such as, Section 179. With respect, we are also unable to agree with the line of reasoning in *Hemendra Dutta Choudhury's* case, (1987) 2 GLR 450, that public interest requires that the insurer should be given the right of hearing on all grounds in the appellate forum. The insurer certainly should have the right to approach the appellate forum and raise defences appropriate to its status. If denial to the insurer of the right to raise all defences before the Tribunal is not a denial of right of hearing and a denial of fair play in action, we fail to see how it would be so when the restriction operates in the appellate forum also.



12. Heard the learned counsel appearing for the appellant as well as the respondents 1 to 5 and 6th respondent and perused the materials available on record.

13. The following points arise for consideration in the present appeal:

(1) Whether the appellant is an aggrieved person as per Section 173 of the Motor Vehicles Act and whether the appeal filed by the appellant is maintainable.

(2) Whether the claim petition filed by the respondents 1 to 5 under Section 163-A of Motor Vehicles Act is maintainable when the deceased himself was negligent and responsible for the accident.

(3) Whether the claim petition under Section 163-A of Motor Vehicles Act is maintainable when the deceased was earning more than Rs.40,000/- per annum.

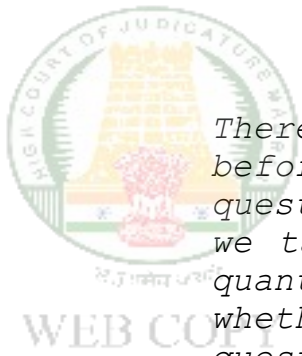
(4) Whether the claim petition is barred by the provisions of Section 53 of the ESI Act.

13(a) Point No.1 - Whether the appellant is an aggrieved person as per Section 173 of the Motor Vehicles Act and whether the appeal filed by the appellant is maintainable?

The learned counsel appearing for the respondents 1 to 5, after completion of arguments by the learned counsel for the appellant contended that the appeal filed by the appellant who is the 1st respondent in the claim petition is not maintainable as the appellant is not a person aggrieved as contemplated in Section 173 of the Motor Vehicles Act. The respondents 1 to 5 contended that the Tribunal directed only the 6th respondent-Insurance Company to **deposit** the compensation amount to the credit of M.C.O.P within **two months** from the date of the award. No direction was issued to the appellant to deposit the compensation amount or pay the same to the respondents 1 to 5. When there is no liability fastened on the appellant, the appeal filed by the appellant is not maintainable. The appellant has filed the appeal only as a proxy of the 6th respondent. The 6th respondent-Insurance Company is entitled to challenge only the quantum of compensation and the appellant is only a proxy for the 6th respondent. The learned counsel appearing for the respondents 1 to 5 relied on the judgments reported in:

(i) **2010 (1) TN MAC 98 [S.Murugan v. Selvi & others]:**

8.....Originally, the 5th respondent / Insurance company had joined together with the appellant to prefer this appeal. However, in view of the order passed by this court, the 5th respondent was transposed from the rank of second appellant to the rank of 5th respondent. Immediately, after the transposing or within the time limit no cross appeal has been preferred by the said 5th respondent.



Therefore, we have to see whether the first respondent before the lower Court, on the appellant herein can question the award passed by the lower Court. Even, if we take that the appellant is entitled to question the quantum of compensation fixed by the lower court, whether such quantum could be modified or altered is a question to be decided.....

12. The appellant was the first respondent before the lower Court who is none other than the owner of the vehicle, which involved in the accident. The fifth respondent / insurer is liable to indemnify the appellant in case the appellant / first respondent was found liable to pay the said compensation. Since, the second respondent before the lower Court (5th respondent herein) did not prefer any appeal against the judgment of lower Court, the fifth respondent is bound by the judgment of the lower Court.....

(ii) AIR 1987 Madhya Pradesh 244 [New India Assurance Co. Ltd. And others v. Smt. Shakuntalabai and others]

"5.But, according to me, the owner of the motor vehicle cannot act as a proxy only of the insurer. If he has right to appeal, he must act in his own right. If there is no award against him, in other words, if no amount is specified due payable by him in the award in terms of Section 110-B, he cannot be considered to be a "person aggrieved" so as to give him the right of appeal as no burden or obligation of any nature has to be discharged by him. He cannot, therefore, have any grievance against the award which does not specify any amount as liability to be discharged by him personally. Unless a person was saddled with any liability in any manner under Section 110-B, he would not be a "person aggrieved" within the meaning of the term employed in Section 110-D....."

13(b) The learned counsel appearing for the appellant in reply to the said contention contended that the Tribunal has held that both the appellant as well as the 6th respondent-Insurance Company are jointly and severally liable to pay compensation. The direction given to the 6th respondent by the Tribunal to deposit the compensation amount within two months to the credit of M.C.O.P will not absolve his joint and several liability along with the 6th respondent. If the 6th respondent fails to comply with the direction of the Tribunal, it is always open to the respondents 1 to 5 to file E.F against the appellant for recovery of the amounts awarded.



