BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON: 12.02.2024

PRONOUNCED ON:26.04.2024

CORAM

THE HONOURABLE MR.JUSTICE K.MURALI SHANKAR

C.M.A(MD)No.218 of 2020
and
C.M.P.(MD)No.3457 of 2020

The Divisional Manager,
United India Insurance Company Limited,
Tenkasi. : Appellant/2nd Respondent

Vs.

1.Amalraj
2.Sermakani
3.Pavithran
4.Minor.Arunadevi
(Minor Arunadevi represented by
her mother and natural guardian
2nd respondent) : Respondents 1 to 4/Petitioners

5.Saleth Arul Irudhayaraj : 5th Respondent /1st Respondent

PRAYER:- Civil Miscellaneous Appeal filed under Section 173 of the Motor Vehicles Act, 1988 challenging the judgment and decree dated 15.11.2019, passed in M.C.O.P.No.209 of 2016, on the file of the Additional Motor Accidents Claims Tribunal and Additional Sub-Court, Tenkasi.

For Appellant : Mr.I.Suthakaran

For Respondents : Mr.R.J.Karthik
for R.1 to R.3
(R.4 minor represented by R.2)
: No Appearance for R.5

JUDGMENT

This Civil Miscellaneous Appeal is directed against the award passed in M.C.O.P.No.209 of 2016, dated 15.11.2019, on the file of the Motor Accident Claims Tribunal / Additional Subordinate Court, Tenkasi.

2. The appellant/Insurer, who was made liable to pay compensation of Rs.12,39,600/- with interest and costs to the respondents 1 to 4 / claimants for the death of Raghavan consequent to an accident occurred on 12.03.2016, challenged the liability mulcted on it and also the quantum of compensation awarded at by the Tribunal.

3. For the sake of convenience and brevity, the parties will hereinafter be referred as per their status/ranking before the Tribunal.

4. The case of the claimants is that on 11.02.2016, the deceased was taking some persons to Arcot for attending a meeting from Pavoorchathiram in a Tempo Traveller Van bearing Registration No.TN-76-J-6689 and on 12.03.2016 at about 03.00 o' clock in the early morning, when the van was proceeding near Mavur Dam junction opposite to Biovarani building of Madurai-Dindigul NH-7 road, a lorry which proceeding in front of the van applied sudden break and in order to avoid dashing against the lorry, the van driver had turned his vehicle, but lost his control and the vehicle fell into the crater and as a result of which, the driver sustained multiple injuries all over his body and when he was taken to Dindigul Government Hospital, he was declared dead and that the accident was occurred only due to the negligent driving of the lorry driver. It is the further case of the claimants that the deceased was aged about 23 years at the time of accident and he was working as a driver and was earning a sum of Rs.3,300/-per month.

5. The defence of the second respondent/Insurer is that on the basis of the complaint lodged by one of the passengers of the van, a criminal case was registered in Cr.No.91 of 2016, against the driver of the said vehicle, that the deceased Raghavan while overtaking the heavy goods vehicle in a rash and negligent manner caused the accident, that since the deceased is the tortfeasor, the claim petition filed under Section 163(A) of the Motor Vehicles Act itself is not maintainable and that therefore, the petition is liable to be dismissed.

6. During enquiry, the claimants have examined the first claimant as P.W.1 and one Thenrajan as P.W.2 and exhibited 3 documents as Exs.P.1 to P.3. The first respondent remained exparte. The second respondent / Insurer has examined its staff Madasamy as R.W.1 and exhibited one document as Ex.R.1. The learned trial Judge, on considering the evidence both oral and documentary and on hearing the arguments of both sides, has passed the impugned order dated 15.11.2019 by holding that the accident was occurred only due to the rash and negligent driving of the deceased, but mulcted the liability on the second respondent /Insurer and directed them to pay the compensation of Rs.

12,39,600/- with interest and costs. Aggrieved by the impugned order, the second respondent / Insurer has preferred the present Civil Miscellaneous Appeal.

7. Admittedly, the first respondent / first claimant is the father, the second respondent / second claimant is the mother, the third respondent / third claimant is the brother and the fourth respondent / fourth claimant is the sister of the deceased Raghavan. The learned Counsel for the appellant / Insurer would mainly contend that the deceased was a tortfeasor, that the deceased borrowed the insured vehicle and as such, stepped into the shoes of the insured, that the deceased was not employed by the insured and that therefore, the claim petition filed under Section 163(A) of the Motor Vehicles Act itself is not maintainable.

8. It is evident from the records that the claimants have made claim petition under Section 163(A) of the Motor Vehicles Act. As already pointed out, in the claim petition the claimants have stated that when the lorry which was moving in front of the van applied sudden break, the van driver in order to avoid dashing against the said vehicle, had turned his vehicle and at that time lost his control and got slip in the nearby pit.

