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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 19.03.2021
Pronounced on : 24.03.2021

Coram:

THE HONOURABLE DR. JUSTICE G. JAYACHANDRAN

C.M.A.No.2363 of 2017
and
C.M.P.No.12634 of 2017

New India Assurance Company Ltd.,
Represented by Branch Manager,
Branch Office,
No.105-A, Railway Station Road,
Thiruppathur, Vellore District 635 601.

.. Appellant/Respondent

/versus/

1.Mrs.A.Hemavathi
2.Minor A.Karthikeyan
3.Minor A.Om.Prakash
4.Mr.Munisamy
5.Mrs.Parvathi
(2nd and 3rd Respondents represented by their
Next Friend/Mother/1st respondent) .. Respondents / Claimants

Prayer: Civil Miscellaneous Appeal has been filed under Section 173 of the Motor Vehicles Act, 1988 against the judgment and decree passed in M.C.O.P.No.370 of 2015 on 23.02.2016 on the file of the learned Motor Accident Claims Tribunal, (Special District- Judge), at Krishnagiri.

For Appellant : Mr.J.Chandran

For Respondents : Mr.S.Viswananthan for
M/s Dass and Viswa Asso.
for R1 to R5



JUDGMENT

(The case has been heard through Video Conferencing)

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This appeal has been filed by the Insurance Company being aggrieved by the liability fixed on the Insurance Company to pay a sum of Rs.7,46,200/- to the claimants, who are the legal representatives of the deceased accident victim.

2.The claim petition was filed under Section 163A of the Motor Vehicles Act, 1988 since the accident had occurred, while the deceased driving his Tata Tempo Van bearing Reg.No.TN-25-D-2234 hit the unknown vehicle proceeding ahead of his van. As per the claim petition, on 24.04.2013, at about 5.15 a.m., the deceased while driving the Tata van as owner-cum-driver insured under the appellant, proceeding from Bangalore to Thiruppathur near TVS Petrol Bunk at Perandapalli 'U' turn, dashed behind the unknown vehicle and died on the spot. At the time of the accident, the deceased was 34 years old and earning a sum of Rs.3,300/- per month as self-employed van owner-cum-driver. The claimants are his widow, two minor sons and his parents. A sum of Rs.5,25,000/- was sought under the claim petition.

3.The Insurance Company filed counter resisting the claim on two grounds. Firstly, the deceased is the tort-feasor. He was driving the vehicle continuously about 170 kilometers, without rest throughout the night and caused the accident by hitting behind the ongoing vehicle in his front. Being a tort-feasor even under Section 163A of the Motor Vehicles Act, 1988, he or his legal representatives are not entitled for compensation to be indemnified by the insurer. The tort-feasor cannot be a recipient. At the most entitled only for Rs.2,00,000- under personal accident cover. Secondly, the deceased on the date of accident had no valid driving licence. His driving licence expired on 19.04.2013. Whereas the accident occurred five days after expiry of the driving licence on 24.04.2013. Since the deceased has driven the vehicle without valid driving licence, there is a breach of insurance policy condition.

4.Before the Tribunal, two witnesses were examined on the side of the claimants. Four exhibits were examined. On the side of the respondents, one witness was examined. Three exhibits



were marked.

5.The Tribunal held that the Insurance Company has failed to prove that the deceased is the tortfeasor. First Information Report does not attribute negligence on the part of the deceased and the First Information Report was not registered against him. It was against the unknown vehicle. The licence of the deceased Arjunan though expired on 19.04.2013, the witness for the Insurance Company admits that the licence can be renewed within 30 days from the date of its expiry. Therefore, the deceased deemed to have a valid driving licence.

6.Regarding the plea that the claimants are entitled only for limited liability under the personal accident cover for which the insurance company has collected additional premium, the Tribunal referring the Clause in the insurance policy, held that even assuming the Insurance Company is liable only to the limit prescribed under the contract, the limit is Rs.7,50,000/- and therefore, the claimants are entitled for Rs.7,46,200/-.

7.In the appeal, the learned counsel appearing for the appellant/Insurance Company would specifically submit that the trial Court erred in holding the First Information Report is not against the deceased Arjunan and he is not the tortfeasor. Referring First Information Report marked as Ex.P1, the learned counsel appearing for the appellant/Insurance Company would submit that the complaint was given by the wife of the deceased on the next day after the accident. She is not the witness to the accident. She has stated that her husband dashed against the unknown vehicle going ahead him. Since the deceased died, the charge against him abated and the Police has not proceeded further. Furthermore, being the owner-cum-driver of the vehicle and having collected the additional premium, the Insurance Company is liable to pay only a sum of Rs.2,00,000/- towards personal accident cover and it is factually not correct that the limited liability is Rs.7,50,000/-. The Tribunal has erred in holding Section 11(1)(i) of the terms of contract refers personal accident cover.

