BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 10.08.2023

Delivered on :29.09.2023

CORAM

THE HONOURABLE MR.JUSTICE K.MURALI SHANKAR

C.M.A(MD)No.647 of 2019

The New India Assurance Company Limited,
105, First Floor, Opp. L.I.C.,
Madurai Road, Virudhunagar Town,
Virudhunagar District. : Appellant/2nd Respondent

Vs.

1.Sumathi

2.Minor.Sandeep

Minor.Jehisha (died) : Respondents 1 & 2 /Petitioners

3.T.Vilvakumar : 3rd Respondent/1st Respondent

(Minor 2nd respondent is represented
by his mother and natural guardian/first respondent)

PRAYER:- Civil Miscellaneous Appeal filed under Section 173 of Motor Vehicles Act, to set aside the judgment and decree passed in M.C.O.P.No.143 of 2018, dated 21.03.2019 on the file of the Motor Accident Claims Tribunal / Chief Judicial Magistrate Court, Virudhunagar District at Srivilliputhur.

For Appellant : Mr.B.Vijay Karthikeyan

For Respondents : No Appearance

J U D G M E N T

The Civil Miscellaneous Appeal is directed against the award passed in M.C.O.P.No.143 of 2018 (M.C.O.P.No.40 of 2014), dated 21.03.2019 on the file of the Motor Accident Claims Tribunal / Chief Judicial Magistrate Court, Virudhunagar District at Srivilliputhur.

2. The appellant/insurer, who was made liable to pay compensation of Rs.6,84,400/- with interest at 7.5% per annum to the respondents 1 and 2/claimants 1 and 2 for the death of one Jeyasankar, consequent to an accident occurred on 25.05.2014, challenged the liability mulcted on it.

3. The case of the claimants is that on 25.04.2014, the claimants, deceased Jeyasankar, his friend Thirukumaran and his wife Latha were travelling in Toyota Car bearing Registration No. TN-67-AF-9594, to attend a function in their relative's house at Sivagangai; that when the Car was proceeding near Thirumangalam in Thirumangalam to Madurai

Highway, the vehicle lost its control and turned towards right side and dashed against the lorry bearing Registration No.TN-69-AE-3340, which was coming from the opposite direction and that the said Jeyasankar, who had driven the Car, had died on the spot and his friend Thirukumaran and his wife Latha sustained serious injuries and on that basis, FIR came to be registered in Crime No.274 of 2014 on the file of the Thirumangalam Town Police Station for the alleged offence under Sections 279, 337, 338 and 304 (A) IPC.

4. It is the further case of the claimants that the deceased Jeyasankar was aged 36 years at the time of accident; that he was doing Palm oil business and was earning Rs.3,300/- per month and that the claimants were depending only on the income of the deceased.

5. The defence of the appellant / second respondent is that the deceased Jeyasankar drove the Car in drunken mode; that the third respondent/first respondent by allowing the deceased to drive the Car in a drunken state has wilfully breached the policy condition; that there is no relationship of the master and servant between the third respondent/first respondent and the deceased Jeyasankar; that the

accident was occurred only due to the rash and negligent driving of the deceased Jeyasankar and that the deceased being the tort feasor, the claimants who are the legal representatives of the deceased are not entitled to claim any compensation.

6. The points that arise for consideration are :

(i) Whether the Tribunal erred in mulcting 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 tort-feasor. ?

(ii) Whether the impugned award dated 21.03.2019, is liable to be set aside.?

7. Admittedly, the first respondent/first claimant is the wife and the second respondent/second claimant is the son of the deceased Jeyasankar.

8. The learned counsel for the appellant/insurer would contend that the deceased was the tort-feasor; that the deceased borrowed the insured vehicle from the insured and thereby stepped into the shoes of the insured; that the deceased was not the driver employed by the insured

and that therefore, the claim petition filed under Section 163(A) of Motor Vehicles Act, is not maintainable and as such, the appellant is not liable for the claim.

9. It is pertinent to note that the claimants have laid the claim petition under Section 163 (A) of the Motor Vehicles Act. In the claim petition, the claimants have stated that while the deceased Jeyasankar was driving the Car, the vehicle lost its control and proceeded towards the right side and dashed against the lorry, which was coming in the opposite direction. Admittedly, the complaint was lodged by the sister of the first claimant and on that basis, FIR came to be registered.