13(c) The learned counsel appearing for the appellant relied on the judgments reported in **1982 ACJ 251, AIR 1987 Madhya Pradesh 244, AIR 1993 Jammu and Kashmir 69, 1995 ACJ 416, 1995 ACJ 690, 1997 ACJ 520 and 1998 ACJ 244 (referred to above)**. Section 173 of the Motor Vehicles Act is the provision which enables the party to the claim petition to file appeal in this Court challenging the award of the Tribunal. Section 173 of the Motor Vehicles Act reads as follows:

"173. Appeals. - (1) Subject to the provisions of sub-section (2), any person aggrieved by an award of a Claims Tribunal may, within ninety days from the date of the award, prefer an appeal to the High Court :

Provided that no appeal by the person who is required to pay any amount in terms of such award shall be entertained by the High Court, unless he has deposited with it twenty-five thousand rupees of fifty per cent, of the amount so awarded, whichever is less, in the manner directed by the High Court :

Provided further that the High Court may entertain the appeal after the expiry of the said period of ninety days, if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal in time.

(2) No appeal shall lie against any award of a Claims Tribunal if the amount in dispute in the appeal is less than ten thousand rupees."

13 (d) As per this Section, only a person who is aggrieved by the award of the Tribunal can file appeal. It may be claimant, insured or insurer, as the case may be. This issue was considered by the Courts in the judgments relied on by the learned counsel appearing for the appellant as well as the respondents 1 to 5 referred to above. The Courts have held that only when the liability is fastened on the driver or owner or insurer of the vehicle, the appeal can be filed by any of them before the competent Appellate Court. It is held in the judgment referred to above that even if the accident has occurred due to rash and negligence of the driver or owner of the vehicle but no liability is fastened on them, they are not aggrieved persons and they cannot file an appeal. In the present case, the Tribunal has held that both the appellant as well as the 6th respondent are jointly and severally liable to pay the compensation awarded. In the latter portion of the award, i.e. in paragraph no.17, the Tribunal has directed the 6th respondent to deposit the compensation amount to the credit of M.C.O.P. This direction to the 6th respondent will not absolve the appellant from the joint and several liability fastened on them. For the above reason, I hold that the appellant is an aggrieved person as contemplated under Section 173 of the Motor Vehicles Act and the present appeal is maintainable.



14(a) **Point No.2** - Whether the claim petition filed by the respondents 1 to 5 under Section 163-A is maintainable when the deceased himself was negligent and responsible for the accident?

Point No.3 - Whether the claim petition under Section 163-A of the Motor Vehicles Act is maintainable when the deceased was earning more than Rs.40,000/- per month?

The respondents 1 to 5 have filed claim petition under Section 163-A of the Motor Vehicles Act claiming compensation for the death of Gunasekaran, husband of the 1st respondent, father of the respondents 2 and 3 and son of the respondents 4 and 5. According to the respondents 1 to 5, while the said Gunasekaran was driving the vehicle belonging to the appellant on the date of accident, which was a rainy day, he lost control of the van and the van got capsized in the right side of the road. The said Gunasekaran died on the spot. One of the employees of the appellant who was also traveling in the van lodged the complaint. In the complaint, he has not alleged that the accident occurred due to rash and negligent driving by the deceased. Similarly, in the counter statement filed by the appellant, they have stated that the accident was inevitable. They have not stated that they are not liable to pay any compensation on the ground that the accident has occurred only due to rash and negligent driving by the deceased. Having taken such a stand that the accident was inevitable and was not due to rash and negligent driving by the deceased, it is not open to the appellant to take a contra stand in the appeal to the effect that the accident has occurred only due to rash and negligent driving by the deceased.

14(b) Section 163-A of the Motor Vehicles Act was incorporated with effect from 14.11.1994 by Act 54 of 1994. The said Section was incorporated with a view to benefit the claimants with an intention to dispose of the claim petition speedily. As per Section 163-A of the Motor Vehicles Act, the claimants need not plead and prove the negligence on the part of the driver or owner of the vehicle. In the judgments relied on by the learned counsel appearing for the appellant as well as the respondents 1 to 5, it has been held that when the claim petition is made by a third party, it is not open to the Insurance Company to raise the objections of negligence.

