

(2012) 11 KL CK 0073
In the High Court Of Kerala
Case No : M.A.C.A. No. 334 of 2005

United India Insurance Co. Ltd.

APPELLANT

Vs

M. Usman Haji and Others

RESPONDENT

Date of Decision : 28-11-2012

Acts Referred:

Motor Vehicles Act, 1988 — Section 163A, 165, 166
Penal Code, 1860 (IPC) — Section 279, 304

Citation : (2013) 1 KLJ 167

Hon'ble Judges : P.S. Gopinathan, J;K. Hema, J

Bench : Division Bench

Advocate : M.A. George, for the Appellant; V.R. Kesava Kaimal, N.M. Madhu, K.C. Sathosh Kumar, K.K. Chandralekha, K.V. Pavithran, Jayanandan Madayi Puthiyaveettil and T.P. Saeed, for the Respondent

Judgement

P.S. Gopinathan, J.—In this appeal, the 2nd respondent insurer in O.P. (MV) No. 204 of 1999 assails the award dated 6.8.2004, whereby the appellant was directed to pay a sum of Rs. 4,13,000/- as compensation with interest at the rate of 9% per annum from the date of petition i.e., 6.2.1999 to respondents 1 to 6 who are the claimants before the Tribunal. At 9.30. a.m. on 6.6.1998, while late A.K. Noufal, a businessman aged 24 years, riding a motor cycle bearing registration No. KRC-9850 along Valapattanam-Kannur road, a van bearing registration KRC- 2274, owned and driven by respondents 7 and 8 hit him down and as a result he sustained injuries. While being lifted to the hospital Noufal succumbed to the injuries. The claimants who are the parents and siblings filed the above petition before the Tribunal styling as one u/s 163A of the Motor Vehicles Act claiming a sum of Rs. 7 lakhs as compensation with a plea that the accident occurred because of the rash and negligent driving of the van by the 8th respondent and hence respondents 7, 8 and the appellant are liable to compensate the claimants as owner, driver and insurer of the van.

2. Respondents 7 and 8, remained ex parte. The appellant tiled a written statement, whereby the insurance policy was admitted, but contended that the

accident occurred because of the negligence on the side of the deceased and that the 8th respondent had no badge and he was not authorized to drive a transport vehicle and that he was not rash or negligent and therefore the appellant is not liable to compensate the claimants.

3. After raising the issues, an enquiry was conducted. During enquiry, the 1st respondent was examined as PW1. Ext. A1 to A5 were marked. Though it is stated in paragraph 6 of the award that no evidence was adduced by the appellant, in the appendix of the award it is seen that Exts. B1 to 4 were marked as appellant's documents.

4. The Tribunal below did not probe into the dispute as to whose negligence caused the accident by stating that the claim made is u/s 163A of the Motor Vehicles Act. On the basis of the materials produced, the Tribunal by the impugned award arrived at a finding that as per the structured formula, respondents 1 to 6 are entitled to a sum of Rs. 4,14,000/- as compensation. In determining the compensation, the income of the deceased was taken as Rs. 3000/- per month. Now this appeal.

5. The main contention that was advanced is that in the petition it is stated that the deceased was having a monthly income of Rs. 6,000/-. But, the second schedule inserted by Act 54 of 1994 can be applied to a claim u/s 163A only if the annual income of the victim/deceased is not exceeding Rs. 40,000/-. In this case, the annual income stated in the application would come to Rs. 72,000/- per annum. Therefore, according to learned counsel for appellant, the claim u/s 163A is not sustainable and that the respondents 1 to 6 should have applied u/s 166 of the M.V. Act. Placing reliance on the decisions reported in *Deepal Girishbhai Soni and Others Vs. United India Insurance Co. Ltd., Baroda*, *National Insurance Co. Ltd. Vs. Divakaran*, and *United India Insurance Co. Ltd. Vs. Akbar Shihab and Others*, : *United India Insurance Co. Ltd. Vs. Akbar Shihab and Others*, , the learned counsel sought for allowing the appeal and remanding the matter to the Tribunal below so as to convert the petition to one u/s 166 of the Motor Vehicles Act and to recalculate the compensation awarded. Yet another grievance of the appellant is that the 3rd respondent, who was driving the van, was not authorized to drive the van and therefore, the Tribunal should have reserved a right to the appellant to realise the award amount from the owner.

