BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

| Reserved on : 20.11.2023 | Delivered on: 22.12.2023 |
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CORAM:

**THE HONOURABLE MR.JUSTICE RMT.TEEKAA RAMAN**

AND

**THE HONOURABLE MR.JUSTICE P.B.BALAJI**

**C.M.A(MD)No.740 of 2020**
**and**
**C.M.P(MD)No.7445 of 2020**

National Insurance Company Limited,
Tirunelveli. ...Appellant/2nd Respondent

Vs.

1.Mahalakshmi
2.Minor.Manickavel
3.Minor.Balamurugan
4.Sundari
5.Velu ...Respondents/Petitioners
(Minors R2 & R3 are represented by their
mother and natural guardian, the 1st respondent
Mahalakshmi)
6.Vijay Auto Mobiles,
57.F1/F2/Railway Road,
Tenkasi,
Tirunelveli District. ... 6th Respondent/1st Respondent

Prayer:- Civil Miscellaneous Appeal filed under Section 173 of Motor Vehicle Act, 1988, against the judgment and decree in M.C.O.P.No.175 of 2015 dated 24.03.2020 on the file of the Motor Accident Claims Tribunal, Additional Subordinate Court, Tenkasi.

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| For Appellant | : Mr.J.S.Murali |
| For R1 to R5 | : Mr.R.J.Karthick |
| For R6 | : Mr.T.Selvakumaran |

## JUDGMENT

**P.B.BALAJI,J.**

The appellant is the Insurance Company, who suffered an award of compensation passed by the Motor Accident Claims Tribunal, Additional Subordinate Court, Tenkasi.

2. The case of the claimants before the tribunal was that the deceased Senthilkumar was riding the two-wheeler on the fateful day of the accident i.e., on 13.02.2015, when, in order to avoid a dog that suddenly crossed the road in front of the two-wheeler, he lost control of the vehicle and fell down. In the said accident, he sustained grievous injuries and fractures which subsequently resulted in his unfortunate demise on the next day i.e., on 14.02.2015. The claimants sought for a compensation of

Rs.30,00,000/-.

3. The appellant filed a counter statement stating that the deceased was working under the first respondent before the tribunal and the claimants have already got the employee's death claim benefits in respect of the deceased and therefore, additional compensation could not be sought for before the Motor Accident Claims Tribunal. It is also stated that the police has registered a criminal case only against the deceased under Section 304(A) IPC and the appellant, therefore, cannot be called upon to compensate the claimants for the death of the said Senthilkumar. Thereafter, the appellant has filed an additional counter stating that the claimants have received compensation under the ESI Act and that they are estopped from claiming compensation under the Motor Vehicles Act.

4. Before the Tribunal, the wife of the deceased examined herself as P.W.1 and an occurrence witness by name Muthukumar was examined as P.W.2. Ex.P1 to Ex.P7 were marked on the side of the claimants. On the side of the respondents, R.W.1 to R.W.4 were examined and exhibits Ex.R1 to Ex.R4 were marked. R.W.1 was examined to establish the

income of the deceased, being his employer. R.W.2, one Balasubramanian was examined to establish the payment of compensation under the ESI Act. R.W.3 Rajeswaran, Sub-Inspector of Police, who is the investigating officer, was also examined in connection with proof of registering the criminal case.

5. The Tribunal found that the vehicle belonged to the first respondent before the Tribunal and the deceased had used the said vehicle in the course of employment and therefore, the appellant was bound to compensate the claimants. Even though, no third party vehicle was involved in the accident, the Tribunal proceeded to award compensation of Rs.21,10,000/-, payable with interest at the rate of 7.5% from the date of the accident. Aggrieved by the said award, the Insurance Company has preferred the above appeal, mainly challenging the liability itself on the ground that the deceased was a tortfeasor, having borrowed the vehicle of the first respondent and no claim for compensation can lie before the Motor Vehicles Act. It is also contended that the claimants have already received compensation under the ESI Act and in view of the provisions of Section 53 of the ESI Act, the present claim for compensation was not

maintainable and especially, since it was the admitted case of the claimants themselves that the accident occurred during the course of employment.

6. We have heard Mr.J.S.Murali, learned counsel appearing for the appellant and Mr.R.J.Karthick, learned counsel appearing for the respondents 1 to 5 and Mr.T.Selvakumaran, learned counsel appearing for the 6th respondent.

7. It is an admitted fact that there was no third party vehicle involved in the accident and it is also an 'Act policy'. What all we have to see is whether the deceased, at the time of accident was riding the two-wheeler in the course of employment and if so, whether he can be treated as a tortfeasor. Even though, the vehicle belonged to the first respondent before the tribunal, it is also to be ascertained whether the claimants are entitled to maintain their petition for compensation, after having received the benefits under the ESI Act.