10. It is pertinent to note that the First Information Report came to be registered against the deceased Jeyasankar. In the FIR., it has been stated that the deceased Jeyasankar had driven the Car rashly and negligently and lost the control by crossing the divider and dashed against the lorry, which came in the opposite direction.

11. It is evident from Ex.P.6/Final Report filed by the jurisdictional police that the investigation revealed that the deceased Jeyasankar had

driven the Car rashly and negligently and suddenly crossed the divider and dashed against the lorry and that since the deceased was responsible for the accident, final report came to be filed as charge abated. It is pertinent to note that the Tribunal, considering the evidence available on record has given a specific finding that the accident was occurred only due to the negligence of the deceased Jeyasankar.

12. It is evident from the impugned award that the claimants by relying on the decision of the Hon'ble Supreme Court in ***Sihivaji and another Vs. Divisional Manager, United India Insurance Company Limited and others*** reported in ***2018 (2) TNMAC 149 (SC)***, have taken a stand that since the claimants have filed the claim petition under Section 163(A) of MACT Act; there was no need or necessity to prove the negligence and that therefore, the insurer cannot raise the defence of the negligence on the part of the deceased.

13.The Tribunal, accepting the arguments putforth by the claimants side and taking note of the fact that the Car was insured with the second respondent, has mulcted liability on the appellant/insurer. 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.

(i) ***Joyesmarry and another Vs. Velumani and others*** in C.M.A.No.4858 of 2019, dated 09.10.2020.

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."

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

The 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."

15. The above decisions are squarely applicable to the case on hand. In the present case, as already pointed out, the deceased Jeyakumar alone has driven the vehicle and due to his driving alone, the vehicle lost its control and dashed against the lorry. The first claimant as P.W.1 in her evidence would specifically admit that the first respondent is the friend of her husband; that her husband borrowed the Car from the first respondent; that the Car involved in the accident is owned by the first respondent; that her husband borrowed the said Car from the first respondent and that her husband alone had driven the vehicle at the time of accident.

16. It is pertinent to note that P.W.1 would also admit that her husband was not working as a driver under the first respondent and that therefore, there was no relationship of driver and owner between her husband and the first respondent.

17. Considering the above, it is clearly evident that the deceased borrowed the vehicle from his friend /third respondent/first respondent

and proceeded with his family and his friend's family to Sivagangai and as such, it has to be inferred that the deceased stepped into the shoes of the actual owner of the vehicle ie., the third respondent/first respondent. It is also necessary to refer the judgment of the Hon'ble Supreme Court in **Ramkhiladi and another Vs The United India Insurance Company and another** *reported in* 2020 2 SCC 550, wherein the Hon'ble Supreme Court has specifically held that in order to make the claim under Section 163(A) of MACT Act, against the owner/insurer of the vehicle, the deceased has to be a third party and unless that fact is established, the claimants are not entitled to get compensation.

18. No doubt, in a claim under Section 163(A) of Motor Vehicles Act, there is no need for the claimants to plead or establish the negligence. But, at the same time, the deceased has to be a third party and cannot maintain a claim against the owner /insurer of the vehicle, which is borrowed by him as he will be in the shoes of the owner and as such, he cannot maintain a claim petition under Section 163(A) of MACT Act.

19. As already pointed out, admittedly, there was no relationship of employer-employee between the first respondent owner and the deceased

Jeyakumar. Considering the main fact that the deceased is the tort-feasor and in view of the judgment of Hon'ble Supreme Court in **Ramkhiladi's** case above referred, the claim petition filed under Section 163 (A) of MACT Act is legally not maintainable. But the Tribunal, without considering the legal position in proper perspective, has mechanically mulcted liability on the insurer and as such, the same is liable to be set aside. Considering the other facts and circumstances, this Court further decides that the parties are to be directed to bear their own costs.

20. In the result, the Civil Miscellaneous Appeal is allowed and the impugned award M.C.O.P.No.143 of 2018, dated 21.03.2019 on the file of the Motor Accident Claims Tribunal / Chief Judicial Magistrate Court, Virudhunagar District at Srivilliputhur, is set aside. The appellant/Insurer is directed to withdraw the amount, if any, already deposited. The parties are directed to bear their own costs.

29.09.2023

NCC : Yes : No
Index : Yes : No
Internet : Yes : No
das

To

1.The Motor Accident Claims Tribunal /
Chief Judicial Magistrate Court,
Virudhunagar District at Srivilliputhur.

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

K.MURALI SHANKAR

das

Pre-delivery order made in
C.M.A(MD)No.647 of 2019

29.09.2023