BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 19.09.2022

Pronounced On : 07.11.2022

CORAM

THE HONOURABLE MR.JUSTICE K.MURALI SHANKAR

C.M.A(MD)No.225 of 2022

1.Tamil Ilakkiya

2.Mathumidha (Minor)

3.Vedha Sri (Minor)

4.Thirumatthal : Appellants /Petitioners

Vs.

The Branch Manager,
The Oriental Insurance Company Limited,
2nd Floor, Kamatchiamman Complex,
Opposite to Kamatchiamman Kovil,
Dindigul Road, Oddanchathiram Town,
Dindigul District. : Respondent/ Respondent

(The appellants 2 and 3 minors rep.by their mother and Guardian Tamil Ilakkiya/first appellant)

PRAYER:- Civil Miscellaneous Appeal filed under Section 173 of the Motor Vehicles Act, 1988, to set aside the judgment and decree, dated

14.08.2019 passed in M.A.C.O.P.No.76 of 2015 on the file of the Motor Accident Claims Tribunal (Additional District Court) (Full Additional Charge), Dindigul.

For Appellants : Mr.C.K.M.Appaji,
For Respondent : Mr.J.S.Murali

JUDGMENT

The Civil Miscellaneous Appeal is directed against the award passed in M.A.C.O.P.No.76 of 2015, dated 14.08.2019 on the file of the Motor Accident Claims Tribunal/Additional District Court, Dindigul, dismissing the claim petition filed under Section 163(A) Motor Vehicle Act.

2.Admittedly, the first appellant/claimant is the wife, the appellants 2 and 3/claimants 2 and 3 are the daughters and fourth appellant/fourth claimant is the mother of the deceased Sadhasivam.

3.The case of the claimants is that on 02.07.2013, at about 08.30 pm, when the deceased Sadhasivam was travelling as a pillion rider with his friend Kalimuthu @ Kalai in his two wheeler bearing registration

No.TN-60-Y-5895, near Kaveriyammapatti High School in Oddanchathiram, a dog suddenly crossed the road, as a result of which, both of them fell down and sustained serious injuries, that both of them were taken to Kovai Medical Centre for treatment and thereafter, taken to Oddanchathiram Government Hospital and that the said Sadhasivam had succumbed to the injuries at 02.00 pm on 03.07.2013.

4.It is the further case of the claimants that since the accident was occurred due to the crossing of dog and the respondent is the insurer of the vehicle involved in the accident, the respondent is liable for the claim.

5.The defence of the respondent/insurer is that as per the terms of the contract of the Insurance, the respondent/insurer is liable to indemnify the owner of the insured vehicle against any award and as such, the respondent is not at all liable to pay any compensation directly; that had the driver was cautious enough to drive the vehicle abiding by the traffic rules as envisaged in the Motor Vehicles Act, the alleged accident would have been avoided; that the insurance policy for the Hero Honda two wheeler has been issued in the name of the deceased

Sadhasivam, but the deceased had not driven the vehicle and even in that case P.A claim has to be made separately and not in Motor Accident claims Petition and that the petition is devoid of merits and the same is liable to be dismissed.

6.During enquiry before the Tribunal, the appellants/claimants have examined the first appellant as P.W.1 and one Karupusamy, alleged to be the occurrence witness as P.W.2 and exhibited six documents as Ex.P.1 to Ex.P.6. The respondent/insurer has examined its Senior Assistant Thiru.T.Thangavelu as R.W.1 and exhibited the photo copy of the Policy of the vehicle, owned by the deceased Sadhasivam as Ex.R.1.

7.The learned trial Judge, upon considering the evidence, both oral and documentary and on hearing the arguments of both the sides, by holding that the petition filed under Section 163(A) of Motor Vehicles Act is not maintainable, dismissed the claim petition. Aggrieved by the dismissal of the claim petition, the claimants have come forward with the present appeal.

8. The points that arises for consideration are;

(i) Whether the Tribunal erred in dismissing the claim petition by holding that the petition seeking for compensation in a road accident by a owner of the vehicle or by any other person, who is driving the vehicle and not being an employee, is not maintainable under 163(A) Motor Vehicle Act?

(ii) Whether the Tribunal erred in rejecting the petitioners' claim under the Personal Accident Coverage ?

(iii) Whether the impugned award is liable to be interfered with?

