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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 04.09.2023

Delivered on : 19.10.2023

CORAM

THE HONOURABLE MR.JUSTICE K.MURALI SHANKAR

C.M.A(MD)No.693 of 2020

The Oriental Insurance Company Limited,
represented by its Divisional Manager,
Divisional Officer, KJR Complex,
16- North Veli Street,
Madurai 625 001. : Appellant/2nd Respondent

Vs.

1.Pavitha

2.Minor J.S.Rohan

3.J.Sulochana : Respondents 1 to 3 / Petitioners 1 to 3

4.Janagaraj : 4th Respondent/1st Respondent

PRAYER:- Civil Miscellaneous Appeal filed under Section 173 of Motor Vehicles Act, against the decree and judgment dated 19.12.2019 made in M.C.O.P.No. 1175 of 2018 on the file of the Motor Accident Claims Tribunal cum VI Additional District Judge, Madurai.

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For Appellant : Mr.E.Chandra Sekaran

For Respondents : Mr.N.Sudhagar Nagaraj, for R1 to R3.

: No Appearance, for R4.

JUDGMENT

The Civil Miscellaneous Appeal is directed against the award passed in M.C.O.P.No.1175 of 2018, dated 19.12.2019, on the file of the Motor Accident Claims Tribunal cum VI Additional District Judge, Madurai.

2. The appellant/insurer, who was made liable to pay compensation of Rs.9,00,000/- with interest at 7.5% per annum to the respondents 1 to 3/claimants, for the death of Suresh, consequent to an accident occurred on 01.03.2018, challenged the liability mulcted on it.

3. The case of the claimants is that on 01.03.2018, at about 17.00 hours, when the deceased was travelling in a two wheeler bearing Registration No.TN-58-U-4618, in workshop main road, near Aatumandhai Vasal, Madurai Town from east-west direction, he was forced to apply brake in order to not to hit against an auto, which came in

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the same road; that due to apply of sudden brake, the two wheeler rider fell down and sustained grievous injuries and that subsequently, succumbed to the injuries on 07.03.2008. Since the accident was occurred due to the out of and use of the two wheeler, the fourth respondent/first respondent being the owner and the appellant/second respondent being the insurer are jointly and severally liable to pay compensation.

4. It is their further case that the deceased was aged 38 years at the time of accident; that he was doing coolie work and that he was earning Rs.3,000/- per month at the time of accident.

5.The defence of the appellant/second respondent insurer is that the deceased Suresh borrowed the motorcycle bearing Registration No.TN-58-U-4618, from his father Janagaraj, who is the owner of the vehicle and thereby, the deceased stepped into the shoes of the owner and that therefore, his legal heirs are not entitled to claim compensation under Section 163 (A) of Motor Vehicles Act and as such, the appellant/ second respondent is not liable for the claim.

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6. During trial, the claimants have examined the first claimant as P.W.1 and other two witnesses as P.W.2 and P.W.3 and exhibited 10 documents as Ex.P.1 to Ex.P.10. The fourth respondent/first respondent had remained ex-parte. The appellant/second respondent has examined three witnesses as R.W.1 to R.W.3 and exhibited six documents as Ex.R.1 to Ex.R.6.

7. The learned trial Judge, upon considering the evidence both oral and documentary, has passed the impugned award, dated 19.12.2019 holding that the accident was occurred only due to the negligence of the deceased and that since the claim petition came to be filed under Section 163(A) of Motor Vehicles Act, the appellant/second respondent has no right to take the plea of negligence, mulcted liability on the appellant/second respondent and directed them to pay compensation of Rs.9 lakhs with interest and costs. Aggrieved by the impugned award mulcting liability, the appellant/ second respondent insurer has preferred the present appeal.

8. It is evident from the records that on the basis of the complaint lodged by the first respondent/father of the deceased, F.I.R., came to be

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registered in Crime No.50 of 2018 for the offence under Sections 279, 337 and 304(A) IPC, but not against any one. Even according to the claimants, the deceased while riding his two wheeler in an attempt to avoid dashing against the Auto, had applied sudden brake and as a result, he fell down from the vehicle and sustained injuries.

