BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON: 28.08.2023

PRONOUNCED ON:11.10.2023

CORAM

THE HONOURABLE MR.JUSTICE K.MURALI SHANKAR

C.M.A(MD)No.890 of 2019

The Branch Manager,
New India Assurance Company Limited,
Coimbatore,
11-19 & 20, II Floor Peoples Park BLDG,
Govt. Arts College Road,
Coimbatore. : Appellant/1st Respondent

Vs.

1.Padma
2.Vishagan
3.Minor Varna
(Minor R3 is represented by her
mother and natural guardian,
the 1st respondnet, Padma) : Respondents 1 to 3 / Petitioners

4.S.Prabu : 4th Respondent/ 2nd Respondent

PRAYER:- Civil Miscellaneous Appeal filed under Section 173 of the Motor Vehicles Act,1988 against the Judgment and Decree made in M.C.O.P.No.106 of 2016, on the file of the Motor Accident Claims Tribunal/Additional District and Sessions Court, Theni @ Periyakulam, dated 29.08.2018.

For Appellant : Mr.J.S.Murali

For Respondents :Mr.C.Vakeeswaran
for R.1 to R.3

JUDGMENT

This Civil Miscellaneous Appeal is directed against the award passed in M.C.O.P.No.106 of 2016, dated 29.08.2018, on the file of the Motor Accident Claims Tribunal / Additional District Court, Theni at Periyakulam.

2. The appellant/Insurer was made liable to pay compensation of Rs.8,05,000/- with interest at 7.5% p.a., to the respondents 1 to 3 / claimants for the death of Marimuthu consequent to an accident occurred on 10.04.2016, challenging the liability mulcted on it and also the quantum of compensation awarded at by the Tribunal.

3. The case of the claimants is that on 10.04.2016, the deceased Marimuthu was proceeding in a TATA Indiga car bearing Registration No.TN-42-A-3150 for the purpose of selling that car, in Kodaikanal to

Palani road and at the place near Karadi Rail Dilli Panikarai, due to the mechanical defect, the vehicle lost its control, fell down in the hills slope and the said Marimuthu had died on the spot and that on the basis of the complaint lodged by the first claimant, a case was registered in Cr.No.76 of 2016, on the file of the Thandikudi Police Station for the offences under Sections 279 and 304A I.P.C. It is the further case of the claimants that the said car was owned by the first respondnet and the same was insured with the second respondent and as such, both are liable to pay the compensation, that the deceased was a broker in buying and selling of car and lorry and was earning more than Rs.30,000/- p.m. and that he was aged about 52 years at the time of accident.

4. The defence of the appellant-Insurer is that the accident was occurred only due to the rash and negligent driving of the deceased Marimuthu and because of uncontrollable speed, the car slipped on the road side and toppled on the hilly slope and the deceased being the tortfeasor, the legal heirs are not entitled to claim compensation. It is the further case of the Insurer that the claimants have taken a stand in the claim petition that the accident was occurred only due to the mechanical defect of the vehicle and if that be so, the Insurer cannot be made liable.

5. During trial, the claimants have examined the first claimant as P.W.1 and two other witnesses as P.W.2 and P.W.3 respectively and exhibited six documents as Exs.P.1 to P.6. The second respondent – owner of the vehicle had remained exparte. The first respondent-Insurer has examined one witness as R.W.1 and exhibited the insurance policy under Ex.R.1 and one witness document – Motor Accident Vehicle's report as Ex.X.1. The learned trial Jude, upon considering the evidence both oral and documentary and on hearing the arguments of both sides, has passed the impugned order dated 29.08.2018, by holding that the accident was occurred only due to the mechanical defect of the vehicle, mulcted the liability on the first respondent – Insurer and directed them to pay compensation of Rs.8,05,000/- with interest and costs. Aggrieved by the impugned award, the Insurer has come forward with the present Civil Miscellaneous Appeal.

6. The points for consideration are;

(1) Whether the Tribunal erred in mulcting the liability on the appellant-Insurer despite showing that the accident was only occurred due to the rash and negligent driving of the deceased Marimuthu and that

the deceased being the tortfeasor, his legal heirs cannot maintain the claim petition for compensation?

(2) Whether the Tribunal has committed a grave error, after recoding a finding that the accident was only occurred due to mechanical defect of the vehicle, in fastening the liability on the appellant-Insurer?

(3) Whether the impugned award dated 29.08.2018, passed in M.C.O.P.No.106 of 2016 is liable to be interfered with?

(4) Wether the quantum of compensation arrived at by the Tribunal is just and proper and is in accordance with law?

7. Admittedly, on the basis of the complaint lodged by the first claimant (P.W.1), F.I.R., came to be registered and in the F.I.R., the first claimant has specifically stated that her husband while returning from Kodaikanal driven the car negligently and as a result of which, the car toppled and fell down in 200 ft hills slope and that her husband had died in the said accident. But in the claim petition as well as in her evidence, the first claimant has canvassed a case that the accident was occurred only due to the mechanical defect of the vehicle. The claimants have examined P.W.3 – Nithyanantham alleged to be the occurrence witness and according to him, when himself and his driver friend Velu were

proceeding towards Kodaikanal in his two wheeler on 10.04.2016, a car bearing Registration No. TN-42-A-3150 which came from Kodaikanal and at the place near Karadi Rail Dilli Panikarai, left front tyre of the car got separated and after losing the control, the vehicle has fell down in the slope and that they have informed about the accident to a forester who was available some distance away from the place of accident and proceeded towards Kodaikanal and that subsequently he came to know that the person who died in the said accident was belonging to his locality. In cross-examination, he would say that he does not know as to how the accident had occurred and that he has not informed about the accident to the police station and that he was not examined by any police till date. Even according to P.W.3, he was proceeding as a pillion rider at that time. The claimants have not chosen to examine the rider of the two wheeler Velu, who had accompanied P.W.3 at the time of accident. Considering the evidence of P.W.3, as rightly contended by the learned Counsel for the appellant, his evidence is hard to believe.

