

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 23.07.2020	Pronounced on: 29.07.2020
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CORAM:

THE HONOURABLE DR. JUSTICE G.JAYACHANDRAN

C.M.A.No.963 of 2015

R.Vijay

.. Appellant/Petitioner

/versus/

1.Mrs.Shabeena Begum
(R1 exparte in lower court)

2.United India Ins.Co.Ltd.,
No.14, Whites Road,
Chennai 600 014.

.. Respondents/Respondents

Prayer: Appeal filed under Section 173 of the Motor Vehicles Act, 1988 against the judgment and decree made in M.C.O.P.No.5667/2012 on the file of Motor Accident Claims Tribunal, III Judge, Small Causes Court, Chennai dated 23rd December 2014.

For Appellant : Mr.T.G.Balachandran

For 2nd Respondent : Mr.D.Baskaran

For 1st Respondent : Exparte before the lower Court

J U D G M E N T

(The case has been heard through video conference)

This appeal under Section 173 of the Motor Vehicles Act, 1988 has been preferred by the accident victim aggrieved by the dismissal of his claim petition.

2. The point for consideration in this appeal is :

Whether the dismissal of the claim petition by the Tribunal on the ground that the petitioner being the cause for the accident and the tort-feasor is not entitled for any compensation under any of the provisions of Motor Vehicles Act,1988 is legally sustainable?

3. The averments in the claim petition filed under Section 163 A r/w Section 140 of the Motor Vehicles Act, 1988 is that the claimant R.Vijay on 28.10.2012 at 13.00 hours while proceeding in his motorcycle bearing TN-02-AR-7107 at Perambur Barrack Road, Opposite to Otteri Police Station Quarters, Chennai from south to north, a motorcycle Honda Activa bearing Reg.No.TN-05-P-1776 driven rashly and negligently from the opposite direction came on the wrong side and hit the claimant vehicle and caused him grievous injury. The petition though filed under Section 163 (A) r/w 140 of Motor Vehicles Act, 1988 under no fall liability, a specific allegation has been made against the other vehicle driver of his rash and negligent driving as the cause for the accident.

4. In the said circumstances, the Insurance Company has filed a counter stating that the claimant is the tort-feasor. He in fact rashly and negligently jumped the medium and dashed against the opposite vehicle causing injury to three persons. First Information Report was registered against the claimant and he has been prosecuted for rash and negligent driving. While so, he being a tort-feasor cannot take advantage of his own fault and claim compensation.

5. Specifically it was contended in the counter of the insurance company that the claimant at the most is entitled for Rs.25,000/- under Section 140 of the Act if he could prove permanent injury. Having alleged rash and negligent driving against the opposite vehicle, the benefit of Section 163A is not available to the claimant.

6. The trial Court, having considered the evidence let in by the claimant and the insurance company, dismissed the claim petition observing that the claimant has hit a static vehicle and caused injury to himself and three others. He being a tort-feasor, he is not entitled for any compensation.

7. The learned counsel appearing for the appellant would submit that the Tribunal has failed to appreciate the fact that the claim petition is made under Section 163A r/w 140 of the Motor Vehicles Act, 1988 and being an Auto driver the claimant was earning a sum of Rs.3,300/- per month, which is less than Rs.40,000/- per annum and having sustained permanent disability of 30% he is eligible for getting compensation under the structured formula contemplated under Section 163A of Motor Vehicles Act, 1988 which is inserted in the statute to prevent beggary, ameliorate the suffering of victims in motor accident.

8. The learned counsel appearing for the respondent-Insurance Company would submit that the First Information Report as well as the claim made by the other injured victims implicate

the claimant as the offender. The fact that the claimant is the offender is proved and accepted by the Court. While so, Section 140 and Section 163A of the Motor Vehicles Act, 1988 does not indicate that the motor accident victim is entitled for compensation under the structured formula, even if he is found to be a violator and offender. Further, having made specific allegation against the other vehicle driver, the claimant has forfeited his right to claim compensation under no fault liability.

9. Pointing out the averment made in the claim petition alleging rash and negligence against the opposite vehicle, the learned counsel for the respondent-Insurance Company would also submit that having pleaded so, the claimant cannot take advantage of provision of law quoted in his claim petition and try to get advantage of the benevolent provision meant for genuine road accident victim. The learned counsel also by way of illustration, submitted that if such applications are entertained and the compensation is awarded, a person may voluntarily cause road accident and sustain injury for monetary benefit. The principle of volenti-non injuria should be applied and no compensation should be granted on misplaced sympathy.