Points 1 to 3 :

9.Admittedly, the two wheeler Hero Honda vehicle bearing Registration No. TN-60-Y-5895, is owned by the deceased Sadhasivam and on the fateful day, the said vehicle was driven by his friend Kalimuthu @ Kalai and that due to crossing of dog, the accident had occurred and as a result of which, the deceased had suffered serious injuries and later succumbed to the same.

10. It is also not in dispute that the vehicle was insured with the respondent and that the insurance policy was in force on the date of accident.

11.The learned counsel for the appellants would submit that the deceased being the owner of the vehicle was travelling as a pillion rider and the vehicle was driven by the deceased's friend Kalimuthu @ Kalai; that since the petition was filed under Section 163(A) of Motor Vehicle Act, there was no need or necessity to prove the negligence and that it was only an accident arising out of use of Motor Vehicle and as such, the trial Court was duty bound to award compensation, but on the other hand, by holding that the petition filed under Section 163(A) of Motor Vehicle Act is not maintainable, dismissed the claim petition.

12.Admittedly, FIR came to be registered against the driver of the two wheeler i.e, Kalimuthu @ Kalai. Moreover, no other vehicle was involved in the accident, except the one, driven by the friend of the deceased, in which, the deceased was travelling as a pillion rider. At this juncture, it is necessary to refer the judgment of the Hon'ble Supreme Court in ***Ningamma and another Vs. United India Insurance Company Limited*** reported in *2009 (2) TN MAC 169 (SC)*:

> “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."

14. It is also necessary to refer the following decisions of this Court.

(1) ***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."

(2) ***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 Sadhasivam has travelled in the two wheeler as pillion rider, whereas his friend Kalimuthu @ Kalai had driven the two wheeler and due to his driving, both of them fell down and sustained injuries.

15.The Tribunal, by taking note of the judgment of the Hon'ble Supreme Court in the ***Oriental Insurance Company Limited Vs. Rajini Devei*** and the judgment of Karnataka High Court in ***Smt. Sangeetha Vs. Krishnachari,*** has held that a claim petition seeking compensation in a road accident by a owner of the vehicle or by any other person driving the vehicle and not being an employee is not maintainable under Section 163(A) of Motor Vehicle Act.

16. Considering the facts and circumstances of the case and also the legal position above referred, the above finding of the Tribunal cannot be found fault with. But, at the same time, Ex.R.1 policy relating

to the vehicle in question is a package policy and it is clearly evident from Ex.R.1 that premium for PA Cover for owner-driver was paid and the liability is shown as Rs.1 lakh. In the impugned order, the learned trail Judge has observed that admittedly, the policy is to cover the third party insurance only and there is no coverage under this policy for owner-driver; that even though the vehicle is insured with the respondent for a liability of policy towards third parties only and there is no premium paid towards the owner-cum-driver then the petitioners cannot avail benefits of this application.

17.R.W.1/Official of the Insurance Company, in his cross examination would admit that the policy was in force at that point of time; that the policy is a package policy. Moreover, as already pointed out, in Ex.R.1 Policy, it has been specifically mentioned in the schedule of premium that PA for owner-driver at Rs.50/- was paid and the limit of liability for P.A. cover under Section III for Registered Owner Cum Driver is Rs.1,00,000/-.

18.No doubt, the Tribunal has also observed that even if P.A Cover is there, P.A claim has to be made separately and not in this Motor

Accident Claim Petition. At this juncture, it is necessary to refer the judgment of the Hon'ble in ***Ram Khiladi vs United India Insurance Company*** reported in ***2020 (2) SCC 550****:*

> *9.5.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 underSection 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 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 163-A 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 163-A 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."

19.The above decision is squarely applicable to the case on hand. In the present case, as already pointed out, in Ex.R.1 package policy, personal accident coverage is given to the owner cum driver of the vehicle to the extent of Rs.1,00,000/-. It is necessary to refer the decision of this Court in ***National Insurance Company Limited Vs. Velmurugan*** reported in ***2018 SCC Online Mad 13152*** and the relevant passages are extracted hereunder :

> *"IMT-15 Personal Accident cover to the insured or any named person other than paid driver of cleaner (applicable to private cars including Three Wheelers rated as private cars and motorized Two Wheeler with or without side car [not for hire or reward]*
>
> *In consideration of the payment of an additional premium it is hereby agreed and understood that the company undertakes to pay compensation on the scale provided below for bodily injury as hereinafter defined sustained by the insured person in direct connection with the vehicle insured or whilst mounting and dismounting from or traveling in vehicle insured and caused by violent accidental external and visible means which independently of any other cause shall within six calendar months of such injury result in*

