BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 21.08.2023

Pronounced on : 14.09.2023

CORAM:

THE HON'BLE MR.JUSTICE **K.MURALI SHANKAR**

C.M.A.(MD)No.577 of 2020

The Branch Manager,
The National Insurance Company Limited,
Keezha Raja Veethi,
Puthukkottai District. ... Appellant/
2nd Respondent

Vs.

1. Malathy
2. Minor Vaishnavan
3. Minor Saithaniya ... Respondents/
Petitioners 1-3

(Minor Respondents 2 and 3 are represented by her mother and Guardian of 1st Respondent herein)

4. Backiyaraj ... Respondent/
1st Respondent

(R4 dispensed with vide order dated 27.11.2020)

Prayer : This Civil Miscellaneous Appeal filed under Section 173 of the Motor Vehicles Act, to set aside the award passed in M.C.O.P.No.259 of 2016 dated 25.04.2019 on the file of Motor Accident Tribunal/Principal District Judge, Puthukkottai and allow this appeal.

For Appellant : Mr.N.S.Ramakrishnadass

For R1 to R3 : Mr.P.Prabhakaran

JUDGMENT

The Civil Miscellaneous Appeal is directed against the award passed in M.C.O.P.No.259 of 2016 dated 25.04.2019 on the file of the Principal District Court, Pudukkottai.

2. The appellant/insurer, who was made liable to pay compensation of Rs.15,57,600/- (Rupees Fifteen Lakhs Fifty Seven Thousand and Six Hundred only) with interest at 7.5% per annum to the respondents 1 to 3/ claimants for the death of Mohandoss, consequent to an accident occurred on 07.07.2015, challenged the liability mulcted on it and also the quantum of compensation awarded at, by the Tribunal.

3. Admittedly, the first respondent/first claimant is the wife, the second respondent/second claimant is the son and the third respondent/ third claimant is the daughter of the deceased Mohandoss.

4. The case of the respondents 1 to 3/claimants is that on 07.07.2015, the first respondent/first claimant was riding a two wheeler TVS Jupiter bearing Registration No.TN-55-AL-1595 with her husband as pillion rider to their relatives house and at about 06.00 p.m., when they were proceeding near Punalkulam A.T. Marriage mahal, parking dogs had suddenly intervened and fell on the left side of the bike and as a result of which, the vehicle lost its control and fell on the right side, that the pillion rider Mohandoss had fallen down in the road and sustained serious head injuries, that he was immediately taken to Meenatchi Hospital, Thanjavur through ambulance and he was immediately referred to Thanjavur Medical College Hospital and despite treatment, he succumbed to the injuries on the next day and that on the basis of the complaint lodged by the first respondent/first claimant, FIR came to be registered.

5. It is the further case of the respondents 1 to 3/claimants that the deceased Mohandoss was previously working in Singapore, that he has been running a saloon in the name and style of Foreign Saloon in partnership with the first respondent/first claimant, that he was earning Rs.20,000/- per month after deducting all the expenses and that he was aged 33 years at the time of accident.

6. The defence of the appellant/insurer is that the deceased Mohandoss had driven the two wheeler along with his wife as pillion rider in a hectic speed, that street dog suddenly crossed the road and as such, he applied the brake and caused the accident due to his own negligence, that the accident register was registered, as if, the two wheeler was driven by the deceased Mohandoss, that the first respondent/first claimant, after the death of her husband and in order to claim compensation, has lodged a complaint, as if, she had driven the two wheeler and that since the deceased Mohandoss is the tortfeasor, the appellant/insurer is not liable for the claim.

7. During enquiry, the respondents 1 to 3/claimants have examined the first respondent/first claimant as P.W.1 and one Sivakumar as P.W.2 and exhibited 10 documents as Ex.P.1 to Ex.P.10. The appellant/insurer has examined 3 witnesses as R.W.1 to R.W.3 and exhibited 6 documents as Ex.R.1 to Ex.R.6.

8. 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 rash and negligent driving of the first respondent/first claimant was responsible for the accident, fixed the contributory negligence at 20% and directed the appellant/insurer to pay compensation of Rs.15,57,600/- with interest and costs to the respondents 1 to 3/ claimants. Aggrieved by the impugned award, the insurer has come forward with the present appeal.

9. The learned counsel appearing for the appellant/insurer would submit that the deceased Mohandoss drove the two wheeler at the time of accident, that the first respondent/first claimant had admitted her husband in Meenatchi Hospital on 07.07.2015 and she has lodged the complaint before the police on 09.07.2015, as if, she had driven the two wheeler, that the Tribunal has failed to see that the deceased Mohandoss and the first respondent/first claimant jointly rode the two wheeler and in the course of their driving met with an accident, that since they are the joint tortfeasor, their legal heirs have no right to file the claim petition and that therefore, the Tribunal has committed an error in mulcting liability on the appellant/ insurer.

