IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 02.03.2021

CORAM:

THE HON'BLE MR. JUSTICE D.KRISHNAKUMAR

CMA.No.1772 of 2013

The Divisional Manager,
The New India Assurance Co.Ltd.,
202 & 204 M.G.Road, Pondicherry ... Appellant / 2nd Respondent

..vs..

1.Kalisankar
S/o.Kannan .. Respondent / Petitioner

2. V.Venkatesan
S/o.Vijayarangan ..Respondent / 1st Respondent

Appeal is filed under Section 173 of the Motor Vehicles Act, 1988, against the common judgment and decree dated 20.01.2012 in M.C.O.P.No. 1313 of 2005 on the file of the Motor Vehicles Accident Claims Tribunal, Additional Sub Judge, Pondicherry.

For Appellant : Mr.M.Krishnamoorthy

For Respondents : Notice served

JUDGMENT

The matter is heard through "Video Conferencing".

This Civil Miscellaneous Appeal has been filed by the appellant-Insurance Company against the judgment and decree dated 20.01.2012 in M.C.O.P.No. 1313 of 2005 on the file of the Motor Vehicles Accident Claims Tribunal,Additional Sub Judge, Pondicherry.

2.The appellant is the 2nd respondent before the tribunal . The 1st respondent has filed the said claim petition, claiming a sum of Rs.12,00,000/- as compensation for the injuries sustained by him in the road accident that took place on 25.11.2004.

3. It is the case of the 1st respondent/claimant that on 25.11.2004 at about 16.30 hrs when the claimant was driving his Maruthi 800 Car bearing Reg.No. Py.01-Q-5361 along with is his family members. While the claimant proceeding on the Villupuram to Pondy Main Road, the driver of the Lorry bearing Reg.No.TNB.5157 belongs to the 2nd respondent herein came in a rash and negligent manner and dashed against the claimant's Maruthi Car. Due to the said accident, the claimant sustained multiple fracture on the left side of the chest and abrasions all over the body. The said accident had happened only due to the rash and negligent driving on the part of the driver of the Lorry bearing Reg.No.TNB.5157. The claimant has filed a claim petition, claiming a sum of Rs.12,00,000/- . The tribunal based on the oral and documentary evidence available on record, has concluded that the accident had occurred only due to the rash and negligence on the part of the driver of the Lorry bearing Reg.No.TNB.5157 and directed the Insurance Company to pay a sum of Rs.4,10,000/- as compensation to the claimant and recover the same from the owner of the vehicle/2nd respondent herein. Challenging the liability fastened on the insurance company, they have preferred the present appeal.

4. The learned counsel for the appellant/Insurance Company submitted that the tribunal ought to have exonerated the appellant and fastened the liability only on the 2nd respondent/owner of the lorry as the said lorry was not insured with the appellant at the time of the accident. The learned counsel for the appellant/insurance company has further submitted that the tribunal after having held that the 2nd respondent/owner of the vehicle has taken the insurance policy from 03.11.2003 to 02.11. 2004 and thereafter for the period from 23.12.2004 to 22.12.2005. There was no policy coverage for the offending vehicle on the date of accident, therefore the tribunal ought to have completely exonerated the appellant instead of ordering pay and recovery. Therefore the liability fastened on the appellant/insurance company is against the legal position and liable to be set aside.

5. Notice was sent to the respondent and the same was returned,hence the appellant/insurance company has taken paper publication and filed Proof of Service before this Court. Names of the respondent/claimant was also printed in the cause list. Heard the learned counsel for the appellant/Insurance Company and perused the document available on record.

6. Before the Tribunal, on the side of the claimants two witnesses were examined as P.W.1 & PW2 and marked fifty four documents Ex.P1 to P54. On side of the respondents, two witnesses were examined as RW1 & RW2 and marked two documents Ex.R1 & Ex.R2.

7. Challenge in the present appeal is only as against the liability fastened on the insurance company, directing pay and recovery.

8. Considering the facts stated in the FIR and the evidence of PW1, the tribunal attributed the negligence on the part of the 2nd respondent's driver. As far as the fixing of liability on the insurance company is concerned, as per Ex.R1 & R2, it is clear that the owner of the vehicle/2nd respondent herein has taken the insurance policy for the period from 03.11.2004 to 02.11.2004 and after that he has taken the policy for the period from 23.12.2004 to 22.12.2005 and there was no policy coverage for the offending vehicle on the date of the accident i.e on 25.11.2004. Though the tribunal has very much observed the said fact in the award, has mentioned that the innocent injured persons do not suffer, merely on policy conditions. Hence directed the insurer/appellant herein shall pay the compensation amount to the claimant and recover the same from the owner of the vehicle.