10. The learned counsel would also point out that both under Section 140 as well as 163A of the Motor Vehicles Act, 1988 the victim ought to have sustained permanent disability or death. In this case, the claimant has not proved any permanent disability. The opinion of Doctor who examined the accident victim after 1 ½ years of the occurrence is unreliable and per se exaggerated.

11. In view of the judgment rendered by three Judges Bench in United India Insurance Co.Ltd., v. Sunil Kumar and another [2017 (2) TNMAC 753 (SC)], the issue under consideration is no more res integra. Earlier, two Judges Bench in National Insurance Company Limited v. Sinitha and others reported in [2012 (1) TN MAC 1(SC)] comparing the provisions under Section 140 of Motor Vehicles Act and 163 A of the Motor Vehicle Act, 1988 took a view that Sub-Section 3 and 4 of Section 140 of Motor Vehicles Act which specifically have a negative clause exonerating the claimant from burden of pleading and establishing wrongful act, neglect or default. Any claim under Section 140 of the Act cannot be defeated because of the fault of the claimant. Such negative clause in Sub Section 4 of Section 140 been consciously omitted Section 163A. In the absence of the said provision in Section 163A of the Motor Vehicles Act, if the claimant is at fault and he has committed the wrongful act and neglect, the advantage of 163A is not available to him. However, this view has been later overruled in United India Insurance Co.Ltd., v. Sunil Kumar and another

cited supra.

12. The provisions of both Sections 163A and 140 of the Motor Vehicles Act, 1988 is extracted below for comparison and for proper appreciation.

"140. Liability to pay compensation in certain cases on the principle of no fault:-
(1) Where death or permanent disablement of any person has resulted from an accident arising out of the use of a motor vehicle or motor vehicles, the owner of the vehicle shall, or as the case may be, the owners of the vehicles shall, jointly and severally, be liable to pay compensation in respect of such death or disablement in accordance with the provisions of this Section.

2. The amount of compensation which shall be payable under sub-Section (1) in respect of the death of any person shall be a fixed sum of fifty thousand rupees and the amount of compensation payable under that sub-section in respect of permanent disablement of any person shall be a fixed sum of twenty-five thousand rupees.

(3) In any claim for compensation under sub-section (1), the claimant shall not be required to plead and establish that the death or permanent disablement in respect of which the claim has been made was due to any wrongful act, neglect or default of the owner or owners of the vehicle or vehicles concerned or of any other person.

(4) A claim for compensation under Sub-Section (1) shall not be defeated by reason of any wrongful act, neglect or default of the person in respect of whose death or permanent disablement the claim has been made nor shall the quantum of compensation recoverable in respect of such death or permanent disablement be reduced on the basis of the share of such person in the responsibility for such death or permanent disablement.

Notwithstanding anything contained in sub-section (2) regarding death or bodily injury to any person, for which the owner of the vehicle is liable to give compensation for relief, he is also liable to pay compensation under any other law for the time being in force:

Provide that the amount of such

compensation to be given under any other law shall be reduced from the amount of compensation payable under this Section or under Section 163-A."

"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 authorised insurer shall be liable to pay in the case of death or permanent disablement due to accident arising out of the use of the 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 in the Official Gazette, from time to time amend the Second Schedule."

13. It is obvious that the provision similar to Sub-Section 4 of Section 140 of Motor Vehicles Act, 1988 is absent in Section 163A of the Motor Vehicles Act, 1988. However, the observation of the Two Judges Bench in National Insurance Co.Ltd. v. Sinitha and others that unlike in a proceeding under Section 140 of the MV Act, where the defence of the Insurer based on negligence is shut out, the same is not the position in a proceeding under Section 163A of the Act has been clarified by the Three Judges Bench in Sunil Kumar and another case,

"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 other 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. Infact, 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."

14. The learned counsel for the Insurance Company/respondent would submit that the clarification of three Judges Bench is only to the extent of restraining the Insurance Company from defeating the claim of the claimant by raising the defence of negligence, but when the claimant himself alleges the negligence on the opposite vehicle, the claimant is bound to prove it and the respondent accrues the right to disprove the allegation of negligence.

15. No doubt, Section 163A has been inserted in the statute as a beneficial legislation. Any claim made under this Section relieves the claimant from proving the negligence on the part of the offending vehicle. However, it is silent about the negligence of the claimant himself and self inflicted injuries. Now that the Three Judges Bench has clarified that even if the claimant is at fault he can resort to Section 163A of the Act, 1988. The claimant is left with the burden of proving age, income and disability.

