
(2012) 03 KL CK 0214
In the High Court Of Kerala
Case No : M.A.C.A. No. 1044 of 2005

United India Insurance Co. Ltd.

APPELLANT

Vs

Akbar Shihab and Others

RESPONDENT

Date of Decision : 12-03-2012

Acts Referred:

Motor Vehicles Act, 1988 — Section 140, 158, 162, 163A, 165

Citation : (2013) ACJ 121 : (2012) 2 KarLJ 317 : (2012) 2 KLJ 317

Hon'ble Judges : Pius C. Kuriakose, J;A.V. Ramakrishna Pillai, J

Bench : Division Bench

Advocate : P.A. Reziya, for the Appellant; P.V. Jayachandran ; G. Unnikrishnan and S. Sreedev, for the Respondent

Final Decision : Allowed

Judgement

A.V. Ramakrishna Pillai, J.—The Insurance Company has come up in appeal. On 29.3.1998 while the first respondent was riding a two wheeler he met with an accident in his attempt to overtake a bus proceeding ahead. He preferred a claim for Rs. 1,70,000/-, against which the Tribunal awarded a sum of Rs. 87,000/- as compensation.

2. The appellant Insurance Company, while admitting the policy contended that the accident was the result of the negligence on the part of the first respondent. To substantiate that, they relied on Ext.B1 which is the final report submitted by the Police before the Judicial First Class Magistrate Court concerned requesting the court to refer the case as "mistake of fact". The claim was preferred u/s 166 of the Motor Vehicles Act (hereinafter referred to as the "Act" for short). After trial, the Tribunal found that the accident was the direct result of negligence of the first respondent. However, the learned Tribunal awarded compensation in terms of S.163A of the Act apportioning the negligence in the ratio 1:1 between the appellant and the driver of the bus and accordingly directed the appellant Insurance Company to pay 50% of the award amount. This finding is under challenge.

3. We have heard the learned counsel for the appellant Insurance Company and the learned counsel for the first respondent. We have also perused the impugned award.

4. The suo motu conversion of the claim by the Tribunal to one u/s 163A of the Act after trial is seriously challenged by the appellant. The learned counsel for the first respondent, per contra, justified the conversion in the light of the decision of the Calcutta High Court in *Sharmila Singh v. Rabin Ghosh*, 2010 ACJ 1428, where it was observed that if the claimant fails to prove the negligence of the driver of the offending vehicle in a proceeding u/s 166 of the Act, the Tribunal can convert the same to one u/s 163A of the Act provided the claimant avers that the income of the victim is below Rs. 40,000/- per annum. As an averment by the claimant regarding the annual income limit was insisted as a condition precedent for converting the claim to one under S.163A, it can be discerned that what was intended in *Sharmila Singh*'s case was not a suo motu conversion.

5. Before going into the merits of the rival submissions made at the Bar, it is useful to examine the relevant provisions of the Act. Section 163A of the Act reads as follows:

163A. Special provisions as to payment of compensation on structured formula basis.-(1) Notwithstanding anything contained in this Act or in any other law for the time being in force or instrument having the force of law, the owner of the motor vehicle or the authorised insurer shall be liable to pay in the case of death or permanent disablement due to accident arising out of the use of motor vehicle, compensation, as indicated in the Second Schedule, to the legal heirs or the victim, as the case may be.

Explanation.-For the purposes of this subsection, "permanent disability" shall have the same meaning and extent as in the Workmen's Compensation Act, 1923 (8 of 1923).

(2) In any claim for compensation under sub section (1), the claimant shall not be required to plead or establish that the death or permanent disablement in respect of which the claim has been made was due to any wrongful act or neglect or default of the owner of the vehicle or vehicles concerned or of any other person.

(3) The Central Government may, keeping in view the cost of living by notification in the Official Gazette, from time to time amend the Second Schedule.

