



C.M.A.No.829 of 2020

IN THE HIGH COURT OF JUDICATURE AT MADRAS

WEB COPY JUDGMENT RESERVED ON : 21.04.2023

JUDGMENT PRONOUNCED ON : 19.07.2023

CORAM

THE HON'BLE MRS.JUSTICE N.MALA

C.M.A.No.829 of 2020
and C.M.P.No.5329 of 2020

HDFC ERFO General Insurance Co. Ltd.,
"Raheja Towers", Delta 4, 177,
Anna Salai,
Chennai – 600 002.

...Appellant

vs.

1.A.Kumar

2.S.Manjula

3.S.Manjula

... Respondents

Prayer: Civil Miscellaneous Appeal is filed under Section 173 of the Motor Vehicle Act, 1988, against the award and decree dated 16.07.2019 made in M.C.O.P.No.1251 of 2014 on the file of the Motor Accident Claims Tribunal, Principal District Judge, Cuddalore.

For Appellant : Mr.S.Arunkumar

For R1 : Mr.Ramya V. Rao

* * * * *



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J U D G M E N T

WEB COPY This Civil Miscellaneous Appeal is filed against the award and decree dated 16.07.2019 made in M.C.O.P.No.1251 of 2014 on the file of the Motor Accident Claims Tribunal, Principal District Judge, Cuddalore.

2.The parties will be referred to as per their rank in the claim petition for the sake of convenience.

3.The deceased was aged 26 years and as a Programmer in ETI India, Chennai was earning a sum of Rs.12,000/- per month. The claim petition was filed by the father and the third respondent, the mother of the deceased. According to the claimants, on 26.11.2006 at about 01.00 a.m., while the deceased was driving the 1st respondent's car bearing Registration No.TN-05-B-0666 from East to West direction on Cuddalore (Palur) Panruti Main Road, Thirumanikuzhi, a pedestrian suddenly crossed the road and in order to avoid the accident the deceased swerved the vehicle and hit a tamarind tree. Due to impact the deceased sustained fatal injuries and died on the spot. The claimants therefore filed the claim petition claiming a sum of



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Rs.25,00,000/- as compensation.

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4.The first and the third respondent is the mother of the deceased.

The first respondent, the mother of the deceased was the owner of the car, which was driven by the deceased at the time of the accident. She filed a counter stating that as the vehicle had a valid insurance policy and all the conditions of the policy were satisfied the liability was that of the second respondent insurance company.

5.The second respondent insurance company filed its counter denying the negligence, quantum and liability. The second respondent insurance company further stated that the mother of the deceased who was arrayed as first and third respondent in the claim petition was not entitled for compensation for the death of her son, who died while driving the car belonging to her. According to the Insurance Company, the deceased was not a third party and further as the accident occurred only due to the negligence of the deceased and therefore the claim petition under Section 166 of the Motor Vehicle Act was not maintainable.



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6.Before the Claims Tribunal, the claimant examined himself as PW1 and one eye-witness as PW2 and marked Ex.P1 to Ex.P8, in support of the claim. On the side of the second respondent one witness was examined and one document was marked.

7.The Claims Tribunal on an assessment of the entire evidence on record held that the accident did not occur due to the negligence of the deceased and awarded the compensation of Rs.15,42,000/- along with 8% interest and mulcted the liability on the second respondent insurance company on the basis of the policy marked as Ex.R1. Aggrieved by the award, the Insurance Company has preferred the above appeal, challenging the finding on negligence and also the liability.

8.According to the learned counsel for the appellant as the deceased himself was the tortfeaser the claim petition filed under Section 166 of the Motor Vehicle Act was not maintainable. The learned counsel further submitted that the Claims Tribunal failed to note that even under the Policy, Ex.R1 the Insurance Company could not be mulcted with the liability as the



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deceased was neither the owner nor an authorised driver. The learned counsel for the appellant relied on few Judgments in support of his submissions and prayed for dismissal of the claim petition.

9.The learned counsel for the first respondent/claimant on the other hand submitted that the Tribunal had given cogent reasons for it's finding on negligence and liability and therefore there was no scope for any interference in the appeal. The learned counsel further submitted that if this Court should find against the claimants on negligence then the claimants should be permitted to file a fresh petition under Section 163-A of the Act.

10.The learned counsel for the appellant relied on the following Judgments:

1.A.Sridhar Vs. United India Insurance Company Ltd., and Another reported in 2011 (2) TN MAC 427 (SC);

2.Oriental Insurance Company Limited Vs. Dhanbai Kanji Gadhvi and Others reported in (2011) 11 SCC 513; and

3.Naveen Kumar Vs. Vijay Kumar and others reported in (2018) 3 SCC 1.



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WEB COPY 11.The learned counsel for the first respondent referred to the following Judgments:

1.National Insurance Company Limited Vs. Balakrishnan and another reported in (2013) 1 SCC 731;

2.Nagappa Vs. Gurudayal Singh and Others reported in (2003) 2 SCC 274; and

3.Ramkhiladi and another Vs. United India Insurance Co. Ltd., and another reported in 2020 ACJ 627.

12.I have heard both the learned counsel and have perused the materials on record.