	Scale of compensation
(i)Death	100%
(ii) Loss of two limbs or sight of two eyes or one limb and sight of one eye	100%
(iii) Loss of one limb or sight of an eye	50%
(iv)Permanent total disablement from injuries other than named above	100%

> *Provided always that*

1. the compensation shall be payable under only one of the items (i) to (iv) above in respect of any such person arising out of any one occurrence and the total liability of the insurer shall not in the aggregate exceed the sum of Rs.--- during any one period of insurance in respect of any such person.

2. No compensation shall be payable in respect of death or bodily injury directly or indirectly wholly or in part arising or resulting from or traceable to (a) intentional self injury suicide or attempted suicide physical defect or infirmity or (b) an accident happening whilst such person is under the influence of intoxicating liquor or drugs.

3. Such compensation shall be payable only with the approval of the insured named in the policy and directly to the injured person or his/her legal representative(s) whose receipt shall be a full discharge in respect of the injury of such person

Subject otherwise to the terms exceptions conditions and limitations of this policy.

** The Capital Sum insured (CSI) per passenger is to be inserted.*

IMT.16. PERSONAL ACCIDENT TO UNNAMED PASSENGERS OTHER THAN INSURED AND THE PAID DRIVER AND CLEANER (For vehicles rated as Private Cars and Motorised Two Wheelers (not for hire or reward) with or without side Car)

In consideration of the payment of an additional premium, it is hereby understood and agreed that the Insurer *undertakes to pay compensation on the scale provided below for bodily injuries hereinafter defined sustained by any passenger other than the insured and /or the paid driver attendant or cleaner and /or a person in the employ of the insured coming within the scope of the Workmen's Compensation Act,1923 and subsequent amendments of the said Act and engaged in and upon the service of the insured at the time such injury is sustained whilst mounting into, dismounting from or traveling in but not driving the insured Motor Car and caused by violent, accidental, external and visible means which independently of any other cause shall within three calendar months of the occurrence of such injury result in:*

[The Tabular column as in IMT-15 and Clauses 1 to 3 in the Proviso, remains the same and therefore, there is no need to repeat the same]

*(4) not more than ---- ** persons/passengers are in the vehicle insured at the time of occurrence of such injury. Subject otherwise to the terms exceptions conditions and limitations of this policy.*

** The Capital sum insured (CSI) per passenger is to be inserted.*

*** the registered sitting capacity of the vehicle insured is to be inserted.*"

20.Considering the above, the claimants are entitled to get Rs.1,00,000/- (Rupees One Lakh Only) as per the terms of contract of insurance. Hence, this Court concludes that the impugned award dismissing the claim petition is liable to be set aside and the respondent/insurer is liable to pay a sum of Rs.1,00,000/- with interest at 7.5% per annum. Considering the other facts and circumstances of the case, this Court further decides that the parties are directed to bear their own costs and the above points are answered accordingly.

21.In the result, the Civil Miscellaneous Appeal is allowed and the impugned order, dismissing the claim petition is set aside. The respondent/insurer is directed to pay a sum of Rs.1,00,000/- (Rupees One Lakh On;y) with interest at 7.5 % per annum from the date of petition till the date of payment, within a period of six weeks from the date of receipt of copy of this judgment and on such deposit, the claimants 1 and 4/Appellants 1 and 4 are permitted to withdraw a sum of Rs.20,000/- (Rupees Twenty Thousand Only) each along with accrued interest. The claimants 2 and 3/Appellants 2 and 3 minors are entitled to get Rs.30,000/- (Rupees Thirty Thousand Only) each. The Tribunal is directed to deposit the share of the minor claimants in any one of the Nationalized Bank in a fixed deposit scheme, till they attain majority. The mother and guardian of the minor claimants is permitted to withdraw the accrued interest once in six months directly from the Bank only for the welfare of the minors. The appellants are directed to pay the Court fee, if any, within a period of one month from the date of receipt of copy of this order.

07.11.2022

Index : Yes : No
Internet : Yes : No
das

To,

1.The Motor Accident Claims Tribunal
(Additional District Court) (Full Additional Charge),
Dindigul.

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

.K.MURALI SHANKAR,J.

das

C.M.A(MD)No.225 of 2022

07.11.2022