8. The learned counsel for the Insurance Company would place

reliance on the following decision:-

i) The Division Bench judgment of our High Court in ***M.Anbalagan vs. K.M.Asalm Basha & others*** reported in ***2015 (2) TNMAC 362 (DB).***

9. The first point for determination is as to "whether the deceased was a tortfeasor, either being the owner of the two-wheeler or alternatively whether he stepped into the shoes of the owner of the two-wheeler". If the answer is in the affirmative, then his legal representatives cannot maintain a claim for compensation under the Motor Vehicles Act. However, if the answer is in the negative, then the legal representatives would be entitled to compensation under Section 153(A) of the Motor Vehicles Act.

10. The Hon'ble Supreme Court in ***Ramkhiladi vs The United India Insurance*** reported in ***2020 (2) SCC 550*** held that a claim petition under Section 163(A) of the Motor Vehicles Act was based on the principles of no fault liability and further held that for making such a claim, the deceased has to be a third party and cannot maintain a claim against the owner/insurer of the vehicle, which was borrowed by him as he

steps into the shoes of the owner and cannot maintain a claim, as if he is a third party.

11. Applying the facts of the present case to the ratio laid down by the Hon'ble Supreme Court, we find that the deceased was only riding the two-wheeler belonging to the first respondent before the Tribunal as an employee of the said first respondent, Vijay Automobiles. Therefore, it cannot be said that the deceased was third party vis-a-vis his employer, Vijay Automobiles. Admittedly, the deceased only falls within the category of borrower since the employer had permitted him to use the vehicle. Thus, the deceased would clearly steps into the shoes of the employer and can only be treated as borrower, there being no third party involved in the said accident. The claim of the legal heirs of the deceased would tantamount to a claim in respect of the tort-feasor alone which is not maintainable before the Motor Vehicle Claims Tribunal.

12. Further, it is the contention of the learned counsel for the appellant / Insurance Company that in view of the admitted fact that the claimants had received benefits under ESI Act, there is bar under the

provisions of the ESI Act to maintain the petition seeking compensation before the Motor Accident Claims Tribunal.

13. In this regard, the learned counsel for the respondents / claimants would place reliance on the Division Bench judgment in ***M.Anbalagan vs. K.M.Asalm Basha and others,*** reported in ***2015(2) TNMAC 362,*** where the Division Bench of this Court held that the victim was entitled to choose the forum, either under the Employees Compensation Act or under the Motor Vehicles Act and that the bar is that the claim cannot be made under both the acts. In ***Daya Kishan Joshi and another vs. Dynemech Systems Pvt., ltd.,*** reported in ***2017(2) TNMAC 641 (SC),*** the Hon'ble Supreme Court discussed the phrase "arising out of" and "in the course of his employment" in relation to the facts of the case and the legal recourse to compensation.

14. On the facts of the case before the Hon'ble Supreme Court it was held that the deceased, who died in the road accident, was riding the vehicle and it was incidental to his employment as sales engineer and therefore, the accidental death would fall squarely within the definition of

Section 3(1) of the Act.

15. In ***Leela Bai and another vs. Seema Chouhan and another*** reported in ***2019(1) TNMAC 504 (SC)***, applying the Doctrine of "notional extension" of employment being attracted, the Supreme Court held that even though the deceased was staying in the bus overnight, it was only by compulsion and not by choice and the accident should be deemed to be one "in the course of employment". The Hon'ble Supreme Court held that there must be a clear nexus between the accident and employment to apply the doctrine of "notional extension" of employment and the same should be culled out from the evidence available before the Court.

16. In ***New India Assurance Co., Ltd., vs. S.Govindaraj and another*** reported in 2***012(2) TNMAC 245***, a learned Single Judge of this Court held that Section 53 of the E.S.I.Act., would be a bar to claim compensation. Only when the workman sustained employment injury or died out of or in the course of employment, the bar under Section 53 of the E.S.I.Act will apply, to claim compensation under the Motor Vehicles Act, or under other enactment or under any other law including the field of Torts.

17. In ***Union of India and another vs. Chandrakali Chaturvedi and others*** reported in ***2012 ACJ 233***, the Division Bench of the Alahabad (Lucknow Bench) held that no provision in E.S.I.Act covers accidental death occurring while travelling in a vehicle and on the facts of the said case, held that the tribunal was justified in awarding compensation to the claimants. On the facts of the case before the Bench, the High Court finding that Section 28 of E.S.I.Act does not cover accidental death that occurred while travelling in a vehicle on the road, further held that the general law would apply and therefore, the Motor Vehicle Act could be invoked seeking compensation.