14(c) Whether the person who was responsible for the accident can maintain the claim petition when he himself was negligent and caused the accident was considered by the Hon'ble Apex Court in the judgment reported in **2009 (2) TNMAC 169 (SC) [Ningamma & another v. United India Insurance Co. Ltd.]**. In the said judgment, it has been held that the owner of the vehicle who is the insured is not entitled to file claim petition for compensation against the Insurance Company. The Insurance Company is liable to indemnify the insured against the claims made by third parties. The Hon'ble Apex Court held that when a person borrows a motorcycle and met with an accident due to his own fault, the injured claimant or legal heirs of the deceased driver of two-wheeler cannot maintain claim petition

under Section 163-A of the Motor Vehicles Act as the rider steps into the shoes of the owner and he was the owner insured at the time of accident. This issue whether the injured claimant or the legal heirs of the deceased who was responsible for the accident can maintain the claim petition under Section 163-A of the Motor Vehicles Act was again considered by the Three-Judges Bench of the Hon'ble Apex Court in the judgments reported in **2017 (2) TN MAC 753 (SC) [United India Insurance Co. Ltd., Vs. Sunil Kumar and another]** and **2018 (2) TN MAC 149 (SC) [Shivaji and another Vs. Divisional Manager, United India Insurance Co. Ltd., and others]**.

14(d) The Hon'ble Apex Court considering the scope of Section 163-A of the Motor Vehicles Act has held that the Insurance Company cannot raise objections of negligence in the claim petition even when the injured claimant or deceased was responsible for the accident. The Hon'ble Apex Court held that permitting the Insurance Company to take such a stand would be contrary to the intention of the legislature and such a stand would defeat the very object of incorporating Section 163-A of the Motor Vehicles Act. In Paragraph Nos.7 and 8 of the judgment reported in **2017 (2) TN MAC 753 (SC) [United India Insurance Co. Ltd., Vs. Sunil Kumar and another]**, the Hon'ble Apex Court has held as follows -

"7.....Section 163-A, on the other hand, was introduced in the New Act for the first time to remedy the situation where determination of final Compensation on fault basis under Section 166 of the Act was progressively getting protracted. The Legislative intent and purpose was to provide for payment of final compensation to a class of Claimants (whose income was below Rs.40,000 per annum) on the basis of a Structured Formula without any reference to fault liability. In fact, in *Hansrajbhai Vs. Kodala* (supra), the Bench had occasion to observe that:

"Compensation amount is paid without pleading or proof of fault, on the Principle of Social Justice as a Social security measure because of ever-increasing Motor Vehicle accidents in a fast-moving society. Further, the law before insertion of Section 163-A was giving limited benefit to the extent provided under Section 140 for no fault liability and determination of compensation amount on fault liability was taking a long time. That mischief is sought to be remedied by introducing Section 163-A and the disease of delay is sought to be cured to a large extent by affording benefit to the victims on Structured-Formula basis. Further, if the question of determining Compensation on fault liability is kept alive it would result in additional litigation and complications in case claimants fail to establish liability of the Owner of the defaulting vehicles."



"5. The issue which arises before us is no longer res integra and is covered by a recent judgment of Three-Judges of this Court in United India Insurance Co. Ltd., Vs. Sunil Kumar and another, 2017 92) 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 a claim for Compensation."

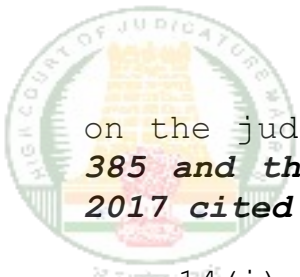
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14(f) **2015 (2) TN MAC 390 [The Branch Manager, New India Assurance Co. Ltd., Vs. Mala and others]:**

"20..... When the claim is made under Section 163-A, claimant need not prove the fault, income or negligence and also can claim income of the injured or deceased up to Rs.40,000/-."

14(g) The Hon'ble Apex Court reiterated the ratio of the judgment reported in **2017 (2) TN MAC 753 (SC) cited supra** and held that the Insurance Company is not entitled to raise the objection of negligence on the part of the injured claimant or the deceased. In view of the above two judgments of the Hon'ble Apex Court, even if the deceased was responsible for the accident, even though no such stand was taken by the appellant, the claim petition filed by the respondents 1 to 5 is maintainable and the Tribunal has rightly awarded compensation to the respondents 1 to 5. At this time it is pertinent to note that only the 6th respondent took the stand that accident has occurred only due to rash and negligent driving by the deceased. The ground no.3 raised now in the appeal is the very same ground with the very same words as in the counter statement filed by the 6th respondent. The stand of the learned counsel appearing for the respondents 1 to 5 that appellant has filed appeal as a proxy of the 6th respondent is indicated by this stand of the appellant.

