BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
Reserved on : 23.12.2020
Pronounced On : 27.01.2021
CORAM
THE HONOURABLE MR.JUSTICE K.MURALI SHANKAR
C.M.A(MD).No.976 of 2016 and
CMP(MD).No. 8749 of 2016

M/s. Royal Sundaram Alliance Insurance Company Ltd.,
Through its Divisional Manager,
No.5B, III Floor, Lawsons Road,
Near Trichy Bus Stand,contonment
Trichy, :Appellant / 2nd Respondent

Vs.

1. Palaniammal
2. Rajeshkumar
3. Santhoshkumar : Respondents 1 to 3 / claimants
4. Kumar : Respondent / 1st Respondent

PRAYER:- Civil Miscellaneous Appeal filed under Section 173 of the Motor Vehicles Act, 1988, against the fair and decreetal order, dated 11.04.2016 made in MCOP.No. 324 of 2014 on the file of the Motor Accidents Claims Tribunal (Principal Sub Court), Kumabakonam.

For Appellant : Mr.S. Srinivasa Raghavan
For R1 to R3 : Mr. P. Thiyagarjan
For R4 : No appearance

J U D G M E N T

The Civil Miscellaneous Appeal has been filed under Section 173 of the Motor Vehicles Act, 1988, challenging the award, dated 11.04.2016 passed in MCOP.No. 324 of 2014 on the file of the Motor Accidents Claims Tribunal / Principal Sub Court, Kumabakonam.

2. The Appellant / insurer, who was made liable to pay compensation of Rs.9,10,000/- with interest at the rate of 7.5% per annum to the respondents 1 to 3 / claimants, who are the legal heirs of the deceased Nachimuthu, who died in an accident occurred on 14.11.2012, challenged the liability mulcted on it.

3. Admittedly, the first respondent / claimant is the wife and the respondents 2 and 3 / claimants are the sons of the deceased Nachimuthu. The case of the claimants is that on 14.11.2012, the deceased Nachimuthu borrowed a Maruthi Omni Van belonging to his friend Kumar, 4th respondent / first respondent and proceeded to his native place at Markkampatti, Dindigul District with his wife and second son, that when he was proceeding in Thanjavur to Trichy main road, near the Saanupatti Ganesh crusher and at about 12.30

p.m., one cow suddenly crossed the road and in order to avoid dashing against the cow, the deceased Nachimuthu turned his vehicle and at that time, the Omni van capsized and as a result of which, the said Nachimuthu had sustained injuries all over his body and immediately he had taken to Government Hospital, Thanjavur and that despite the treatment, he succumbed to the injuries on that day itself.

4. The claimants' further case is that the deceased Nachimuthu was aged about 48 years at the time of accident, that he was doing flower business in a wholesale manner and was earning a sum of Rs.5,000/- per month, that the claimants were depending on the income of the deceased and that therefore, they have been claiming compensation of Rs.25,00,000/- with interest.

5. The defence of the Appellant / insurer is that the deceased Nachimuthu drove the Maruthi Omni Van in a rash and negligent manner, that since he was not able to control the Car, the Car capsized in the ditch and that since the deceased was responsible for the accident, the Appellant / insurer is not liable for the claim.

6. During enquiry before the Tribunal, the respondent Nos. 1 and 2 / claimants 1 and 2 have examined themselves as PW.1 and PW.2 respectively and exhibited five documents as Exs. P1 to P5. The Appellant / Insurance Company has examined one Vaitheeswaran as RW.1 and exhibited a copy of the insurance policy as Ex.R1.

7. The learned Trial Judge, upon considering the evidence both oral and documentary, came to the conclusion that the deceased Nachimuthu was not a tortfeasor and that the accident was occurred as the cow suddenly crossed the road and consequently, mulcted liability on the Appellant / insurer directing them to pay a sum of Rs.9,10,000/- as compensation with interest at 7.5% per annum. Aggrieved over the said award, the Appellant / Insurance Company has come forward with the present appeal.