18. In fact, one of us (**RMT.TEEKAA RAMAN. J.)** in C.M.A.(MD)Nos.1448 of 2016 and 166 of 2017 ***(R.Geethabanu V. Government of Tamil Nadu, Commercial Tax Officer),*** dated 08.04.2022, had an occasion to elaborately discuss this specific issue in the said appeals and held that a claim petition under the Workmen Compensation Act and a claim under the Motor Vehicles Act cannot be simultaneously maintained. In the said decision, the judgment of the Hon'ble Division Bench in ***United***

***India Insurance Co. Ltd., V. Anthony Selvam*** reported in ***2014-2-TNMAC-227*** and the ratio laid down by the Hon'ble Supreme Court in Special Leave(Civil)No.1271 of 2010, (***New India Assurance Co.Ltd., V. Bidami***) dated 17.04.2014 have been applied.

19. On a perusal of the various judgments, we cull out the following principles of law:

> (i) The risk of the owner or borrower or permissive user of the vehicle involved in the accident and consequent claim arising thereunder is not covered under Section 147 of the M.V.Act.
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> (ii) It does not matter whether the claim in the above cases are made under Section 163-A or Section 166 of the M.V.Act.
>
> (iii) Similarly, the policy being an Act policy or a package / comprehensive policy also makes no difference.
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> (iv) Even the issue of negligence becomes wholly irrelevant if Section 147 of the Act does not cover the rider, being the owner (or borrower or friend of the owner or a permissive user)
>
> (v) Equally, it does not also matter if the owner / insured was driving / riding the vehicle or whether he was travelling in the vehicle, at the time of the accident.

(vi) In all the above instances, the Insurance Company is not liable as their liability is purely contractual vis-a-vis the owner / insured of the vehicle.

(vii) Even though Section 28 of the E.S.I.Act will not cover an accidental death and recourse will have to be taken under general law, in the event of the victim being an employee and the injury was an employment injury arising out of an accident where the victim himself was a tort-feaser, then a claim under the M.V.Act is not maintainable.

(viii) If compensation is received under the E.S.I. Act then no compensation can be claimed before the Motor Accident Claims Tribunal.

(ix) In the event of the claim being made as a third party, then the claimants are entitled to choose either of the two fora, namely, the Tribunal dealing with the Motor Vehicles Act or the Tribunal dealing with the Employees Compensation Act, 1923, depending upon the benefits that the claimants may get before either of them, a choice which is to be made by the claimants. The bar, however, is that such a claim cannot be made under both the Acts.

20. We have already found that the deceased was a borrower himself and on that score itself, the deceased is not entitled to get compensation. Even otherwise,it is admitted that the claimants have received

compensation under the E.S.I.Act. Thus, the bar under Section 53 of E.S.I.Act, would also come into play. In view of the admitted position that the claimants have received compensation under the ESI Act, there is no necessity for us to even conduct a roving enquiry as to whether the accident occurred "out of" or "in the course of employment". The learned counsel for the respondents also placed reliance on ***Venkataramanappa vs. S.Ananda and others*** reported in ***2013 ACJ 1581,*** where the Division Bench of Karnataka High Court held that the Tribunal fell in error in rejecting the claim petition under the Motor Vehicles Act on the ground that the ESI Act does not bar right to claim compensation against third parties. However, we are unable to apply the ratio laid down in the said case, on a different set of facts, to the facts of the present case. Here, admittedly there is no dispute with regard to the fact that the deceased was riding the vehicle in the course of the employment with the first respondent before the Tribunal and at such time, the accident occurred, resulting in his demise. Further, when, admittedly, a claim for compensation has been made under the provision of ESI Act, it cannot be stated thereafter Section 53 of the ESI Act would not be a bar to maintain the petition under the MV Act.

21. For all the foregoing reasons, we are unable to justify the findings of the tribunal that the claim for compensation before the Motor Accident Claims Tribunal was maintainable and that the appellant / Insurance Company is liable to compensate the legal representatives of the deceased, namely, the claimants. The Tribunal has erroneously applied the law to the facts of the present case and proceeded to award compensation of Rs.21,10,000/-. Therefore, we are constrained to interfere with the award of the Tribunal.

22. In fine, the Civil Miscellaneous Appeal is allowed and the award and decree passed by the Tribunal in M.C.O.P.No.175 of 2015 dated 24.03.2020 is set aside. No costs. Consequently, connected miscellaneous petition is closed.

**(T.K.R.J.) & (P.B.B.J)**
**22.12.2023**

Internet : Yes
Index:Yes/No
Neutral Citation:Yes/No
am/Ls

To

1.The Motor Accident Claims Tribunal,
Additional Subordinate Court,
Tenkasi.

2.The Section Officer,
VR Section, Madurai Bench of Madras High Court,
Madurai.

**RMT.TEEKAA RAMAN, J.,**
**and**
**P.B.BALAJI,J**

am/Ls

judgment in
**C.M.A(MD)No.740 of 2020**

22.12.2023