14(h) The next contention of the learned counsel appearing for the appellant is that the deceased was earning more than Rs.40,000/- per annum and the claim petition filed under Section 163-A is not maintainable. The claimant can file the claim petition under Section 163-A of the Motor Vehicles Act only if the income of the injured claimant or the deceased is less than Rs.40,000/- per annum. In the present case, according to the learned counsel appearing for the appellant, in the claim petition, the respondents 1 to 5 have stated that the deceased was earning a sum of Rs.6,000/- per month. The 5th respondent as P.W.1 has deposed that the deceased was earning a sum of Rs.4,250/- per month and marked Ex.P4-salary slip. The appellant examined R.W.1 and marked Ex.R2-salary slip. The 6th respondent summoned R.W.2, another employee of the appellant and through him marked Ex.R3, salary certificate. As per the salary certificate, the deceased has received a sum of Rs.3776.65/- as salary for the month of September 2004. The allowances received by the deceased must also be taken into account for calculating the monthly income of the deceased. The Tribunal erroneously deducted conveyance allowance of Rs.550/- and over time allowance of Rs.559/-. The said deductions are erroneous and both the amount has to be taken into account while arriving at the monthly income of the deceased. In support of his contention, the learned counsel appearing for the appellant relied



on the judgments reported in **2008 (1) TNMAC 166 (SC), 2004 (5) SCC 385 and the judgment dated 20.12.2017 made in C.M.A.(MD).No.558 of 2017 cited supra.**

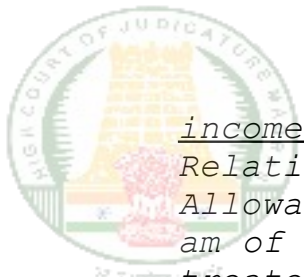
14(i) On the other hand, it is the contention of the learned counsel appearing for the respondents 1 to 5 that all the allowances granted to the deceased employee cannot be taken into account while arriving at the income of the deceased for calculating the loss of dependency for the legal heirs. Only the allowances which are beneficial to the family can be taken into account and allowances which are of personal benefit for the deceased must be deducted. The conveyance allowance and over time allowance cannot be included in the salary of the deceased. He relied on the following judgments in support of his contention -

(A) 2016 ACJ 1930 [Jasbhai Bhailalbhair Patel and others]

5.0.....Thus, while considering the income of the victim/deceased employee the allowances like washing allowance, conveyance allowance are not required to be included while determining the income for the purpose of awarding future economic loss. It is required to be noted that in the present case as such even the conveyance allowance was reimbursed on producing the vouchers and conveyance allowances are paid to an employee for the purpose of his conveyance/traveling expenses from his residence to office and office to residence. Under the circumstances, the said conveyance allowance is not required to be included in the income of the victim for the purpose of awarding future economic loss. Similarly, the overtime allowances also is not required to be included in the income of the victim for the purpose of awarding future economic loss, as the overtime allowance changes is paid for the period the employee has worked overtime. Overtime allowance is never steady and/or never claimed as a matter of right. On the death of the employee naturally there will not be any overtime work and therefore, the same was not required to be paid and therefore, the overtime allowance is also not required to be included in the income of the victim for the purpose of awarding future economic loss.

(B) 2009 ACJ 2865 [Branch Manager, New India Assurance Co. Ltd. v. A.Mary Imelda Jayaseeli & others]

9. From the above sub-heads, it is clear that a sum of Rs.880/- p.m was given by the employer towards conveyance assistance and a sum of Rs.100/- was given towards washing allowance. Obviously, the amounts given under the aforesaid sub-heads never can be taken as



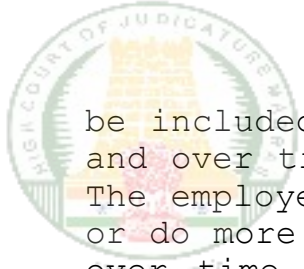
income of the deceased and that should be deleted. Relating to other sub-heads, such as, House Rent Allowance, Special Allowance, Educational Assistance, I am of the considered opinion that those are all should be treated as income and there could be no second thought over it. Regarding the medical allowance and Leave Travel Concession, those amounts were paid only annually and that also should be taken while assessing the annual income of the deceased.

(C) 2010 (1) TN MAC 6 (DB) [S.Rhama & Others v. Tamil Nadu State Transport Corporation]

22. In so far as the allowances, Conveyance Allowance, Vehicle Maintenance, Attire Allowance and Business Promotion Allowance are exclusively meant for deceased Sundara Rajan for his conveyance and for promoting business. There is no evidence to show the nature of other allowance of Rs.8083/- paid under the caption 'Other Allowances'. Therefore, the allowances paid towards Conveyance, Attire Allowance, Business Promotion, Vehicle Maintenance and Other Allowances, were meant only for the deceased employee and were not meant for benefit of the family and cannot be included in the salary.