8. The points for consideration are:

(i) Whether the Tribunal erred in fastening the liability on the Appellant / insurer, despite the production of evidence to show that the accident was occurred only due to the rash and negligent driving of the deceased and that the deceased is the tortfeasor?

ii) Whether the impugned Award, dated 11.04.2016 is liable to be set aside?

9. The learned counsel appearing for the Appellant / Insurance Company would strenuously contend that the deceased himself was the tortfeasor as he had caused the accident by his own negligence and

as such, the claim petition itself is not legally sustainable under the provisions of Motor Vehicles Act, that the Tribunal ought to have held that the deceased Nachimuthu had borrowed the vehicle from the 4th respondent / 1st respondent and as such, the deceased stepped into the shoes of the actual owner of the vehicle and he is not a third party, that since the deceased had stepped into the shoes of the owner of the vehicle, the claim petition filed by the legal heirs of the deceased is not maintainable and that therefore, the finding of the Tribunal mulcting liability on it, is illegal and the same is liable to be set aside.

10. It is pertinent to mention that claimants have laid the claim petition, as usual, under the many provisions of the Motor Vehicles Act viz., under Sections 140, 141, 163A and 166 of the said Act.

11. In the claim petition, the claimants have themselves admitted that while the deceased had attempted to turn the vehicle in order to avoid dashed against the cattle, the Maruthi Omni Van got capsized,

12. As rightly pointed out by the Appellant / insurer side, the First Information Report was lodged by the second respondent / claimant, son of the deceased and in that complaint, he has specifically stated that when the vehicle was driven in a rash and negligent manner, the vehicle got capsized unexpectedly. Admittedly, the First Information Report came to be registered against the deceased Nachimuthu. Moreover, no other vehicle was involved in the accident, except the one driven by the deceased. It is also not in dispute that the said Maruthi Van was owned by the 4th respondent / 1st respondent Kumar, who is none other than the friend of the deceased Nachimuthu.

13. The learned counsel appearing for the respondents 1 to 3 / claimants would contend that since the claimants have filed the claim petition under Section 163A of the said Act, there was no need for them to prove the negligence and that it was only an accident arising out of use of the Motor Vehicle and as such, there is no infirmity in the award passed by the Tribunal and he relied on the decision of this Court reported in ***2019 (1) TNMAC 233 (New Indian Assurance Company Ltd., Vs. Kavitha and another).*** In the said decision, while the deceased was proceeding in his motorcycle, a dog suddenly crossed the road and on seeing the dog, the deceased suddenly turned his vehicle, but, lost his control and skipped on the road and as a result of which, the deceased sustained injuries and that despite the treatment, he succumbed to the injuries. When the claim was made under Section 163A of the Motor Vehicles Act, the Tribunal after holding that though the accident was occurred due to the rash and negligent riding of the deceased, since the policy issued is a package policy, the insurer is liable for the claim and

directed the insurer to pay compensation. When the said award was challenged before this Court, by holding that Section 163A of Motor vehicles Act applies to all victims of Motor Accident and covers cases where even the negligence is on the part of the victim, has upheld the finding of the Tribunal.

14. The learned counsel appearing for the Appellant has relied relied on the following decisions in support of his contentions:

(1) ***2009 (13) SCC 710 :***
Ningamma and another Vs. United India Insurance Company Limited :

"13.In the light of the aforesaid submissions, the question that falls for our consideration is whether the legal representatives of a person, who was driving a motor vehicle, after borrowing it from the real owner meets with an accident without involving any other vehicle, would be entitled to Compensation under Section 163A of MV A or under any other provision(s) of law and also whether the Insurer who issued the Insurance Policy would be bound to indemnify the deceased or his legal representative?..........

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.

