



C.M.A.(MD)No.591 of 2020

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 12.07.2023

Pronounced on : 24.07.2023

CORAM:

THE HON'BLE MR.JUSTICE K.MURALI SHANKAR

C.M.A.(MD)No.591 of 2020

The Branch Manager,
Oriental Insurance Company Limited,
Pudukkottai.

... Appellant/
2nd Respondent

Vs.

1. Thanikodi

2. Veerammal

3. Tamilarasan

4. Thirumalingam

... Respondents 1to4/
Petitioners 1to4

5.Selvarasu

... 5th Respondent/
1st Respondent

Prayer : This Civil Miscellaneous Appeal filed under Section 173 of the Motor Vehicles Act, to set aside the judgment and decree dated 15.07.2020 passed in M.C.O.P.No.155 of 2016 on the file of the Sessions Judge, Mahila Court, Pudukkottai.

For Appellant : Mr.C.Karthik

For R1 to R4 : No appearance

For R5 : Mr.R.Karunanidhi



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JUDGMENT

The Civil Miscellaneous Appeal is directed against the award passed in M.C.O.P.No.155 of 2016 dated 15.07.2020 on the file of the Mahila Court, Pudukkottai.

2. The appellant/insurer, who was made liable to pay compensation of Rs.5,95,500/- with interest at 7.5% per annum to the respondents 1 and 2/claimants 1 and 2, who are the legal heirs of the deceased Murugesan, who died in an accident occurred on 08.10.2013, challenged the liability mulcted on it and also the quantum of compensation awarded at, by the Tribunal.

3. Admittedly, the respondents 1 and 2/claimants 1 and 2 are the parents and the respondents 3 and 4/claimants 3 and 4 are the brothers of the deceased Murugesan.

4. The case of the respondents 1 to 4/claimants is that on 08.10.2013 the deceased Murugesan had taken the two wheeler Hero Honda bearing



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Registration No.TN-55-AF-9004 belonging to the fifth respondent/first respondent and proceeded to Karambakudi in the morning and while he was returning back on the same day at about 07.30 p.m. near Vandan lodge bus stand, Puthur street, Karupusamy temple arch, due to strong winds and due to the distraction caused by the headlight of the vehicle, which came in the opposite direction, he suddenly dashed against the tree on the road side and sustained injuries on his head and other places of the body and died on the spot.

5. It is further case of the respondents 1 to 4/claimants that the deceased Murugesan was aged 31 years at the time of accident, that he had returned from Dubai 6 months prior to the accident and that he was doing agriculture and also milk vending business and was earning Rs.15,000/- per month.

6. The defence of the appellant/insurer is that the deceased Murugesan was not possessing a valid driving licence at the time of accident, that the fifth respondent/owner of the vehicle, without adhering to the stipulation of policy, had delivered his vehicle to the deceased



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Murugesan to drive the same, that the insurance policy of the vehicle involved in the accident does not cover personal risk of any driver of the vehicle, that there is no insurance cover for the rider of the two wheeler, that the deceased Murugesan, without knowing driving, had hit against the tamarind tree on the road side and that the appellant/insurer is not liable for the claim. It is their further defence that the compensation claimed and awarded is excessive and against all limits.

7. During enquiry, the respondents 1 to 4/claimants have examined the first respondent/first claimant Thanikodi as P.W.1 and one Manokaran as P.W.2 and exhibited 7 documents as Ex.P.1 to Ex.P.7. The appellant/insurer has examined Special Sub Inspector of Police Tharmaraj as R.W.1 and exhibited the certified copy of the rough sketch prepared by the police as Ex.X1.

8. The learned trial Judge, upon considering the evidence both oral and documentary and on hearing the arguments of both the sides, has passed the impugned award dated 15.07.2020 holding that the accident was occurred only due to the negligence of the deceased, that the deceased



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had no driving licence at the time of accident, that since there is policy violation, the respondents 1 to 4/claimants are not entitled to get 50% of the compensation on the ground of contributory negligence and that therefore, the appellant/insurer was directed to pay 50% of the award amount of Rs.5,95,500/- with interest and then to recover the same from the fifth respondent/owner of the vehicle. Aggrieved by the said award, the insurer has preferred the present appeal.