14(j) From the materials on record, it is seen that the respondents 1 to 5 in the claim petition contended that the deceased was earning a sum of Rs.6,000/- per month. They could not substantiate the said statement. P.W.1 in her evidence has deposed that her deceased son was earning a sum of Rs.4,250/- per month and marked Ex.P4 (salary slip). The appellant examined R.W.1, the Assistant Manager of the appellant and on summon by the 6th respondent, R.W.2, another employee of the appellant was examined as R.W.2. Through R.W.1 and R.W.2, Exs.R2 and R3 were marked. From the salary certificate for the month of September 2004, it is seen that the deceased was paid Rs.3,776.65/- as salary which included conveyance allowance of Rs.550/- and over time allowance of Rs.559/-. The Tribunal has rightly deducted the said two amounts from the monthly income of Rs.3,776.65/- of the deceased. From the judgments relied on by both the learned counsel appearing for the appellant as well as the learned counsel appearing for the respondents 1 to 5, it is consistently held that certain allowances like conveyance allowance, over time allowance, washing allowance, etc., cannot be included in the salary for arriving at the income for granting compensation for loss of dependency.

14(k) A Division Bench of this Court in the judgment reported in **2010 (1) TN MAC 6 (DB) cited supra, in paragraph no.22** has given illustration as to which are the allowances that can be included in the salary of the deceased and which are the allowances that cannot



be included in the salary of the deceased. The conveyance allowance and over time allowance will not benefit the members of the family. The employee may or may not do over time work in a particular month or do more hours of over time or less hours of over time work. The over time allowance will vary from month to month. For the above reason, I hold that the income of the deceased is less than Rs.40,000/- per annum and the claim petition filed by the respondents 1 to 5 is maintainable and respondents 1 to 5 are entitled to compensation as per the structural formula of Schedule II of 163-A of the Motor Vehicles Act.

15(a) **Point No.4 - Whether the claim petition is barred by the provisions of Section 53 of the ESI Act?**

The appellant in the counter statement has stated that the deceased was an insured employee under the ESI Act and the claim petition under Motor Vehicles Act is not maintainable. It is further contended by the learned counsel for appellant that the respondents 1 to 3 are receiving compensation from the Employees State Insurance Corporation and to substantiate the same **R.W.3**, an employee of Employees State Insurance Corporation was examined and Ex.R5 was marked through him. The learned counsel appearing for the appellant contended that as per Section 53 of ESI Act, the insured employee or legal heirs of the insured employee are barred from claiming compensation under any other Act. The Tribunal without properly considering the scope of Section 53 of the ESI Act has held that the claim petition under Section 163-A of the Motor Vehicles Act is maintainable and granted compensation. In support of his contention, the learned counsel appearing for the appellant relied on the judgments, **2012 ACJ 2292 [Regional Manager, New India Assurance Co. Ltd. v. Vijay Balshiram Walunj and others]** and **2009 1 TN MAC 680 SC [National Insurance Co. Ltd., Vs. Hamida Khatoun and others]**. Both are referred to above.

15(b) On the other hand, it is the contention of the learned counsel appearing for the respondents 1 to 5 that the respondents 4 and 5 did not get any benefit from ESI Act. The benefits granted under ESI Act will be paid to the children of the deceased only until they are minors and widow of the deceased will not get the benefits if she is re-married. Section 163-A of the Motor Vehicles Act was inserted in later point of time in Motor Vehicles Act than Section 53-A of ESI Act and therefore, the claim petition under Section 163-A of the Motor Vehicles Act is maintainable and it is not a bar in view of Section 53 of ESI Act. The learned counsel appearing for the respondents 1 to 5 relied on the following judgments reported in support of his contention -

(A)1998 ACJ 579 [Tribhuwan Singh v. Ramesh Chandra and others]

10. However, in the instant case, the facts are that the appellant was going on a cycle and he had not entered into the premises of the employer. The accident had occurred on the public road. In my opinion, in these circumstances, it could not be said that the appellant



had met with the accident in the course of his employment or that the injuries were caused by accident arising out of the employment. Thus, the injuries sustained by the insured were not 'employment injury'. A Division Bench of the Karnataka High Court in the case of G.N. Vishwanath v. Andal 1982 ACJ (Supp) 128 (Karnataka), held that as the deceased met with an accident when he was going on his cycle on the public road, it was not 'employment injury'. The same High Court again in the case of Deputy General Manager, Karnataka State Road Trans. Corporation v. Gopal Mudaliar 1983 ACJ 128 (Karnataka), held that the injury sustained in motor accident when the worker was going on a cycle cannot be considered as 'employment injury'. It is, thus, obvious that even the view of the Karnataka High Court has been that when the deceased or injured met with an accident while on the public road, it could not come within the purview of employment injury. In the instant case, it has not come on record as to what was the distance of the place of accident from the factory. The accident had taken place at Vidhadhar Nagar turn. Therefore, it is difficult to apply the notional extension theory for holding that the appellant had suffered employment injuries. That being so, the bar of Section 53 does not come into play.