8.Infact, Section II is only regarding own damage for the vehicle and not for the person. The judgments relied by the learned counsel appearing for the respondents/claimants reported in (i) 2014(4) TAC 196(Mad.) [Bajaj Allianz General Insurance



Co.Ltd., C.Ramesh] and (ii) 2013(1) TNMAC 783[National Insurance Company Ltd., v. Krishnan] factually are not applicable to the present case, the Hon'ble Supreme Court in Ramkilad judgment recently has held that the owner of the vehicle cannot maintain the claim petition against its own insurer, even under Section 163A of the Motor Vehicles Act, 1988. He is only entitled for PA cover if he had paid additional premium for personal accident cover. In this case, since additional premium for personal accident cover has been paid, the learned counsel appearing for the appellant/Insurance Company would submit that the claimants are entitled for Rs.2,00,000/- as per the insurance contract and not more than that and to get this money, they need not file claim petition before the Motor Accident Claims Tribunal.

9.Learned counsel appearing for the respondents/claimants referring the judgment in Bajaj Allianz General Insurance Co.Ltd., v. C.Ramesh reported in 2014(4) TAC 196 (Mds.) and National Insurance Company Limited v. Krishnan reported in 2013(1) TN MAC 783 submitted that the owner-cum-driver under Section 163 A of the Motor Vehicles Act, 1988, is entitled for compensation as per the structured formula under Second Schedule. Having collected additional premium, the liability cannot be restricted to Rs.2,00,000/-only. Further, the learned counsel would submit that the accident occurred involving two motor vehicles and the First Information Report was registered against the unknown vehicle, which could not be traced. Further, having duly insured, the claimants are entitled to get adequate and fair compensation.

10.Point for consideration is whether the claim petition under Section 163 A of the Motor Vehicles Act, 1988 is maintainable against own insurer?

11.Section 163 A of the Motor Vehicles Act, reads as follows:-

163A. 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



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

12. In Sunilkumar case relied by the appellant, the Division Bench of the Hon’ble Supreme Court unable to agree with the reasoning and the conclusion of the other Division Bench decision in National Insurance Company Limited -vs- Sinitha and others reported in (2012(2) SCC 356) referred the matter to the Larger Bench and Three Judges Bench of the Apex Court formulated the following Question of Law for resolution.

“Whether in a claim proceeding under Section 163 A of the Motor Vehicles Act, 1988, it is open for the insurer to raise the defence/plea of negligence?”

13. After due deliberation, the Larger Bench of the Hon’ble Apex Court in Sunil Kumar case concluded as under:-

“8. From the above discussion, it is clear that grant of compensation under Section 163-A of the Act on the basis of the structured formula is in the nature of a final award and the adjudication thereunder is required to be made without any requirement of any proof of



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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 163A 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 163A of the Act to permit the Insurer to raise the defence of negligence would be to bring a proceeding under Section 163A of the Act at par with the proceeding under Section 166 of the Act, which would not only be self-contradictory but also defeat the very legislative intention.

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

14. Following the above dictum laid in Sunil Kumar case, the Hon'ble Apex Court in Shivaji and another v. Divisional Manager, United India Insurance Co. Ltd., (CDJ 2018 SC 817), after extracting the facts and decision of the Tribunal and High Courts, reversed the decision of the High Court and held as under:-

"3. The appellant filed a claim petition seeking compensation under Section 163A of the Motor Vehicles Act, 1988. The Tribunal noted that since the claim petition had been filed under Section 163A of the Act, the question of proving that the



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accident happened due to the rash and negligent act of the driver did not arise. By its award dated 30th July 2011, the Tribunal allowed a claim of Rs.4,60,800 together with interest at the rate of 9% per annum.

4.The Insurer preferred an appeal before the High Court of Karnataka. The appellants also filed an appeal before the High Court seeking enhancement of compensation awarded by the Tribunal. The High Court, by its impugned judgment, allowed the insurers appeal and set aside the order of the Tribunal. The High Court opined that the idea behind enacting Section 163A is to ensure that even in the absence of any mistake on the part of the driver of the offending vehicle, the injured person or the legal heirs of the deceased person are compensated by the owner and the insurer. As a result, under this provision, since the victim has been contemplated to be an innocent third party, protection is extended only to the injured person or to the legal heirs of the deceased victim, and not to the driver who is responsible for causing the said accident. Since the deceased driver in this case was the tortfeasor and responsible for causing the accident, the High Court held that compensation could not have been awarded to the appellants.

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., v. Sunil Kumar & Anr., wherein it was held that to permit a defence of negligence of the claimant by the insurer and/or to understand Section 163A 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



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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 163A of the Act, it would bring a proceeding under Section 163A of the Act at part 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 163A of the Act, the insurer cannot raise any defence of negligence on the part of the victim to counter a claim for compensation."