20.When we apply the said principle into the facts of the present case we are of the view that the claimants were not entitled to claim compensation under Section 163-A of the MVA and to that extent the High Court was justified in coming to the conclusion that the said provision is not applicable to the facts and circumstances of the present case. However, the question remains as to whether an application for demand of compensation could have been made by the legal representatives of the deceased as provided in Section 166 of the MVA. The said provision specifically provides that an application for compensation arising out of an accident of the nature specified in sub-section (1) of section 165 may be made by the person who has sustained the injury; or by the owner of the property; or where death has resulted from the accident, by all or any of the legal representatives of the deceased; or by any agent duly authorised by the person injured or all or any of the legal representatives of the deceased, as the case may be. When an application of the aforesaid nature claiming compensation under the provisions of Section 166 is received, the Tribunal is required to hold an enquiry into the claim and then proceed to make an award which, however, would be subject to the provisions of Section 162, by determining the amount of compensation, which is found to be just. Person or persons who made claim for compensation would thereafter be paid such amount. 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."

(2) ***CMA.No. 4858 of 2019 dated, 09.10.2020 :***
Joyesmarry and another vs. Velumani and others:

13. Once it has been decided that the accident had taken place due to the negligence of the deceased, the question which arises for consideration is whether in such circumstances, the second respondent insurance company is liable to pay compensation to the claimants. The liability of the insurance company is to the extent of indemnification of the insured against the injured person, a third party or in respect of damages to property. The insurer is not liable to indemnify the insured if the accident had taken place where the insured himself was driving the vehicle and due to his negligence accident had taken place. The Hon'ble Supreme Court in Oriental Insruance Company Ltd., Vs. Jhuma Saha (Smt) and Ors reported in (2007) 9 SCC 263 has held as *follows:*

"10. The deceased was the owner of the vehicle. For the reasons stated in the claim petition or otherwise, he himself was to be blamed for the accident. The accident did not involve motor vehicle other than the one which he was driving, the question which arises for consideration is that the deceased himself being negligent, the claim petition under Section 166 of the Motor Vehicles Act, 1988, would be maintainable.

11. Liability of the insurer - Company is to the extent of indemnification of the insured against the respondent or a injured person, a third person or in respect of the damages of property. Thus, if the insured cannot be fastened with liability under the provisions of Motor Vehicles Act, the question of the insurer being liable to indemnify insured, therefore, does not arise."

14. The above judgment has also been followed by the Hon'ble Supreme Court in the decision in National Insurance Co. Ltd., vs. Ashalata in Bhowmik and Ors reported in 2018(9) SCC 801, wherein at paragraph No.8 it has been held as follows:

8. This Court in Oriental Insurance Co. ltd., Vs. Jhuma Saha (Smt) and Ors (2007) 9 SCC, 263 was considering a similar case where the owner himself was driving the vehicle which due to his negligence dashed with a tree on the roadside as a result of which he died. The Court held that the claim petition filed by his LRs was not maintainable.

15. In the instant case, it is the owner of the vehicle who met with the accident due to his own negligence and therefore, the insurance company is not liable to pay any compensation to the claimants."

(3) ***2020(2) TNMAC 753 :***

Manager, New India Assurance Company Ltd., vs. Vinayagamoorthy and another:

"Motor Vehicles Act. 1988 (59 of 1988), Sections 166, 165, 163-A and 140 - Maintainability of Claim Petition under Section 166, when claimant is tortfeasor - Claimant / R1 driving Car belonging to R2/ owner with his wife and two minor children as occupants in Car - claimant drove Car, against flood

water on bridge in a rainy day – Car swept away with its occupants in flood and wife and two children died – Claim petition filed by Claimant / R1 under Section 166 as a Legal Heir – Claimant, being a tortfeasor himself, cannot claim compensation for his own fault – Nor owner / R2 and Insurer can be held vicariously liable to pay compensation erred in allowing Claim Petition and awarding compensation – Claim under Section 163-A also not maintainable – Tribunal ought to have restricted Compensation under Section 140 – Claimant entitled to Rs.1,50,000/- (Rs.50,000/- x 3) as compensation under Section 140 – Appellant / Insurer directed to deposit Rs.1,50,000/- with interest at 7.5% p.a within period of 6 weeks."