6. Section 166 of the Act is as under:

166. Application for compensation.- (1) An application for compensation arising out of an accident of the nature specified in sub-section (1) of Section 165 may be made-

(a) by the person who has sustained the injury; or

(b) by the owner of the property; or

(c) where death has resulted from the accident, by all or any of the legal representatives of the deceased; or

(d) 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:

Provided that where all the legal representatives of the deceased have not joined in any such application for compensation, the application shall be made on behalf of or for the benefit of all the legal representatives of the deceased and the legal representatives who have not so joined, shall be impleaded as respondents to the application.

(2) Every application under sub section (1) shall be made, at the option of the claimant, either to the claims Tribunal having jurisdiction over the area in which the accident occurred or to the Claims Tribunal within the local limits of whose jurisdiction the claimant resides or carries on business or within the local limits of whose jurisdiction the defendant resides, and shall be in such form and contain such particulars as may be prescribed:

Provided that where no claim for compensation u/s 140 is made in such application, the application shall contain a separate statement to that effect immediately before the signature of the applicant.

(3) xxxxx

(4) The Claims Tribunal shall treat any report of accidents forwarded to it under sub section (6) of Section 158 as an application for compensation under this Act.

7. Section 168 of the Act runs as follows:

168. Award of the Claims Tribunal- (1) On receipt of an application for compensation made u/s 166, the Claims Tribunal shall, after giving notice of the application to the insurer and after giving the parties (including the insurer) an opportunity of being heard, hold an inquiry into the claim or, as the case may be, each of the claims and, subject to the provisions of Section 162 may make an award determining the amount of compensation which appears to it to be just and specifying the person or persons to whom compensation shall be paid and in making the award the Claims Tribunal shall specify the amount which shall be paid by the insurer or owner or driver of the vehicle involved in the accident or by all or any of them, as the case may be:

Provided that where such application makes a claim for compensation u/s 140 in respect of the death or permanent disablement of any person, such claim and any other claim (whether made in such application or otherwise) for compensation in respect of such death or permanent disablement shall be disposed of in accordance with the provisions of Chapter X.

(2) The Claims Tribunal shall arrange to deliver copies of the award to the parties

concerned expeditiously and in any case within a period of fifteen days from the date of the award.

(3) When an award is made under this section, the person who is required to pay any amount in terms of such award shall, within thirty days of the date of announcing the award by the Claims Tribunal, deposit the entire amount awarded in such manner as the Claims Tribunal may direct.

8. The following propositions emerge on a combined reading of the aforesaid sections:

(a) Proceedings u/s 166 can be initiated either on an application of the person who suffered loss/injury in the accident or on any report of accident forwarded to the Tribunal under sub section 6 of Section 158. Proceedings u/s 163A can be initiated only on an application by the claimants.

(b) u/s 166 of the Act, the Tribunal is required to assess the compensation for the injury or death of a person, as the case may be, involved in an accident where the cause of the accident is the negligence of the driver of any offending vehicle. For succeeding a claim u/s 166, proof of negligence of the driver of the vehicle is essential. However, u/s 163A of the Act, the claimant is not required to prove the negligence on the part of the driver of the offending vehicle.

(c) Section 166 takes care of claims pertaining to all types of injuries, death and property damage. 163A has been enacted notwithstanding the provisions of Section 166 of the Act and claims u/s 163A is limited only to circumstances mentioned therein, i.e. the death or permanent disablement.

(d) On an application u/s 166 of the Act, the Tribunal shall hold an enquiry into the claim and make an award determining the amount of compensation which appears to it to be "just" subject to the provisions of Section 162 of the Act. Compensation in a claim u/s 163A shall be determined with reference to second schedule of the Act. This special provision for paying compensation on structural formula was introduced by the legislature as a social security scheme to avoid long drawn litigation. Now it is settled by judicial pronouncement that there need not be any strict adherence to the multiplier as per the second schedule, especially in the case of death of unmarried persons where the multiplier has to be determined with reference to the age of the claimant though the second schedule does not permit the adoption of a multiplier applicable to the age of the claimant [See Ramesh Singh and Another Vs. Satbir Singh and Another,