13.It is seen that the claim petition was filed under Section 166 of the Motor Vehicle Act. It is well settled that the petition under Section 166 of the Motor Vehicle Act is based on fault liability, therefore unless and until negligence is proved against the driver of the insured vehicle, the liability



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cannot be mulcted on the insured as well as the insurer.

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14. In the present case, the claimant's relied on the evidence of PW2 to prove that the deceased died while trying to avoid hitting a pedestrian. In contra, the second respondent/Insurance company relied on the documentary evidence filed in the case in support of its contention that the negligence of the deceased resulted in the accident. It is seen from the documentary evidence Ex.P1, the FIR, that it was registered against the deceased. A case in Crime No.1102 of 2006 was registered against the deceased for offence under Section 279, 337, 304(A) of IPC and after investigation the case was closed as "Mistake of Fact". PW2 was examined by the claimant's to prove that the deceased was not negligent. PW2 was said to be an Eye-witness and he deposed that he witnessed the accident while he was riding his two wheeler. He further deposed that soon after the accident he went to see the deceased and found him dead. In his cross examination he admitted that he had not lodged the FIR and he was not investigated by the police with regard to the accident. PW2 in his cross examination admitted that he could not recollect the Registration Number of



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the car. Now the question before this Court is whether the oral evidence of PW2 has to be preferred or the documentary evidence, Ex.P1. In my view, the documentary evidence deserves to be preferred as against the oral evidence of PW2.

15.It is seen that the FIR was lodged by one Imran Khan, who was the occupant of the car. According to the complainant, the deceased lost control of the car and hit against the tamarind tree. Due to the impact, the car capsized and fell into a pit on the right side of the road. The complainant sustained injuries and so also a co-occupant, who was seated in the front seat also died. Therefore from the contents of the FIR, it is clear that there was no pedestrian crossing the road at the time of the accident and it was only because of the negligence of the deceased that the accident occurred. The evidence of PW1 is artificial, unreliable and against the contents of the FIR. If really PW2 was present in the scene of the accident, then he would have spoken about the death and injury to the other occupants of the car. In the light of the said discussions, I am of the view



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that the negligence of the deceased resulted in the accident and therefore the finding of the Tribunal on negligence is unsustainable and is set aside.

16.In the case of *A.Sridhar Vs. United India Insurance Company Ltd. and Another* reported in *2011 (2) TN MAC 427 (SC)* the Hon'ble Supreme Court held that when negligence was attributed to the person driving the vehicle and not because of the fault of the owner of the vehicle or the fault of any other vehicle, the Insurance Company could not be made liable to pay compensation. The Hon'ble Division Bench of this Court in the case of *United India Insurance Company Vs. Rekha* reported in *2017 (2) TN MAC 674*, took the same view. In the light of the said binding precedents, I am of the view that the contention of the learned counsel for the appellant that the Insurance Company cannot be mulcted with the liability is sustainable.

17.The learned counsel for the claimant prayed that an opportunity may be given to the claimants to file a petition under Section 163-A of the Act, I am afraid that the said submission cannot be entertained as no useful



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purpose would be served. Even as per the Judgment relied on by the learned counsel for the respondent in the case of ***Ramkhiladi and Another Vs. United India Insurance Co. Ltd., and another*** reported in ***2020 ACJ 627***, the Hon'ble Supreme Court held that the claim petition under Section 163-A was not maintainable by a borrower/permissive user of the vehicle against the owner/insurer of the said vehicle, as such borrower or permissive user steps into the shoes of the owner/insurer and the owner could not be both a claimant as well as the recipient.

18.The learned counsel for the claimant then submitted that the policy in the present case, which was marked as Ex.R1 was a comprehensive policy/package policy as an additional premium of Rs.500/- was paid for a capital sum of Rs.2,00,000/-. The learned counsel relying on the terms of the policy and also the Judgment of the Hon'ble Supreme Court in the case of ***Ramkhiladi and Another Vs. United India Insurance Co. Ltd., and another*** reported in ***2020 ACJ 627***, submitted the claimants would be entitled to compensation under Personal Accident cover, which in the present case was Rs.2,00,000/-. In ***Ramkhiladi*** case, the claim petition was



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filed under Section 163-A of the Motor Vehicle Act, which was based on no fault liability. The Hon'ble Supreme Court in the context of the facts of the case held that the deceased driver could not be construed as a third party with respect to the insured vehicle, but however held that the deceased driver stepped into the shoes of the owner of the vehicle and as such the claimants were entitled to a sum of Rs.1,00,000/- under the package policy. It is pertinent to note here that the claim petition in the present case is filed under Section 166 of the Motor Vehicle Act, which is based on fault liability. As I have held that the deceased was himself the tortfeasor, the claim petition filed under Section 166 of the Motor Vehicle Act, in the absence of the proof of negligence is not sustainable.

19.In view of the above, this Civil Miscellaneous Appeal is allowed and the award and decree dated 16.07.2019 made in M.C.O.P.No.1251 of 2014 on the file of the Motor Accident Claims Tribunal, Principal District Judge, Cuddalore is set aside. There shall be no order as to costs. Consequently, the connected miscellaneous petition is closed.



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Index : yes/no
Internet : yes/no
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To

- 1.The Principal District Judge,
Cuddalore.
- 2.The Section Officer,
V.R.Section,
High Court,
Madras.

N.MALA, J.

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PRE-DELIVERY JUDGMENT IN
C.M.A.No.829 of 2020



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