11. Apart from this, Section 75 of the E.S.I. Act envisages the matters which can be decided by the E.S.I. Court. Clause (e) is the only relevant clause for our purpose. Under this clause, if an employee has a right to have benefit as to the amount and duration thereof, he can approach the E.S.I. Court. The benefits have been categorised in Chapter V of the Act. Section 46(1) (c) provides that insured is entitled to the periodical payment when suffers from disablement as a result of employment injury. In my opinion, Section 46 does not envisage remedy where an employee suffers from tortious act. It has been held by Madhya Pradesh High Court in the case of Madhya Pradesh State Road Trans. Corporation v. Praveer Kumar Bhatnagar 1994 ACJ 579 (MP), that the E.S.I. Court does not deal with a tortfeasor's liability and does not award against him damages/ compensation according to the uncodified law of Torts for such of his act of omission or commission as is regarded as a wrong liable to be redressed under the English common law. It has further been held in this case that Section 53 of the E.S.I. Act, cannot kill the indefeasible right of obtaining compensation/damages under Motor Vehicles Act. The learned Judge has interpreted Section 53 of the E.S.I. Act and has held



that the term 'any other law' which follows immediately the clause "under the Workmen's Compensation Act or" must reasonably mean a law of the same genre as of the named Act, and that Section 110-A of the Motor Vehicles Act (166 of the new Act) is not covered by Section 53. I fully agree with the view taken by the learned Judge in that case. The right to sue arising from the substantial law namely, law of Torts cannot be destroyed by the procedural provision of Section 61 of the E.S.I. Act or Section 53 of the Act.

15. For the reasons stated above, I have no hesitation in holding that the Tribunal has erred in holding that the claimant being employee and covered under the E.S.I. Act is debarred from getting compensation under the Motor Vehicles Act, because of bar of Section 53 of the E.S.I. Act. Since evidence of the parties had been recorded, it was the duty of the learned Tribunal to give finding on the issues framed. Since the learned Tribunal has not given the finding on the issues, it has become necessary to remand the case to the Tribunal for deciding it afresh.

(B)2012 ACJ 233 [Union of India and another v. Chandrakali Chattervedi and others]

6. Needless to say that the Act being a special law, in case the case of claimants-respondents is covered under the said Act, then they may not be entitled for the payment of compensation under the Motor Vehicles Act. However, the close scrutiny of the Act shows that the case of the deceased was not covered under Section 28 of the Act. From the reading of the Act, it appears that Act deals with the health insurance of the industrial workers and not with the accident occurred on the road while moving in vehicle.

11. The plain reading of Section 28 of the Act, does not seem to make out a case that it shall cover the accidental death taken place while travelling in the vehicle on road. The fund may be utilized for the treatment and provide medical aid etc. to the employees whose case is covered under the Act. Learned counsel for the appellant also could not point out any provision under the Act, which may cover the accidental death occurred while travelling in a vehicle may be of the employer itself.

12. It is settled law that in case special law does not cover the controversy, then it shall be dealt with by general law. The Motor Vehicles Act, 1988, specifically deals with the accidental death, injuries



and compensation payable thereon. The Tribunal has rightly paid the compensation to the claimants in pursuance of the power exercised under the Motor Vehicles Act 1988.

(C) Paragraph Nos.10 and 12 of the judgment reported in **2012 ACJ 2292 [Regional Manager, New India Assurance v. Vijay Balshiram Walunj and others]**. The paragraphs of this judgment are relied on by the learned counsel for the appellant also and the same is extracted supra.

(D)1991 ACJ 636 [Regional Director, Employees' State Insurance Corporation v. Francis De Costa and another]

17. The next contention that the Motor Vehicles Act provides the remedy for damages for an accident resulting in death of an injured person and that, therefore, the remedy under the Act cannot be made availed of lacks force or substance. The general law of tort or special law in Motor Vehicles Act or Workman Compensation Act may provide a remedy for damages. The coverage of insurance under the Act in an insured employment is in addition to but not in substitution of the above remedies and cannot on that account be denied to the employee. In K. Bharati Devi v. G.I.C.I., AIR 1988 A.P. 361 the contention that the deceases contracted life insurance and due to death in air accident the appellant received compensation and the same would be set off and no double advantage of damages under carriage by Air Act be given was negatived.

15(c) To decide this issue, it will be relevant to extract Section 53 of ESI Act and Section 163-A of the Motor Vehicles Act for easy reference and better appreciation of the issue in the hand.

Section 53 of E.S.I. Act

"53. Bar against receiving or recovery of compensation or damages under any other law-

An insured person or his dependants shall not be entitled to receive or recover, whether from the employer of the insured person or from any other person, any compensation or damages under the Workmen's Compensation Act, 1923 or any other law for the time being in force or otherwise, in respect of an employment injury sustained by the insured person as an employee under this Act."