9. As Sections 163A and Section 166 of the Act, which are mutually exclusive and independent of each other, envisage two different situations, we are of the considered view that the conversion of a claim petition filed u/s 166 of the Act to one u/s 163A suo motu by the Tribunal is incompetent. Nor is it possible for the Tribunal to award compensation in terms of Section 163A of the Act when after evidence, it is satisfied that the claimants have to be divested of the compensation u/s 166 of the Act. The legislature has not intended any such

procedure. Adoption of such a course by the Tribunal could not be permissible. For this conclusion, we draw support from an observation by the Apex Court in *Deepal Girishbhai Soni v. United India Insurance Company Limited*, 2004 (2) KLT 395::2004 ICO 550 which can be profitably extracted here:

Having regard to the fact that S.166 of the Act provides for a complete machinery for laying a claim on fault liability, the question of giving an option to the claimants to pursue their claims either under S.163A or S.166 does not arise. Remedy for payment of compensation both under Sections 163A and 166 being final and independent of each other as statutorily provided, a claimant cannot pursue his remedies thereunder simultaneously. One, thus, must opt/elect to go either for a proceeding under S. 163A writer S. 166 of the Act, but not under both.

10. In the above case, the claimants proceeded to file two applications one u/s 163A and the other u/s 166 of the Act. Both claims were entertained and the Tribunal as well as the High Court proceeded on the basis that the amount of compensation u/s 163A was by way of an interim award and the same would not preclude the claimant from proceeding with the claim u/s 166 of the Act. Laying down the law as above, because of the special circumstances of that case, the claim u/s Section 163A was treated as one u/s 140 of the Act and the claimants were directed to refund the balance after adjusting the amount provided u/s 140 of the Act.

11. In paragraphs 59 and 60 of the aforesaid judgment, it was further observed as under:

59. The question may be considered from different angles. As for example, if in the proceedings under S. 166 of the Act, after obtaining compensation under S. 163A, the awardee fails to prove that the accident took place owing to negligence on the part of the driver or if it is found as of fact that the deceased or the victim himself was responsible therefore as a consequence where to the Tribunal refuses to grant any compensation; would it be within its jurisdiction to direct refund either in whole or in part the amount of compensation already paid on the basis of structured formula? Further more, if in a case, the tribunal upon considering the relevant materials comes to the conclusion that no case has been made out for awarding the compensation under S. 166 of the Act, would it be at liberty to award compensation in terms of S.163A there of ?.

60. The answer to both the aforementioned questions must be rendered in the negative, (emphasis added). In other words, the question of adjustment or refund will invariably arise in the event if it is held that the amount of compensation paid in the proceedings under S. 163A of the Act is interim in nature.

12. We do notice that Deepal's case is silent regarding the point of time at which the option has to be exercised by the claimants to go for a proceeding either u/s 163A or u/s 166 of the Act. We are of the firm view that such an option has to be

exercised by the claimant before the commencement of trial, so that no prejudice would be caused to the opposite party.

13. In the present case, the learned Tribunal proceeded to pass an award u/s 163A of the Act on the claim petition, which was originally filed u/s 166 of the Act without an application by the claimant, that too, after it was found that the accident had occurred due to the negligence of the claimant. The suo motu conversion is unjustifiable for other reasons also. As pointed out earlier, a proceeding u/s 163A can be initiated only in the case of death or permanent disablement. In this case, the respondent/claimant did not have a case that he was disabled permanently. In Deepal's case, the Apex Court has further observed that the proceeding u/s 163A being a social security provision, providing for a distinct scheme, only those whose annual income is upto Rs. 40,000/- can take the benefit there of. All other claims are required to be determined in terms of Chapter XII of the Act. In a claim under S. 163A of the Act there should be a specific averment in the petition to the effect that the annual income of the claimant does not exceed Rs. 40,000/-.

