IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 25.03.2021	PRONOUNCED ON : 01.04.2021

CORAM::

THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN

C.M.A.NO.1426 OF 2017

The New India Assurance Company Limited,
Rep. by its Manager,
New India Assurance Buildings,
No.87, M.G.Road, Fort, Mumbai - 400 001.
.. Appellant/2nd Respondent

/versus/

1. Rafi, ... 1st Respondent/Petitioner

2. T.Kannan, ... 2nd Respondent/1st Respondent

Prayer:

Civil Miscellaneous Appeal is filed under Section 173 of Motor Vehicle Act, 1988, against the judgment and decree made in M.C.O.P.No.249 of 2015 on the file of the Motor Accidents Claims Tribunal (District Judge), Krishnagiri dated 21.11.2016

For Appellant : Mr.M.Krishnamoorthy

For R1 : Mr.S.P.Yuvaraj

For R2 : exparte

J U D G M E N T

Heard the Learned Counsel for the appellant and the Learned Counsel for the respondent No.1.

2. This Appeal is preferred by the Insurance Company being aggrieved by the award of the Tribunal fastening liability on the appellant/Insurance Company to pay compensation of Rs.4,18,900/- with 7.5% interest to the claimant. The appeal is filed challenging both the liability as well as the quantum.

3. As per the claim petition filed under Section 163-A of the M.V Act, the claimant Rafi along with one Thangavelu, as drivers of the lorry bearing registration No.KA-01-D-1685, left Sankagiri to Solapur at Maharashtra on 27.03.2012. While the claimant was driving the lorry along the Chitradurga to Hospet Highway in between the villages Madanaickanahalli and Chikkakondanahalli, a cyclist, who was going in front of the lorry suddenly turned to the middle of the road. To avoid hitting the cyclist, the claimant swerved the lorry but unfortunately hit the mini tempo van coming from Hospet side towards Chitradurga side. Due to the sudden impact, the claimant sustained fractured injuries and taken to Government Hospital at Chitradurga immediately. Next day he was shifted to Manipal Hospital at Bangalore and was treated as inpatient till 02.04.2012. Thereafter, for one year taking treatment at Uthangarai. The accident occurred due to the sudden crossing of the cyclist. The injuries, he sustained has caused permanent disability and loss of earning. Due to the fracture of left maxilla and loss of teeth, he is not able to speak fluently as before. Due to injuries in his right leg, he is not able to walk freely as before and stand continuously. Therefore, claiming compensation of Rs.5,00,000/- against the owner of his lorry and its insurer, petition filed before the M.A.C.T, Krishnagiri.

4. The Insurance Company contested the claim petition on the ground that the claim is not maintainable since the claimant is the tortfeasor. The police had registered criminal case against the claimant for offences under section 279 and 337 of I.P.C. in Crime No.18/12 (on the file of Thruvanur Police Station). The claimant had no valid driving license to drive the lorry, hence the insurance company is not liable to indemnify the claimant. The owner of the mini tempo trax van and it insurer are necessary parties. The claim petition is bad for non-joinder of necessary parties. The claimant is an employee under the insured. He is not a third party. The Insurance does not cover the employee driver. The claimant has to seek compensation before the Labour Tribunal under Workman Compensation Act and not before the M.A.C.T. Without prejudice, the claim of compensation is highly excessive and without any basis, for loss of income and proof of income.

5. To prove the claim, the petitioner and the doctor, who gave the disability certificate were examined as P.W-1and P.W-2. Ex.P-1 to Ex.P-12 were marked. On behalf of the respondent, the Administrative Officer of the Insurance Company was examined as R.W-1 and the copy of the Insurance Policy marked as Ex.R-1.

6. The Tribunal based on the deposition of P.W-1, R.W-1, the F.I.R Ex.P-1 and Ex.P-8 the Motor Vehicle Inspector report

concluded that, the accident has occurred due to the negligence of the claimant. At the time of accident, the claimant had valid driving license Ex.P-5. The 1st respondent being the owner of the lorry has employed the claimant to be the driver of the lorry. Hence, the employer/insured is responsible for the tortious act of the employee. In turn, the Insurance Company is liable to indemnify the insured.