Section 163-A of Motor Vehicles Act

163. Scheme for payment of compensation in case of hit and run motor accidents. - (1) The Central



Government may, by notification in the Official Gazette, make a scheme specifying, the manner in which the scheme shall be administered by the General Insurance Corporation, the form, manner and the time within which applications for compensation may be made, the officers or authorities to whom such applications may be made, the procedure to be followed by such officers or authorities for considering and passing orders on such applications, and all other matters connected with, or incidental to, the administration of the scheme and the payment of compensation.

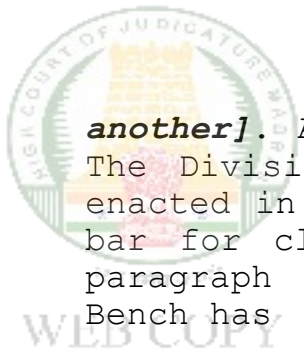
(2) A scheme made under sub-section (1) may provide that - (a) a contravention of any provision thereof shall be punishable with imprisonment for such term as may be specified but in no case exceeding three months, or with fine which may extend to such amount as may be specified but in no case exceeding five hundred rupees or with both;

(b) the powers, functions or duties conferred or imposed on any officer or authority by such scheme may be delegated with the prior approval in writing of the Central Government, by such officer or authority to any other officer or authority;

(c) any provision of such scheme may operate with retrospective effect from a date not earlier than the date of establishment of the Solatium Fund under the Motor Vehicles Act, 1939 (4 of 1939) as it stood immediately before the commencement of this Act.

Provided that no such retrospective effect shall be given so as to prejudicially affect the interests of any person who may be governed by such provision."

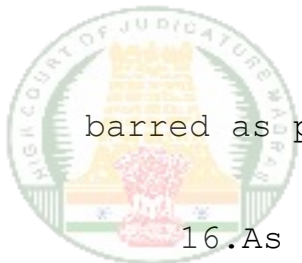
15(d) A reading of the Section 53 of the ESI Act reveals that an insured person covered by ESI Act cannot claim under Workmen's Compensation Act or any other law for the time being in force or otherwise in respect of an employment injuries sustained by the insured person as an employee under the said Act. The ESI Act is enacted for providing medical assistance to an insured employee and for sickness benefit and for reimbursement of medical expenses incurred by the insured person. The legal heirs of the deceased person will get only dependent benefits. On the other hand, under the provisions of the Motor Vehicles Act, the injured person or the legal heirs of the deceased can claim compensation for the loss of dependency, loss of earning capacity, pain and suffering, extra nourishment, attender charges, loss of amenities, etc. The claim under the Motor Vehicles Act is for enforcing the law of torts. Whether the claim petition under the Motor Vehicles Act is maintainable when the deceased was insured employee was considered by the Division Bench of this Court in the judgment reported in **1982 AIR MADRAS 223 [Mangalamma and others V. Express Newspapers Ltd. And**



another]. At that time, the Motor Vehicles Act, 1939 was in force. The Division bench considering Section 53 of ESI Act which was enacted in the year 1948, held that Section 53 of the ESI Act is a bar for claiming compensation under the Motor Vehicles Act. In paragraph No.13 of the judgment referred to above, the Division Bench has held as follows:

"13.....As a matter of fact the claimants are receiving compensatory benefit under the Employees' State Insurance Act as spoken to by R. W. 1, in relation to the accident and that can only be on the basis that the deceased sustained employment injury within the meaning of S. 53 of the said Act. See. 53 specifically bars any claim for compensation or damages under the Workmen's Compensation Act or any other law for the time being in force including the Motor Vehicles Act. The object of the said section appears to be to see that the employer is not faced with more than one claim in relation to the same accident. Employees' State Insurance Act has been enacted subsequent to the Motor Vehicles Act. Therefore. once the claimants get the benefit under the Employees' State insurance Act in relation to an accident, then no claim for compensation under S. no-A of the motor vehicles Act could be maintained."