Admittedly, the complaint was lodged by one of the passengers of the Tempo Traveller Van and on that basis, F.I.R., came to be registered in Cr.No.91 of 2016, by the Ammaiyanaickanaur Police Station. It is pertinent to note that the said complainant in the complaint has stated that when the van driver had attempted to overtake the lorry which was proceeding in front of the van, the van driver lost his balance and fell into the pit.

9. In the claim petition, the claimants have not given any particulars about the lorry which was alleged to be the reason for the accident, as per the stand of the claimants. They have not even furnished any of the particulars of the said lorry nor taken any steps to implead the owner and the insurer of the lorry. P.W.2 would say that he had travelled in the said vehicle at that time. The claimants have not chosen to examine the complainant who lodged the complaint with the police to speak about the mode of the accident. In the absence of any evidence to show that another lorry was also involved in the accident and taking note of the stand of the insurer that while the van driver had attempted to overtake the lorry, the van driver lost his control and fell into the pit, the Tribunal has rightly come to the conclusion that the accident was

occurred only due to the rash and negligent driving of the deceased and the same cannot be found fault with.

10. The learned Counsel for the claimants has relied on the decision of the Hon'ble Supreme Court in the case of ***Shivaji and another Vs. Divisional Manager, United India Insurance Co., Ltd., and others*** reported in ***AIR 2018 SC 3705***, wherein the deceased car driver had dashed against the truck resulting in his death and the death of two other persons, who were travelling in the car and that the claim petition was filed under Section 163A of the Motor Vehicles Act, the Tribunal by observing that the question of proving that the accident happened due to the rash and negligent act of the driver did not arise, as the claim petition was filed under Section 163A of the Act, allowed the claim, but the High Court of Karnataka allowed the insurer appeal and set aside the order of the Tribunal and when the same was challenged before the Hon'ble Supreme Court, the Hon'ble Apex Court has observed as follows:

> *"5. The issue which arises before us is no longer res integra and is covered by a recent judgment of three judges of this Court in United India Insurance Co. Ltd. V. Sunil Kumar & Another (AIR 2017 SC 5710) wherein it was held that to permit a defence of negligence of the claimant by the insurer*

and/or to understand Section 163A of the Act as contemplating such a situation, would be inconsistent with the legislative object behind introduction of this provision, which is "final compensation within a limited time frame on the basis of the structured formula to overcome situations where the claims of compensation on the basis of fault liability was taking an unduly long time". The Court observed that if an insurer was permitted to raise a defence of negligence under Section 163A of the Act, it would "bring a proceeding under Section 163A of the Act at par with the proceeding under Section 163A of the Act which would not only be self- contradictory but also defeat the very legislative intention". Consequently, it was held that in a proceeding under Section 163A of the Act, the insurer cannot raise any defence of negligence on the part of the victim to counter a claim for compensation"

11. 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 subsection (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."*

12. 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."

13. The learned Counsel for the appellant/Insurer has also relied on the decision of the Hon'ble Supreme Court in ***National Insurance Co., Ltd., Vs. Ashalata Bhowmik and others*** in ***Civil Appeal No.9100 of 2018***, dated 31.08.2018, wherein the Hon'ble Apex Court has observed as follows:

"7. We have carefully considered the submissions of the learned counsel made at the Bar and perused the materials placed on record. It is an admitted position that the deceased was the owner-cum-driver of the vehicle in question. The accident had occurred due to the rash and negligent driving of the vehicle by the deceased. No other vehicle was involved in the accident. The deceased himself was responsible for the accident. The deceased being the owner of the offending vehicle was not a third party within the meaning of the Act. The deceased was the victim of his own action of rash and

negligent driving. A Claimant, in our view, cannot maintain a claim on the basis of his own fault or negligence and argue that even when he himself may have caused the accident on account of his own rash and negligent driving, he can nevertheless make the insurance company to pay for the same. Therefore, the respondents being the LRs of the deceased could not have maintained the claim petition filed under Section 166 of the Motor Vehicles Act.

8. This Court in Oriental Insurance Co. Ltd. v. 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. It was held thus:-

> *"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 an injured person, a third*

person or in respect of damages of property. Thus, if the insured cannot be fastened with any liability under the provisions of the Motor Vehicles Act, the question of the insurer being liable to indemnify the insured, therefore, does not arise".

9. Therefore, the High Court was not justified in directing the appellant/insurer to pay the compensation determined by the Tribunal. Since the indemnification extended to personal accident of the deceased is limited to Rs. 2,00,000/- under the contract of insurance, the respondents are entitled for the said amount towards compensation."