7. Regarding the quantum of compensation, the Tribunal taking note of the wound certificate Ex.P-2 and the discharge summary Ex.P-3 issued by Manipal Hospital, Bangalore held that, the claimant has proved he sustained head injury, fracture of the left maxilla, palatine split, a lacerated injury over his lower lip, abrasions over his right knee, foot and right toe. Treated as inpatient from 29.03.2012 to 02.04.2012. P.W-2 the doctor who has examined the claimant had given disability certificate Ex.P-11 assessing permanent disability of 35%. However, consider the fact that P.W-2 is not the doctor who treated the claimant, the percentage of disability was fixed at 20% . The Tribunal, taking the notional income of the claimant as Rs.9,000/- per month had applied multiplier method and awarded a total sum of Rs.4,18,900/- as below which includes compensation under conventional and non conventional heads.

Sl.Nos.	Compensation under various heads	Award passed by the Tribunal
1.	Loss of earnings	3,88,800/-
2.	Pain and Sufferings	10,000/-
3.	Mental agony and shock	5,000/-
4.	Extra Nourishment	5,000/-
5.	Transport to hospital	5,000/-
6.	Medical Expenses	5,100/-
	Total	Rs.4,18,900/-

8. In the appeal, the above award is assailed on the ground that, the claim petition is filed under section 163-A of the Act is not maintainable since the claimant admits his income is more than Rs.40,000/- p.a. The petition under section 163-A of the Motor Vehicle Act is maintainable only if the claimants income is less than Rs.40,000/-p.a., contrary to the dictum laid by the Hon'ble Supreme Court in Deepal Girishbhai Soni and others -vs- United India Insurance Company Limited reported in 2004 (1) TN MAC 193 (SC), the Tribunal had erroneously entertained the claim petition.

9. Further, claim by tortfeasor against its own insurer is not maintainable under section 163-A of the Motor Vehicle Act. The law on this point is no more res integra after the judgment of the Hon'ble Supreme Court in Ningamma and others -Vs- United India Insurance Company Limited reported in 2009 (2) TN MAC 169 (SC). Further, when compensation sought under section 163-A of the Act, it shall be only in tune with the structured formula given under Schedule-II of the M.V. Act and compensation shall be only in accordance with the schedule. The award of the Tribunal for mental agony, extra nourishment and transport are not provided under the schedule and the compensation awarded for these heads are not sustainable. Without evidence that the injury sustained by the claimant had caused loss of earning capacity, the tribunal has applied the multiplier method.

10. Section 163-A of the Motor Vehicles Act was introduced by an amendment in the year 1994, to provide quick remedy for poor claimants whose income is less than Rs.40,000/- p.a. The burden of proving negligence was relieved so as to avoid delay in getting due and fair compensation. In Deepal Girishbhai Soni and others -vs- United India Insurance Company Limited reported in 2004 (5) SCC 385, the Hon'ble Supreme Court held at paragraph No.51 that,

> “51. The scheme as envisaged under Section 163-A, in our opinion, leaves no manner of doubt that by reason thereof the rights and obligations of the parties are to be determined finally. The amount of compensation payable under the aforementioned provisions is not to be altered or varied in any other proceedings. It does not contain any provision providing for set-off against a higher compensation unlike Section 140. In terms of the said provision, a distinct and specified class of citizens, namely, persons whose income per annum is Rs 40,000 or less is covered thereunder whereas Sections 140 and 166 cater to all sections of society.”
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> ………..
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> And paragraph No.67 held that,
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> “We, therefore, are of the opinion that Oriental Insurance Company Limited v. Hansrajbhai v. Kodala's reported in (2001) 5 SCC 175, 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/- 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.''