9. The points that arise for determination are :

- 1) *Whether the Tribunal erred in applying the doctrine of pay and recovery, despite the finding of the Tribunal itself that the deceased is the tortfeasor and that the deceased was not possessing a valid driving licence at the time of accident?*
- 2) *Whether the impugned award is liable to be interfered with?*

10. The learned counsel appearing for the appellant/insurer would submit that the deceased is not a third party as per the terms and conditions of the policy, that the deceased had driven the two wheeler belonging to the fifth respondent/first respondent without having any driving licence, that the policy condition does not cover personal risk of



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any driver of the vehicle, that there is no coverage for the rider of the two wheeler and that therefore, the appellant/insurer is not liable for the claim.

11. It is seen from the impugned award that an argument was attempted to be made by the respondents 1 to 4/claimants' side that compensation is to be paid without any pleading or proof of fault, on the principle of social justice as a social security measure because of ever increasing motor vehicle accident in a fast moving society and it is not open for the insurer to raise any defence of negligence on the part of victim in claim proceedings under Section 163A of the Motor Vehicles Act. It is pertinent to note that the respondents 1 to 4/claimants have laid the claim application under Sections 140, 141, 142, 166 and 166A of the Motor Vehicles Act and admittedly, not under Section 163A of the Motor Vehicles Act.

12. As already pointed out, the learned trial Judge has given a specific finding that the accident was occurred only due to the negligence of the deceased Murugesan. It is also not in dispute that the vehicle was belonging to the fifth respondent/first respondent and the deceased



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Murugesan borrowed the vehicle and proceeded to Karambakudi and as such, it can be easily inferred that the deceased Murugesan stepped into the shoes of the actual owner of the vehicle i.e., fifth respondent/first respondent.

13. At this juncture, it is necessary to refer the judgment of the Hon'ble Supreme Court in *Ningamma and another Vs. United India Insurance Co. Ltd.* reported in **2009 (13) SCC 710**,

“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 163-A of MVA 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?.....

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18. In the case of ***Oriental Insurance Company Ltd Vs. Rajni Devi and others*** reported in (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



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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.”

14. As already pointed out, the deceased Murugesan is the tortfeasor. Applying the legal dictum above mentioned, this Court has no hesitation to hold that the claim petition filed under Section 166 of the Motor Vehicles Act or even if it is filed under Section 163A of the Motor Vehicles Act is not legally maintainable.

15. But in the case on hand, Ex.P.6 is a package policy and admittedly, the premium for personal accident cover for owner-cum-driver was paid at Rs.50/- and the liability is shown as Rs.1 lakh. Generally, as per the contract of insurance, in case of personal accident, the owner-cum-driver is entitled to the amount agreed under the contract. But in the present case, as already pointed out, admittedly, the deceased Murugesan was not possessing a valid driving licence at the time of accident. Since the deceased Murugesan had driven the vehicle without a valid driving



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licence and personal accident cover is covered by the terms of contract, the respondents 1 to 4/claimants are not entitled to invoke personal accident coverage. In view of the violation of the policy condition, the appellant/insurer is not liable to pay the agreed amount under the contract of insurance policy.

16. Considering the above, this Court has no other option, but to hold that the respondents 1 to 4/claimants are not entitled to get any compensation. The Tribunal, without considering the legal position in proper perspective, has awarded the compensation to the respondents 1 and 2/claimants 1 and 2 and as such, the same is liable to be interfered with. Hence, this Court concludes that the impugned award dated 15.07.2020 passed by the Tribunal is liable to be set aside. 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.

17. In the result, this Civil Miscellaneous Appeal is allowed and the impugned award dated 15.07.2020 passed in M.C.O.P.No.155 of 2016 on



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the file of the Mahila Court, Pudukkottai is set aside and the claim petition stands dismissed. The appellant/insurer is permitted to withdraw the amount, if any deposited. The parties are directed to bear their own costs.

24.07.2023

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

1. The Sessions Judge,
Mahila Court,
Pudukkottai.



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K.MURALI SHANKAR,J.

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Pre-Delivery Order made in
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Dated : 24.07.2023