9. It is the specific case of the claimants that the Auto driver was responsible for the accident. Considering the evidence available on record, the Tribunal has rightly come to a decision that the accident was occurred only due to the rash and negligent driving of the deceased.

10. Admittedly, the two wheeler bearing Registration No.TN-58-U-4618, was owned by the fourth respondent/first respondent and the same was insured with the appellant/second respondent at the time of accident. It is not in dispute that the deceased Suresh is none other than the son of the fourth respondent/first respondent.

11. The learned counsel for the appellant would specifically contend that the deceased borrowed the two wheeler from his father and caused the accident by himself and that therefore, the deceased is the

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tort-feasor and he stepped into the shoes of the owner of the vehicle i.e., fourth respondent/first respondent, legal representative of the deceased are not entitled to claim compensation and as such, the claim petition is not maintainable against the insurer.

12. 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,*

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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

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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

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make the insurance company liable to make the payment to the heirs."

13. 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

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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*

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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."

14. The learned counsel for the claimants would submit that since the claim petition is filed under Section 163(A) of Motor Vehicles Act, it is not open for the insurer to raise any defence of negligence on the part of victim. In the present case, as already pointed out, the vehicle was owned by the fourth respondent/first respondent. Admittedly, the fourth respondent/first respondent is the father of the deceased. Considering the above, it can be easily inferred that he borrowed the vehicle from the fourth respondent/first respondent and as such, the deceased stepped into the shoes of the owner of the vehicle i.e., fourth respondent/first respondent. Applying the legal dictum above referred, this Court has no

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hesitation to hold that the claim petition filed under Section 163A of the Motor Vehicles Act is not legally maintainable.

15. In the case on hand, Ex.R.6 policy is a two wheeler 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. At this juncture, it is 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 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.

16. In the case on hand, as already pointed out, in Ex.R.6 policy, personal accident coverage is given to the owner cum driver of the vehicle to the extent of Rs.1,00,000/-. Considering the above, the claimants are entitled to Rs.1,00,000/- as per the terms of contract of Insurance, as the deceased driver being in the shoes of the owner of the

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vehicle. Consequently, this Court has no other option but to hold that the impugned award mulcting liability on the insurer to pay a compensation of Rs.9,00,000/- is liable to be set aside and that the Appellant/ Insurance Company is liable to pay a sum of Rs.1,00,000/- (Rupees One Lakh only) with interest at 7.5% per annum. Considering the other facts and circumstances of the case, this Court further decides that the the parties are to be directed to bear their own costs and the above points are answered accordingly.

17. In the result, the Civil Miscellaneous Appeal is partly allowed and the impugned award directing the Appellant / Insurance Company to pay a compensation of Rs.9,00,000/- 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 above said MCOP No.1175 of 2018, on the file of the Motor Accident Claims Tribunal / VI Additional District Judge, Madurai, 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, the first claimant/ first respondent is entitled to get **Rs.50,000/-,** minor claimant/second respondent is to be given

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Rs.25,000/- and the third claimant/third respondent is entitled to get **Rs.25,000/-** with interest and costs, on due application before the Tribunal. If the award amount was already deposited, the balance amount shall be withdrawn by the Appellant / Insurance Company. The Tribunal is directed to deposit the share of the minor claimant in any one of the Nationalized Bank in a fixed deposit scheme, till he attain majority. The mother and guardian of the minor claimant is permitted to withdraw the accrued interest once in three months directly from the Bank only for the welfare of the minor. The parties are directed to bear their own costs. Consequently, the connected Miscellaneous Petition is closed.

19.10.2023

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

1.The Motor Accident Claims Tribunal cum
VI Additional District Judge, Madurai.

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

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K.MURALI SHANKAR,J.

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Pre-delivery order made in
C.M.A(MD)No.693 of 2020

19.10.2023