10. The points that arise for consideration are :

1) *Whether the Tribunal erred in mulcting liability on the appellant/insurer, despite production of evidence to show that the accident was occurred only due to the rash and negligent driving of the deceased Mohandoss and that the deceased Mohandoss is the tortfeasor?*
2) *Whether the impugned award dated 25.04.2019 is liable to be interfered with?*

11. The respondents 1 to 3/claimants, in order to prove the mode of accident, have examined the first respondent/first claimant, who was the rider of the two wheeler as P.W.1 and P.W.2 alleged to be the occurrence witness. P.W.1, in her evidence, would reiterate the contentions raised in the claim petition with regard to the mode of accident. In cross-examination, she would say that she has alone lodged the complaint with the police, but subsequently she would add that they have only obtained her signature. She would further say that she had alone driven the vehicle on the date of accident and denied the suggestion that her husband alone had driven the vehicle at the time of accident and they have laid the claim, as if, she had driving the vehicle only to get compensation. P.W.2, in his chief examination affidavit, would reiterate the contentions raised by the

first respondent/first claimant with regard to the mode of accident and in cross-examination, he would say that he was not aware as to who had lodged the complaint with the police, that he has not lodged any complaint, that he has not given evidence in any other Court and that he came to know about the case from P.W.1.

12. Admittedly, on the basis of the complaint lodged by the first respondent/first claimant, FIR came to be registered in Crime No.214 of 2015 on 09.07.2015 for the offence under Section 304(A) IPC against the first respondent/first claimant, who is the complainant before the police. It is not in dispute that the jurisdictional police, after completing the investigation, has laid the charge sheet against the first respondent/first claimant before the jurisdictional Court.

13. But it is the specific case of the appellant/insurer that the deceased Mohandoss alone had driven the two wheeler at the time of accident with his wife-first respondent/first claimant as pillion rider, that the vehicle was not driven by the first respondent/first claimant as alleged by her and that the first respondent/first claimant alone had taken her

injured husband to Meenatchi Hospital, Thanjavur and at the time of admitting him, she has stated that the vehicle was driven by her husband. In order to prove the said defence, the appellant/insurer has summoned and examined Dr.Saravana Vel attached to Meenatchi Hospital, Thanjavur as R.W.1 and he would say that the injured Mohandoss was brought to treatment at 07.00 p.m. on 07.07.2015 by his wife Malathy informing that he fell down while travelling in a two wheeler near Kings College and that the injured Mohandoss had driven the vehicle with his wife as pillion rider and on that basis, he entered the accident register under Ex.R.1. It is pertinent to note that when the copy of the accident register was attempted to be marked through R.W.1, the respondents 1 to 3/claimants' side have raised objections for marking the same and hence, subject to their objection Ex.R.1 came to be marked. It is pertinent to note that the respondents 1 to 3/claimants have produced the very same accident register extract and exhibited the same as Ex.P.9. When the respondents 1 to 3/claimants have produced the accident register and exhibited the same, this Court is at loss to understand as to why and on what basis the objections were raised.

14. It is evident from Ex.P.9 and Ex.R.1-accident register that it has been recorded that the injuries were found due to alleged history of road traffic accident - fall from two wheeler while driving bike with his wife at 07.00 p.m. on 07.07.2015. It is further evident that the injured Mohandoss was brought to the hospital by his wife-first respondent/first claimant at 07.25 p.m. on 07.07.2015. It is not in dispute that after treatment at Meenatchi Hospital, he was referred to Thanjavur Medical College Hospital and despite treatment, he succumbed to the injuries on 08.07.2015.

15. As already pointed out, the first respondent/first claimant has lodged the police complaint only on 09.07.2015. As rightly contended by the learned counsel appearing for the appellant/insurer, the first respondent/first claimant has not offered any valid or acceptable explanation for the delay in lodging the complaint. Though P.W.2 would say that he had witnessed the accident, he has also not offered any reason or explanation for not lodging the complaint immediately.

16. The appellant/insurer has also taken a stand that the first respondent/first claimant was not possessing any driving licence at the

time of accident and in order to prove the same, they have summoned and examined the staff attached to the Regional Transport Office (RTO), Pudukottai as R.W.2 and R.W.2 would say that no licence was issued to Malathy, W/o.Mohandoss from their office and produced the letter given by the Regional Transport Office (RTO), Pudukkottai in this regard. No doubt, when R.W.2 was in witness box, it was suggested by the respondents 1 to 3/claimants that in case if the deceased Mohandoss and the said Malathy had obtained licence from some other place, the same would not find place in their office. It is pertinent to note that even after putting such suggestion to R.W.2, the respondents 1 to 3/claimants have not chosen to produce the driving licence of the first respondent/first claimant and there is absolutely no explanation for non-production of the same.

17. As rightly contended by the learned counsel appearing for the appellant/insurer, the respondents 1 to 3/claimants have not specifically disputed the fact that immediately after the accident, the injured Mohandoss was taken to Meenatchi Hospital, Thanjavur by the first respondent/first claimant and the accident register was entered in that hospital. Considering the entries in Ex.P.9 and Ex.R.1-accident register

and the evidence of R.W.1 and also taking note of the delay of 2 days in preferring the complaint before the police and also the non-production of driving licence for the first respondent/first claimant, this Court has no hesitation to hold that the deceased Mohandoss alone had driven the two wheeler at the time of accident and not by the first respondent/first claimant and with an ulterior intention to claim the compensation, police complaint came to be lodged after 2 days, as if, the first respondent/first claimant had driven the two wheeler.