14. The learned Counsel for the appellant has also relied on the judgment of the Hon'ble Supreme Court in ***Ramkhiladi and others Vs. the United India Insurance Company and Others*** reported in ***2020 ACJ 627*** wherein the Hon'ble Apex Court, by referring the ***Ningamma's case*** above referred, has observed as follows:

"5.4 An identical question came to be considered by this Court in the case of Ningamma (supra). In that case, the deceased was driving a motorcycle which was borrowed from its real owner and met with an accident by dashing against a bullock cart i.e. without involving any other vehicle. The claim petition was filed under Section 163A of

the Act by the legal representatives of the deceased against the real owner of the motorcycle which was being driven by the deceased. To that, this Court has observed and held that since the deceased has stepped into the shoes of the owner of the vehicle,Section 163A of the Act cannot apply wherein the owner of the vehicle himself is involved. Consequently, it was held that the legal representatives of the deceased could not have claimed the compensation under Section 163A of the Act. Therefore, as such, in the present case, the claimants could have even claimed the compensation and/or filed the claim petition under Section 163A of the Act against the driver, owner and insurance company of the offending vehicle i.e. motorcycle bearing registration No. RJ 29 2M 9223, being a third party with respect to the offending vehicle. However, no claim under Section 163A was filed against the driver, owner and/or insurance company of the motorcycle bearing registration No. RJ 29 2M 9223. It is an admitted position that the claim under Section 163A of the Act was only against the owner and the insurance company of the motorcycle bearing registration No. RJ 02 SA 7811 which was borrowed by the deceased from the opponent owner Bhagwan Sahay. Therefore, applying the law laid down by this Court in the case of Ningamma(supra), and as the deceased has stepped into the shoes of the owner of the vehicle bearing registration No. RJ 02 SA 7811, as rightly held by the High Court, the *claim petition under Section 163A of the Act against the owner and insurance company of the vehicle bearing registration No. RJ 02 SA 7811 shall not be maintainable"*

15. The Hon'ble Supreme Court has specifically held that though Section 163A of the Act is based on the principle of no fault liability, the deceased has to be a third party and cannot maintain the claim under Section 163A of the Act against the owner and insurer of the vehicle. No doubt in a claim under Section 163A of the Motor Vehicles Act, there is no need for the claimants to prove the negligence, but at the same time, the deceased had 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 the claim petition under Section 163A of the Motor Vehicles Act. The claimants, at the trial, have attempted to canvass a case that the deceased was working under the first respondent. No doubt, the first claimant as P.W.1 would say that her son was working as driver on permanent basis and that he was working as permanent driver with the owner of the van, but she has not produced any documents to prove the same.

16. As rightly pointed out by the learned Counsel for the Insurer, in the claim petition, the claimants have specifically stated that the deceased was working as driver and the same was self occupation. In the claim petition, the claimants have nowhere whispered that the deceased was working under the first respondent. Admittedly, the claimants have neither pleaded nor proved that there existed a relationship of employer and employee relationship between the first respondent and the deceased. Considering the main fact that the deceased is the tortfeasor and in view of the Hon'ble Supreme Court in ***Ramkhiladi's case*** above referred, the very claim petition filed under Section 163A of the Motor Vehicles Act is legally not maintainable.

17. No doubt, as per the dictum laid down by the Hon'ble Supreme Court in ***Ramkhiladi's case*** above referred, in case of personal accident, as per the contract of insurance, 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 the contract of insurance. In the case on hand, Ex.R.1 is a package policy and admittedly, Rs.100/- was paid for personal accident coverage

for owner cum driver to the limit upto Rs.2,00,000/-. Hence, the respondents 1 to 4/claimants are entitled to get Rs.2,00,000/- as per the contract of the insurance. But the Tribunal, without considering the above aspects in proper perspective, has mechanically mulcted the liability on the Insurer and as such, the same is liable to be interfered with. 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.

18. In the result, the Civil Miscellaneous Appeal is partly allowed and the impugned award directing the appellant/Insurer to pay compensation of Rs.12,39,600/- is set aside. The appellant/Insurer is directed to deposit a sum of Rs.2,00,000/-(Rupees Two Lakhs only) with interest at 7.5% per annum from the date of petition till the date of deposit to the credit of M.C.O.P.No.209 of 2016, on the file of the Motor Accident Claims Tribunal / Additional Sub Court, Tenkasi, 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 being made, the respondents 1 and 2/claimants 1 and 2 are entitled to get Rs. 75,000/- each and the respondents 3 and 4/claimants 3 and 4 are entitled

to get Rs.25,000/- each. Accordingly, the respondents 1 to 3 /claimants 1 to 3 are permitted to withdraw their share along with interest and costs and the share of the minor respondent No.4 / claimant No.4 shall be deposited in any one of the Nationalised Banks till the minor attains majority and the second respondent, who is the mother of the minor respondent is permitted to withdraw the interest once in three months directly from the Bank. If the amount was already deposited, the balance amount shall be withdrawn by the appellant/Insurer. Consequently, the connected Miscellaneous Petition is closed. The parties are directed to bear their own costs.

26.04.2024

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

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To

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

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.218 of 2020

26.04.2024