8. Admittedly, the car involved in the accident was not at all subjected to motor vehicle inspection. The Tribunal has put the entire blame on the police for the same. The claimants, in order to prove the

above aspect, have summoned and examined P.W.2 – the Sub-Inspector of Police attached to the Thandikudi Police Station and according to P.W.2, that the Inspector of Police has given a requisition to the Motor Vehicle Inspector for inspection of the vehicle involved in the accident, for which, the Motor Vehicle Inspector had given a reply that the accident vehicle was not available in the accident sport and that the inspection will be made if the vehicle is produced before them and through P.W.2, the requisition given by the police Inspector to the Motor Vehicle Inspector and the reply endorsement made by the Motor Vehicle Inspector has been marked as Ex.X.1.

9. As already pointed out, the accident was occurred on 10.04.2016, but the requisition was made to the Motor Vehicle Inspector for conducting inspection on 12.12.2016, nearly after eight months from the date of accident. P.W.2 has not offered any reason or explanation for the delay in submitting the requisition. The alleged steps taken by the police for subjecting the vehicle to motor vehicle inspection is a part of their investigation, so as to enable them to file the final report giving their view about the mode of accident and the reason for the same. In the present case, the claimants have come forward with the present petiton

claiming compensation and as such, it is for the claimants to prove that the accident was occurred only due to the mechanical defect.

10. As already pointed out, in the beginning the first claimant has given a complaint alleging that the accident was occurred only due to the negligent driving of her husband. But it is not known as to how she came to know subsequently that the accident was occurred only due to the mechanical defect of the vehicle. As rightly contended by the learned Counsel for the appellant, there is absolutely no evidence to prove that the accident was occurred only due to the mechanical defect of the vehicle. Even assuming for arguments sake that the accident was occurred only due to the mechanical defect of the vehicle, this Court is at loss to understand as to how the Insurer can be made liable and in that case, the responsibility has to be fixed only on the owner of the vehicle.

11. The learned Counsel for the appellant would submit that in the absence of any mechanical defect in the vehicle and in the absence of any other vehicle involved, this Court has to infer that the accident was occurred only due to the negligence or carelessness on the part of the deceased. The learned Counsel for the appellant would further submit

that the deceased being the tortfeasor, his legal heirs are not entitled to claim any compensation and as such, the claim petition is not maintainable as 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?..........*
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> *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."*

13. It is also necessary to refer the following decisions :

(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 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 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. In the case on hand, admittedly the vehicle was owned by the first respondent. It is not the case of the claimants that the deceased was a driver or employee under the first respondent. Even according to the claimants, the deceased Marimuthu had taken the vehicle for the purpose of selling the same. Considering the above, it can be inferred that he borrowed the vehicle from the first respondent and as such, the deceased stepped into the shoes of the owner of the vehicle ie., the first respondent. As already pointed out, no other vehicle was involved in the accident, except the Indiga car. This Court has already observed that the

claimants have miserably failed to prove any mechanical defect and that was the reason for the accident. Considering the entire facts and circumstances of the case, as rightly contended by the learned Counsel for the appellant, this Court has no hesitation to hold that the accident was occurred only due to the negligent driving of the deceased and as such, the deceased is the tortfeasor. Applying the legal dictum above referred, this Court has no other option, but to hold that the claim petition filed under Section 163 or 163-A of the Motor Vehicles Act is not maintainable.

15. In the present case, Ex.R.1 policy is a private car package policy. No doubt, as per the contract of insurance, in case of personal accident, the owner-driver is entitled to get the amount agreed in the contract. But in the case on hand, admittedly no premium was paid for personal accident coverage for owner-driver. Hence, this Court has no other go, but to say, the claimants are not even entitled to get any amount under the personal accident coverage.

16. The Tribunal, without considering the above legal aspects proper perspective, has mechanically mulcted the liability on the

appellant-Insurer and granted compensation and as such, the same is liable to be interfered with. Hence, this Court concludes that the claimants are not entitled to get any compensation and the compensation awarded is liable to be set aside and is set aside. Considering the other facts and circumstances, 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, the Civil Miscellaneous Appeal is allowed and the impugned award passed in M.C.O.P.No.106 of 2016, dated 29.08.2018, on the file of the Motor Accident Claims Tribunal/Additional District and Sessions Court, Theni @ Periyakulam, is set aside. The appellant-Insurer is permitted to withdraw the award amount already deposited, if any.

11.10.2023

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

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To

1.The Motor Accident Claims Tribunal/
Additional District and Sessions Court,
Theni @ Periyakulam,

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

K.MURALI SHANKAR,J.

SSL

PRE-DELIVERY JUDGMENT MADE IN

C.M.A(MD)No.890 of 2019

11.10.2023