18. Even according to the respondents 1 to 3/claimants, the vehicle involved in the accident is owned by the fourth respondent/first respondent, who is none other than the partner of the deceased Mohandoss.

19. The respondents 1 to 3/claimants have filed the claim petition as usual under the many provisions of Motor Vehicles Act i.e., 140, 141, 142, 163(A), 163(B), 166 and 182(A) of Motor Vehicles Act.

20. The learned counsel appearing for the appellant/insurer would submit that since the deceased Mohandoss is the tortfeasor, it has to be

taken that the deceased Mohandoss stepped into the shoes of the actual owner of the vehicle and as such, the very claim petition itself is not maintainable.

21. At this juncture, it is necessary to refer the following judgments;

(i) 2009 (2) TN MAC 169 (SC) (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.”*

(ii) 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."

(iii) 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."

22. The above decisions are squarely applicable to the case on hand. As already pointed out, the deceased Mohandoss alone has driven the two wheeler and due to his driving alone, the vehicle lost its control and as a result of which, he fell down and sustained fatal injuries.

23. As already pointed out, the vehicle was belonging to his partner, the fourth respondent/first respondent and admittedly, he borrowed the vehicle from his partner and proceeded with his wife to the relatives house and as such, it is to be inferred that the deceased Mohandoss stepped into the shoes of the actual owner of the vehicle i.e., the fourth respondent/first respondent. Applying the legal position above referred, this Court has no other option, but to say that the claim petition filed under Section 166 or 163A of Motor Vehicles Act is legally not maintainable.

24. In the present case, the respondents 1 to 3/claimants as well as the appellant/insurer have produced the copy of the insurance policy under Ex.P.10 and Ex.R.6 respectively. Ex.P.10 (Ex.R.6) is a package policy and admittedly, the premium for P.A. cover for Rs.1,00,000/- for owner cum driver of the vehicle was paid at Rs.50/- and the liability is shown as

Rs.1,00,000/-. The learned counsel appearing for the appellant/insurer 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.

25. It is also necessary to refer the Judgment of the Hon'ble Supreme Court in ***Ramkhiladi and another Vs. United India Insurance Company Ltd., and another*** reported in ***2020 (2) SCC 550,*** whereunder, 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 present case, as already pointed out, in Ex.P.10 (Ex.R.6)-package policy, personal accident coverage is given to the owner cum driver of the vehicle to go to the extent of Rs.1,00,000/-. Hence, the respondents 1 to 3/ claimants are entitled to Rs.1,00,000/- as per the terms of contract of Insurance, as the deceased Mohandoss stepped into the shoes of the owner of the vehicle. Consequently, the impugned award mulcting liability on the appellant/insurer to pay a compensation of Rs.15,57,600/- is liable to be

set aside and the appellant/insurer is liable to pay compensation of Rs.1,00,000/- with interest at 7.5 per annum.

26. Considering the other facts and circumstances of the case, this Court further decides that the parties are to be directed to bear their own costs and the above points are answered accordingly.

27. In the result, the Civil Miscellaneous Appeal is partly allowed and the impugned award directing the appellant/insurer to pay compensation of Rs.15,57,600/- (Rupees Fifteen Lakhs Fifty Seven Thousand and Six Hundred only) is set aside. The appellant/insurer is directed to deposit a sum of **Rs.1,00,000/- (Rupees One Lakh only)** with interest at 7.5% per annum from the date of petition till the date of payment to the credit of M.C.O.P.No.259 of 2016 on the file of the Principal District Court, Pudukkottai, less the amount already deposited, if any, within a period of four weeks from the date of receipt of a copy of this judgment and on such deposit being made, the first respondent/first claimant is entitled to get Rs.30,000/- (Rupees Thirty Thousand only) and the respondents 2 and 3/claimants 2 and 3 are entitled to get **Rs.35,000/-**

(Rupees Thirty Five Thousand only) each. Accordingly, the first respondent/first claimant is permitted to withdraw her share along with interest and costs and the share of the minor respondents 2 and 3/claimants 2 and 3 shall be deposited in any one of the Nationalised Banks till they attain majority. The first respondent/first claimant, who is the mother of the minor respondents 2 and 3/claimants 2 and 3, is permitted to withdraw the interest of minors once in three months directly from the Bank. If the amount was already deposited, the balance amount shall be withdrawn by the appellant/insurer. The parties are directed to bear their own costs.

14.09.2023

NCC : Yes/No
Index : Yes/No
Internet: Yes/No
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To:

1. The Principal District Court,
   Pudukkottai.

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

K.MURALI SHANKAR,J.

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Pre-Delivery Order made in
C.M.A.(MD)No.577 of 2020

Dated : 14.09.2023