16. The learned counsel for the respondent/Insurance Company has rightly pointed out that in this case, the disability certificate given by the Doctor, who has admittedly not treated the victim and given the certificate after lapse of 1 ½ years, is totally unreliable. More so, when the victim has not stated anything about the permanent disability in his evidence.

17. The Doctor for fracture at 4th metacarsal bone for which the claimant has been surgically treated and K wire removed but mal-united has assessed permanent disability at 30% when for amputation of leg itself the All India Medical Science Schedule prescribes only 40%, the reason for assessing disability at 30% for fracture at 4th metacarsal bone makes the certificate unreliable. Unless and until, the victim is examined by the Medical Board to ascertain whether he has actually sustained any permanent disability and the percentage of the disability, the claimant can neither seek compensation under Section 140 of the Motor Vehicle Act or 163-A of the Motor Vehicle Act, 1988 which specifically provides compensation for death or permanent disability.

18. The above said submissions of the learned counsel for the respondent is both factually and legally sustainable. The perusal of the evidence given by the Doctor and his disability certificate vis-a-vis the evidence of the victim does not correlate. Without ascertaining the fact, whether the claimant has really sustained permanent disability, the compensation under Section 163A cannot be awarded. At the same time, the appellant, who is the accident victim cannot be deprived of just and due compensation. Therefore, the matter is remitted back to the Tribunal for fresh appraisal of the evidence including referring the victim to medical board for assessment of disability. The Motor Accident Claims Tribunal based on the disability, proof of age and income, the matter may be decided on merits preferable within 4 months from the date of receipt of the records.

19. In the result, C.M.A. No.963 of 2015 is disposed of. The award in M.C.O.P.No.5667 of 2012 dated 23.12.2014 on the file of the III Small Causes Court, Chennai is hereby set aside and remanded back for denova trial. No order as to costs.

Sd/-

Assistant Registrar (CS-V)

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Sub Assistant Registrar

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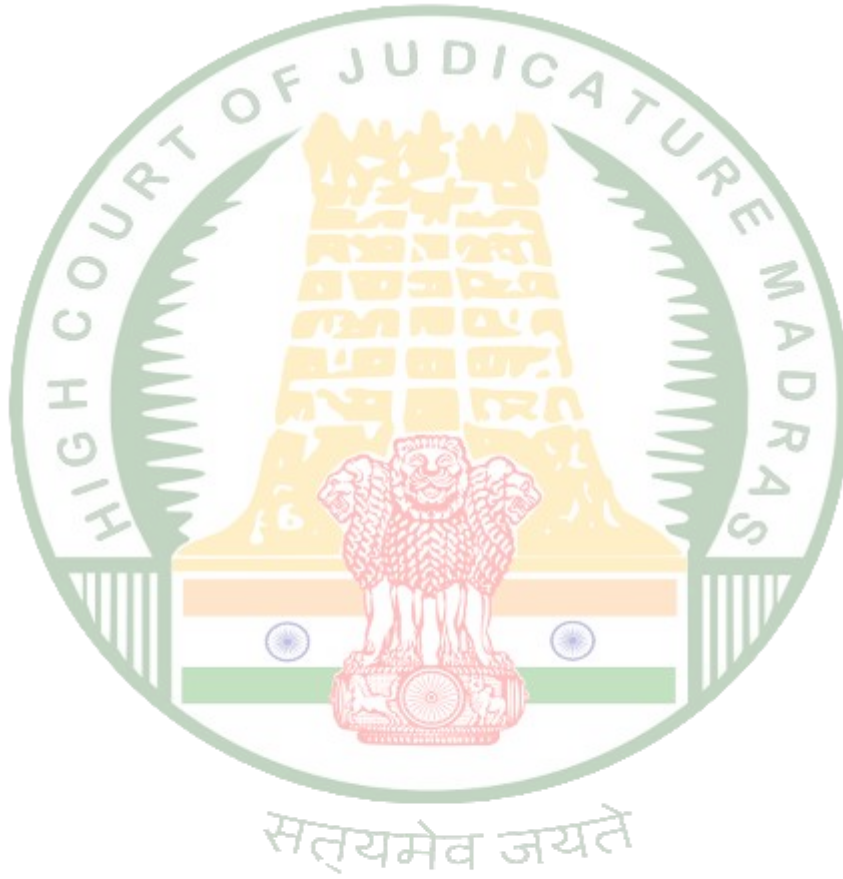
To

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

2.The Section Officer,
VR Section, Madras High Court.

C.M.A.No.963 of 2015

KJ(CO)
CB(29/04/2021)



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