11. Thus, it is sound and clear that no petition were the income is more than Rs.40,000/- p.a is maintainable under Section 163-A of the Motor Vehicles Act and the award passed in the claim petition under section 163-A of the Act, shall not be more than the award fixed under structured formula mentioned under the schedule II of the Act.

12. Regarding claim petition filed against the own insurer, whether by the owner or by his employee, they are not third parties. Section 163-A of the Act gives the privilege of exemption to prove negligence only in case of third party claim.

13. In Oriental Insurance Company Ltd -vs- Rajni Devi and others reported in (2008) 5 SCC 736, 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 however, where the 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 Motor Vehicles Act, cannot be said to have any application in respect of an accident wherein the owner of the motor vehicle himself is involved.

14. In the recent judgment of the Hon'ble Supreme Court rendered in Ram Khiladi & another -vs- The United India Insurance Company & another reported in 2020 (1) CTC 443, the Apex Court has put at rest the debate by holding,

> "9.5 It is true 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 163A 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 163A of the Act against the owner and insurer of the vehicle bearing registration No. RJ 02 SA 7811. In the present case, 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. In the present case, as observed herein above, the deceased cannot be said to be a third party with respect to the insured vehicle bearing registration No. RJ 02 SA 7811. 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. As held by this Court in the case of Dhanraj (supra), an insurance policy covers the liability incurred by the insured in respect of death of 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. In the said decision, it is further held by this Court that Section 147 does not require an insurance company to assume risk for death or bodily injury to the owner of the vehicle.

9.6 In view of the above and for the reasons stated above, in the present case, as the claim under Section 163A of the Act was made only against the owner and insurance company of the vehicle which was being driven by the deceased himself as borrower of the vehicle from the owner of the vehicle and he would be in the shoes of the owner, the High Court has rightly observed and held that such a claim was not maintainable and the claimants ought to have joined and/or ought to have made the claim under Section 163A of the Act against the driver, owner and/or the insurance company of the offending vehicle i.e. RJ 29 2M 9223 being a third party to the said vehicle.”

15. In the instant case also, the owner of the other vehicle namely mini trax van is not party. The criminal case for negligence registered against the claimant. The claim petition filed under section 163-A of the Act against his the owner and the insurer of the vehicle he was driving. Therefore, unless the terms of the contract provides for any insurance coverage, the claimant, who does not cover under section 147 of the Act.

16. In the light of the Hon'ble Supreme Court judgment in Ram khiladi cited supra, the Insurance Company liability to pay compensation to the driver of the vehicle insured under them depends on the terms of contract under the insurance policy. The perusal of the Insurance policy marked as Ex.R-1 indicates the vehicle driven by the claimant is covered by package policy with Limited liability for Personal Accident cover of owner driver. The claimant as paid employee under the owner of the vehicle is entitled to claim compensation only under the Workman Compensation Act and the petition under section 163-A of the Act, is not maintainable for the reasons stated above.

17. Therefore, the Tribunal award impugned in this appeal is liable to be set aside. Accordingly, the Civil Miscellaneous Appeal is Allowed. The award passed in M.C.O.P.No.249 of 2015 on the file of Motor Accident Claims Tribunal, (District Judge), Krishnagiri dated 21.11.2016 is hereby set aside. The claimant is at liberty to file petition under Workman Compaction Act, 1923, before the appropriate forum and seek for remedy. The time spent on the claim petition and appeal shall be condoned for reckoning limitation if any.

18. In the result, the Civil Miscellaneous Appeal is Allowed. No order as to costs.

Sd/-
Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

bsm

To

1. The Motor Accidents Claims Tribunal (District Judge),
   Krishnagiri.

2. The Section Office,
   V.R.Section, High Court,
   Madras.

+1cc to Mr.S.P.Yuvaraj, Advocate, S.R.No.21650
+1cc to Mr.M.Krishnamoorthy, Advocate, S.R.No.21966

C.M.A.No.1426 of 2017

RLD(CO)
CS/26/10/2021