14. Thus, we find force in the argument advanced by the learned counsel for the appellant Insurance Company that the course of action taken by the Tribunal treating the claim petition as one u/s 163A, after the evidence is over, is not at all justifiable and the same has to be interfered with. We hold that the conversion of the claim petition to one u/s 163A was unwarranted and the claim had to be treated as one u/s 166 of the Act.

15. The learned counsel for the first respondent, relying on the decision of the Apex Court in Smt. Kaushnuma Begum and Others Vs. The New India Assurance Co. Ltd. and Others, would argue that the first respondent is entitled to get compensation on the basis of the "rule of strict liability" proposed in Rylands v. Fletcher without resorting to strict proof of negligence. The ratio upheld by the House of Lords in Rylands v. Fletcher is as follows:

We think that the true rule of law is that the person who, for his own purposes, brings on his land, and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril, and, if he does not do so, he is prima facie answerable for all the damage which is the natural consequence of its escape.

16. In Kaushnuma Begum's case, a jeep, while in motion capsized, due to the bursting of tyre and in that process, it hit down a pedestrian and he sustained fatal injuries. The Apex Court found that the "rule of strict liability proposed in Rylands v. Fletcher can be made applicable in such cases where there was no negligence on the part of the driver. It was held that compensation on account of the accident arising out of the use of motor vehicles can be claimed under common law even without the aid of a statute. The principle behind the said decision is that claims in respect of death or bodily injury of innocent persons shall not be disallowed merely because there was no negligence on the part of the driver of the vehicle involved in the accident.

17. A brilliant observation made by the Apex Court in Gujarat State Road Transport Corporation, Ahmedabad Vs. Ramanbhai Prabhatbhai and Another, is worth quoting in this context. It reads:

When a pedestrian without negligence on his part is injured or killed by the motorist whether negligent or not, he or his legal representatives, as the case may be, should be entitled to recover damages if the principle of social justice should have any meaning at all.(emphasis applied).

18. In both the cases referred to above, the Apex Court was highlighting the need of compensating innocent victims in motor accidents even in the absence of negligence on the part of the driver. The fact situation in the present case is entirely different from Kaushnuma Begum's case, as it is evident that the first respondent also had some role in causing the accident. The contention taken by the appellant Insurance Company in the written statement filed by them before the Tribunal was that the accident was due to the negligence of the first respondent. The first respondent who was riding his two wheeler was trying to overtake a bus which was proceeding ahead and when he saw a bus coming from the opposite direction, he suddenly lost control over his vehicle and thus his vehicle hit the bus which was proceeding ahead, so contended the appellant Insurance Company relying on Ext.B1 final report filed by the police. The learned Tribunal relying on Ext.A2 scene mahazar found that the accident had occurred somewhere in the middle of the road. It is common knowledge that one cannot keep his side while overtaking. Overtaking is not an illegal act, unless it is specifically prohibited by the authorities concerned by sign boards or other indications. None of the parties have a case that any such sign board was there at the scene of occurrence. However, it is the duty of the driver of the vehicle overtaking to ensure that no vehicle is coming from the opposite side and sufficient distance is kept between his vehicle and the vehicle that is being overtaken." Evidence regarding these aspects are not forthcoming in this case.

19. In view of the inconsistent finding regarding the negligence entered into by the learned Tribunal and also in view of the suo motu conversion of the claim petition which was originally filed u/s 166 of the Act to one u/s 163A of the Act after the evidence is over resulting in the impugned award, we feel that the award has to be interfered with and the matter has to be remanded back to the Tribunal for fresh disposal.

20. In the result, we allow the appeal. The impugned award is hereby set aside. O.P.(MV) No. 655 of 1998 on the file of the Motor Accidents Claims Tribunal, Tirur is remanded to the Tribunal for fresh disposal treating the same as one u/s 166 of the Act. Both parties shall be afforded an opportunity to adduce further evidence, if any. The entire exercise shall be completed by the learned Tribunal within a period of three months from the date of appearance of the parties. Parties shall enter appearance before the Tribunal on 9.4.2012. Needless to mention that the appellant Insurance Company is entitled to receive back the amount already deposited.