15. The spirit and purpose of introducing Section 163-A in the statute succinctly explained by the Hon'ble Apex Court in *Hansrajbhai -vs- Kodala* reported in [2001(5) SCC 175], wherein it is observed 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 non 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."

16. As far as the claim under Section 163A is concerned,



the judgments referred on either side clearly distinguish the third party claim and the claim by the insurer. Section 163 A of the Motor Vehicles Act, 1988 exempts the claimant proving the negligence against the vehicle owner. It does not prevent the vehicle owner for getting exonerated from liability by proving the negligence upon the claimant, who is the tortfeasor/insurer. This is based on the principle that the tortfeasor cannot be the recipient. Exception laid in United India Insurance Company v. Sunil Kumar and another[AIR 2017 SC 5710] is that, if the claim is made against the other vehicle as the third party, the Insurance Company cannot take advantage of the claimant's negligence. This privilege is not applicable for the claim petition filed against the owner/insurer. This legal position has been clarified in Ramkhiladi v. The United India Insurance Co.Ltd., reported in 2020(1) TNMAC 1 (SC).

"5.5 It is true that, in a claim under Section 163A 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 163A 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 hereinabove, the deceased



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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.

5.6 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.

5.7 Now, so far as the reliance placed upon by the learned Advocate for the



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claimants shall not be entitled to the benefit of the amendment to the 2 nd Schedule. At the same time, as observed hereinabove, the claimants shall be entitled to Rs.1 lakh as per the terms of the contract of insurance, the driver being in the shoes of the owner of the vehicle. 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



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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."

17. In the instant case, the claimants are the legal representatives of the deceased accident victim. First Information Report clearly indicate that he went and dashed against the unknown vehicle moving ahead of it. The deceased is the owner-cum-driver. The claim petition is filed by the legal representatives of owner-cum-driver who is the insurer. Therefore, he is not a third party. He is entitled for compensation as per the terms of the contract only under PA cover and not under TP cover.

18. The perusal of the insurance policy reveals that it is the commercial vehicle package policy. Premium collected under compulsory PA cover for owner driver and limited liability for fare paying passengers.

19. The Limit liability as found in the insurance policy reads as below:-

"Limit of the amount the company's liability under Section II 1(i) in respect of any one accident; as per the Motor Vehicles Act, 1988. Limit of the amount of the Company's Liability under Section II 1 (ii) in respect of any one claim arising out of one event: upto Rs.7,50,000/-."

20. The Tribunal, taking note of this limit of liability as mentioned in the policy certificate of the insurance marked



as Ex.R1, had held that even if the claimants, who are entitled only under PA cover, the liability is fixed to the extent of Rs.7,50,000/- as per the contract and therefore, the insurance company is liable to pay Rs.7,46,200/- with interest. The appellant had collected Rs.2,175/- for basic OD Cover (own damage) and Rs.11,277/- for the third party premium. Under Basic Third Party Cover, it is stated that compulsory PA cover for Owner Driver, LL to non fare paying passengers, (excluding employees), LL to persons employed for operation and /or maintenance and/or loading and/or unloading. LL to paid driver loading and/or unloading, LL to paid driver conductor cleaner employed for operation. Therefore, as per the terms of the insurance contract, the personal cover liability is not limited and even assuming it is limit then the limit of the liability is Rs.7,50,000/-. Therefore, this Court is of the view that, the Tribunal award need not be interfered.

21.By an order dated 09.08.2017, this Court has passed a conditional order directing the appellant/Insurance Company to deposit a sum of Rs.5,00,000/-to the credit of M.C.O.P.No.370 of 2015 on the file of the Motor Accident Claims Tribunal, Special District Judge, Krishnagiri. If such deposit is already made, the appellant/Insurance Company shall deposit the balance amount to the credit of C.M.A.No.2363 of 2017 within a period of eight weeks from the date of receipt of a copy of this order. On such deposit, the claimants/respondents are entitled to withdraw their respective share amount along with accrued interest as per the ratio fixed by the Tribunal in M.C.O.P.No.370 of 2015.

22.In the result, this Civil Miscellaneous Appeal Suit is dismissed. The judgment and decree passed in M.C.O.P.No.370 of 2015 dated 23.02.2016 is hereby confirmed. No order as to costs. Consequently, connected miscellaneous Petition is closed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

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To:

The Motor Accident Claims Tribunal,
Special District Court, Krishnagiri.

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+1cc to M/s.J.Chandran, Advocate, S.R.No.19276

+1cc to M/s.S.Viswananthan, Advocate, S.R.No.19264

C.M.A.No.2363 of 2017
and

C.M.P.No.12634 of 2017

SR-II(CO)
SB(28/10/2021)