15(e) Subsequent to the said judgment, the Motor Vehicles Act, 1988 was enacted repealing the earlier Act. Section 163-A was incorporated in the Motor Vehicles Act, 1988 with effect from 14.11.1994. When Section 163-A was incorporated, the legislature was conscious of Section 53 of the ESI Act. In spite of Section 53 of the ESI Act, 1948 the legislature incorporated Section 163-A of Motor Vehicles Act. Section 163-A referred to above starts in "Notwithstanding anything contained in this Act or in any other law for the time being in force or instrument having force of law". From the plain reading of this Section, it is clear that Section 163-A will prevail over Section 53 of the ESI Act as the same came into force with effect from 28.01.1948 very much earlier to Section 163-A of the Motor Vehicles Act, which came into force on 14.11.1994. This issue was considered in the judgment reported in **2012 ACJ 2292 cited supra**. The Courts held that Section 163-A has been introduced long after provision of Section 53 of the ESI Act and therefore, Section 53 of the ESI Act is not a bar for the claim under Section 163-A of the Motor Vehicles Act. The Division Bench of this Court in the judgment reported in **1982 AIR MADRAS 223** referred to above has ruled that in view of Section 53 of the ESI Act, the claim petition under the Motor Vehicles Act is not maintainable, as Section 53 of the ESI Act was a latter enactment. The same principle applies to hold that Section 53 of the ESI Act is not a bar for the claim under Section 163-A of the Motor Vehicles Act, 1989 as Section 163-A was incorporated in Motor Vehicles Act with full knowledge of Section 53 of ESI Act. In view of the above, the claim petition under Section 163-A is maintainable and it is not

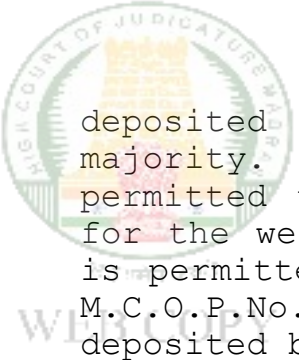


barred as per provision of Section 53 of the ESI Act.

16. As far as the quantum of compensation is concerned, the deceased was aged 40 years at the time of accident and as per II Schedule of the Motor Vehicles Act, the correct multiplier is '16'. The Tribunal erroneously applied lesser multiplier of '15'. Applying the multiplier '16' and after deducting $1/3^{\text{rd}}$ towards the personal expenses of the deceased, the compensation granted towards loss of dependency is modified to Rs.3,16,160/- [Rs.2,470/- x 12 x 16 x $2/3$]. The Tribunal has awarded a sum of Rs.25,000/- towards loss of estate, Rs.2,000/- towards funeral expenses and Rs.25,000/- towards loss of consortium. As per the structural formula in II Schedule of 163-A of the Motor Vehicles Act, the 1st respondent is entitled to only a sum of Rs.5,000/- for loss of consortium, respondents 1 to 5 are entitled to a sum of Rs.2,500/- for loss of estate and Rs.2,000/- for funeral expenses. Hence, the amount granted by the Tribunal under the head loss of consortium and loss of estate are reduced to Rs.5,000/- and Rs.2,500/- respectively. The amount awarded under the head funeral expenses is hereby confirmed. Thus, the compensation awarded by the Tribunal is modified as follows:

S.No	Description	Amount awarded by Tribunal (Rs)	Amount awarded by this Court (Rs)	Award confirmed or enhanced or granted
1.	Loss of dependency	2,96,400/-	3,16,160/-	enhanced
2.	Loss of estate	25,000/-	2,500/-	reduced
3.	Loss of consortium	25,000/-	5,000/-	reduced
4.	Funeral expenses	2,000/-	2,000/-	confirmed
	Total	3,48,400/-	3,25,660/-	Reduced by Rs.22,740/-

17. In the result, this Civil Miscellaneous Appeal is partly allowed and compensation granted by the Tribunal at Rs.3,48,400/- is reduced to Rs.3,25,660/- along with interest and costs. The 6th respondent-Insurance Company is directed to deposit the award amount along with interest and costs, within a period of six weeks from the date of receipt of a copy of this judgment, to the credit of M.C.O.P.No.830 of 2005. On such deposit, the respondents 1, 2, 4 & to 5 are permitted to withdraw their share of the award amount along with proportionate interest and costs, as per the ratio of ~~apportionment~~ ^{apportionment} fixed by the Tribunal, less the amount already withdrawn if any, by filing necessary application before the Tribunal. The share of the minor 3rd respondent is directed to be



deposited in any one of the Nationalized Banks, till he attains majority. The 1st respondent, mother of the minor 3rd respondent is permitted to withdraw the accrued interest, once in three months, for the welfare of the minor. The 6th respondent-Insurance Company is permitted to withdraw the excess amount lying to the credit of M.C.O.P.No.830 of 2005, if the entire amount has already been deposited by them. No costs.

Sd/-

Assistant Registrar (CS-II)

/ True Copy /

Sub Assistant Registrar(CS-)

gsa/rgr

To

1.The Principal District Judge,
(Motor Accident Claims Tribunal),
Madurai.

2.The Section Officer,
V.R. Section,
High Court, Madras (**2 copies**).

+1 CC to M/s.J.S.MURALI, Advocate (SR-64520[F] dated 30/04/2019)

gsa/rgr

judgment in
C.M.A(MD) No.864 of 2014
27.04.2019

ES/08.07.2019/31P/5C