The above decisions are squarely applicable to the case on hand. As already pointed out, the deceased Nachimuthu alone has driven the vehicle and due to his driving alone, the vehicle got capsized in the nearby hit. No doubt, the vehicle was belonging to his friend, the fourth respondent / first respondent and admittedly, he borrowed the vehicle from his friend and proceeded with his family to his native place and as such, it is to be inferred that the deceased stepped into the shoes of the actual owner of the vehicle viz., the fourth respondent / first respondent. Applying the legal dictum mentioned above, this Court has no hesitation to hold that the claim petition filed under Section 166 or 163A of the Motor Vehicles Act is not maintainable.

15. But, at the same time, in the present case, Ex.R1 - Policy is a package Policy and admittedly, the premium for P.A. cover for Rs.2,00,000/- for owner – cum – driver of the vehicle was paid and the liability is shown as Rs.2,00,000/-. The learned counsel for the Appellant would fairly concede that as per the contract of insurance, in case of personal accident, the owner cum driver is entitled to the amount agreed under the contract.

16. At this juncture, it is necessary to refer the Judgment of the Hon'ble Supreme Court reported in ***2020 (2) SCC 550 (Ramkhiladi and another Vs. United India Insurance Company Ltd., and another),*** and whereunder, it it has been observed that as per the Contract of Insurance, in case of personal accident, the owner cum driver is entitled to the amount stipulated and that the deceased who would be in the shoes of the owner of the vehicle, shall be entitled to the amount as per the terms of contract of Insurance. In the case on hand, as already pointed out, in Ex.R1 package policy, personal accident coverage is given to the owner cum driver of the vehicle to go to the extent of Rs.2,00,000/-. Considering the above, the claimants are entitled to Rs.2,00,000/- as per the terms of contract of Insurance, as the deceased driver being in the shoes of the owner of the vehicle. Consequently, this Court has no other option but

to hold that the impugned award mulcting liability on the insurer to pay a compensation of Rs.9,10,000/- is liable to be set aside and that the Appellant / Insurance is liable to pay a sum of Rs.2,00,000/- (Rupees Two Lakhs only) with interest at 7.5% per annum. Considering the other facts and circumstances of the case, this Court further decides that the the parties are to be directed to bear their own costs as the above points are answered accordingly.

17. In the result, the Civil Miscellaneous Appeal is partly allowed and the impugned award directing the Appellant / Insurance Company to pay a compensation of Rs.9,10,000/- is set aside. The Appellant / Insurer is directed to deposit a sum of Rs.2,00,000/- (Rupees Two Lakhs only) with interest at 7.5% per annum from the date of petition till the date of payment to the credit of above said MCOP No.324 of 2014, on the file of the Motor Accident Claims Tribunal / Principal Subordinate Court, Kumbakonam, less the amount already deposited, if any, within a period of eight weeks from the date of receipt of a copy of this Judgment and on such deposit, the respondents 1 to 3 / claimants are permitted to withdraw their shares along with accrued interest and costs, as per the apportionment fixed by the Tribunal, on due application before the Tribunal. If the amount was already deposited, the balance amount shall be withdrawn by the Appellant / Insurance Company. The parties are directed to bear their own costs. Consequently, the connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar (CO)

// True Copy //

/ /2021

Sub Assistant Registrar(CS)

NOTE: In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate/litigant concerned.

To

1.The Motor Accident Claims Tribunal
The Principal Sub Judge, Kumabakonam.

2.The Record Keeper,(2C)
Vernacular Section,
Madurai Bench of Madras High Court,
Madurai.

+1 CC to M/s.P.THIYAGARAJAN, Advocate (SR-2217[F] dated 27/01/2021)

+1 CC to M/s.S.SRINIVASA RAGHAVAN, Advocate (SR-2108[F] dated 27/01/2021)

Pre-delivery order made in
C.M.A(MD).No.976 of 2016
27.01.2021

TP(CO)
KB(26.02.2021) 9P 6C