9. According to the learned counsel for the appellant, when the policy did not cover on the date of the accident, the insurance company cannot be made liable to pay the compensation amount to the claimants and only the owner of the vehicle alone held responsible to pay the compensation amount. In support of his contentions, the following decisions are relied by the learned counsel for the appellant.

The Hon'ble Supreme Court in RAMKHILADI's Case held as under:

”5.9 Now, so far as the submission made on behalf of the claimants that in a claim under Section 163A of the Act mere use of the vehicle is enough and despite the compensation claimed by the heirs of the owner of the motorcycle which was involved in the accident resulting in his death, the claim under Section 163A of the Act would be maintainable is concerned, in view of the decision of this Court in Rajni Devi (supra), the aforesaid cannot be accepted. In Rajni Devi (supra), it has been specifically observed and held that the provisions of Section 163A of the Act cannot be said to have any application with regard to an accident wherein the owner of the motor vehicle himself is involved. After considering the decisions of this Court in the cases of Oriental Insurance Co. Ltd. V. Jhuma Saha (2007) 9 SCC 263; Dhanraj (supra); National Insurance Co. Ltd. V. Laxmi Narain Dhut (2007) 3 SCC 700 and Premkumari v. Prahlad Dev (2008) 3 SCC 193, it is ultimately concluded by this Court that the liability under Section 163A of the Act is on the owner of the vehicle as a person cannot be both, a claimant as also a recipient and, therefore, the heirs of the owner could not have maintained the claim in terms of Section 163A of the Act. It is further observed that, for the said purpose, only the terms of the contract of insurance could be taken recourse to. In the recent decision of this Court in the case of Ashalata Bhowmik (supra), it is specifically held by this Court that the parties shall be governed by the terms and conditions of the contract of insurance. Therefore, as per the contract of insurance, the insurance company shall be liable to pay the compensation to a third party and not to the owner, except to the extent of Rs.1 lakh as observed hereinabove.''

10. Following the judgment of the Hon'ble Supreme

Court cited supra, this Court in NATIONAL INSURANCE CO. LTD., PUDHUCHERRY VS. RANI AND 5 OTHERS [C.M.A.No.1848 of 2017, dated 12.3.2020] held as under:

> ''13. The Hon'ble Supreme Court in the judgment, cited supra, in unequivocal terms held that in a claim under Section 163-A of the Act, there is no need for the claimants to plead or establish the negligence and/or that the death in respect of which the claim petition is sought to be established was due to wrongful act, neglect or default of the owner of the vehicle concerned. It is also true that the claim petition under Section 163-A of the Act is based on the Principle of 'No Fault Liability'. However, at the same time, the deceased has to be a third party and cannot maintain a claim under Section 163-A of the Act, against the owner/Insurer of the vehicle, which is borrowed by him as he will be in the shoes of the owner and he cannot maintain a claim under Section 163-A of the Act, against the owner and Insurer of the vehicle. In the case before the Hon'ble Supreme Court, the finding was that the parties are governed by the contract of Insurance and under the contract of Insurance, the liability of the Insurance Company would be qua third party only. Thus the deceased cannot be said to be a third party with respect to the insured vehicle. There cannot be any dispute that the liability of the Insurance Company would be as per the terms and conditions of the Contract of Insurance. The insurance policy covers the liability incurred by the insured in respect of death or bodily injury to any person (including an owner of the goods or his authorized representative) carried in the vehicle or damage to any property of a third party caused by or arising out of the use of the vehicle. Thus Section 147 does not require an Insurance Company to assume risk for death or bodily injury to the owner of the vehicle.''

11. The aforesaid decisions are squarely applies to the facts of the case in hand. Therefore, the appellant/Insurance company is not liable to pay any compensation to the claimant/respondent.

12. In view of the above, the appellant/insurance company is not liable to pay compensation in the absence of policy on the date accident and since the negligence was clearly proved on the driver of the offending vehicle, the owner of the offending vehicle/2nd respondent alone be made liable to pay the compensation to the claimant.

13. Accordingly, the Judgment and decree dated 20.01.2012 made in M.C.O.P.No. 1313 of 2005 by the tribunal is set aside and the Civil Miscellaneous Appeal is allowed insofar as the liability fixed on the insurance company. It is open to the claimant to proceed as against the owner of the vehicle/2nd respondent herein for compensation in the manner known to law.

14. The appellant/Insurance company is permitted to withdraw the compensation amount deposited if any, before the tribunal by filing appropriate applications. No costs.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

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To

1. The Motor Vehicles Accident Claims Tribunal,
   Additional Sub Judge, Pondicherry.

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

+1cc to Mr.M.Krishnamoorthy, Advocate, S.R.No.13520

CMA.No.1772 of 2013

RLD(CO)
SB(29/10/2021)