6. It is pertinent to note that the appellant had not assailed the quantum of compensation determined by the Tribunal. Neither do any of the respondents dispute. The appellant had not adduced any evidence supporting its pleading attributing negligence against the deceased. Since none of the parties does challenge the quantum of compensation, the appellant or 7th respondent or 8th respondent had not adduced any evidence attributing negligence against the deceased in riding the motor cycle and in the light of the decisions reported in *Ningamma and Another Vs. United India Insurance Co. Ltd.*, and *Oriental Insurance Co. Ltd. Vs. Dhanbai Kanji Gadhvi and Others*, : *Oriental Insurance Co. Ltd. Vs. Dhanbai Kanji Gadhvi and Others*, , we find that in this case even if the

appeal is allowed and the matter is remanded to the Tribunal, no purpose would be served other than to alter the provision under which" the award is passed to Section 166 instead of Section 163A of the Motor Vehicles Act.

7. Going by Sections 163A, 165 and 166 of the Motor Vehicles Act, we find that Section 163A only provides a special provision as to payment of compensation on structured formula basis. Even though the claim u/s 163A is also on fault basis principle, sub clause (2) to Section 163A would show that when compensation is sought as per the structured formula, the claimant need not plead or prove that the accident was caused due to the rash or negligent driving of the motor vehicle or wrong or default of any other person. But in claims u/s 166, the claimants are bound to plead and prove as to how they are entitled to claim compensation and how the respondents are liable.

8. In this case, though the petition is styled as u/s 163A, it is specifically pleaded that the accident occurred because of the rash and negligent driving of the 8th respondent at an exorbitant speed at a busy junction. In the box, PW1 also had given evidence that the accident occurred because of the rash and negligent driving of the 3rd respondent. That evidence of PW1 was not assailed in cross-examination. It is not in dispute that in the final report submitted by the police after investigation it is alleged that the accident occurred because of the rash and negligent driving of the van by the 8th respondent and he was accused for offences u/s 279 and 304 IPC. Therefore, though the petition was styled as one u/s 163A, in fact, the sum and substance of the petition is a claim with plea of negligence against the driver. In the above circumstances, in the light of the decision of the Apex court in *Ningamma and Another Vs. United India Insurance Co. Ltd.*, , we find that the petition before the Tribunal is to be treated as one u/s 166 of the Motor Vehicles Act and to be disposed of for doing justice to the claimant. In *Ningamma's* case (*supra*), the claim u/s 163A of the M.V. Act was allowed by the Tribunal. High Court allowed the appeal holding that the claim petition before the Tribunal was not maintainable as there was no tortfeasor involved. Against that order Civil Appeal was filed before the Apex Court with special leave. While allowing the appeal and remanding the case to the High Court, at page 34, it is held as follows:

Undoubtedly Section 166 of the MVA deals with "just compensation" and even if in the pleadings no specific claim was made u/s 166 of the MVA, in our considered opinion a party should not be deprived from getting "just compensation" in case the claimant is able to make out a case under any provision of law. Needless to say, the MVA is beneficial and welfare legislation. In fact, the court is duty bound and entitled to award "just compensation" irrespective of the fact whether any plea in that behalf was raised by the claimant or not.

In paragraph 37, the Apex Court requested the High Court to consider the matter including quantum of compensation. We find that it would not be appropriate in the interest of justice to shunt the bereaved claimants from one forum to another

forum on technical reasons especially when the quantum of compensation as per the impugned award is not assailed.

9. The Apex court in *Oriental Insurance Co. Ltd. Vs. Dhanbai Kanji Gadhvi and Others*, held that there is no prohibition in praying for compensation as per the structured formula even if the petition is filed u/s 166 of the Motor Vehicles Act.

10. In the above circumstances, we find that the petition before the Tribunal can be treated as one u/s 166 of the Motor Vehicles Act even though the compensation claimed and calculated are on the basis of the structured formula as per the second schedule. Calculation of the compensation requires no interference, especially because none of the parties assails it.

11. We also notice that the appellant had not raised any contention before the Tribunal that since the income of the deceased stated in the petition exceeds as per the schedule, the petition is not maintainable. Learned counsel for appellant would submit that it being a question of law, it could be raised at any time, even in appeal. We are unable to accept the argument because if the appellant had raised such a contention before the Tribunal, the claimants would have got an opportunity to make necessary amendments to convert the petition as one u/s 166 of the Motor Vehicles Act and the same would have been disposed of long back and need not have dragged the matter to this court. It is also pertinent to note that the question whether the claim is u/s 163A or 166 of the Motor Vehicles Act is a mixed question of fact and law. Misquoting a provision of law in an application of this nature shall not be allowed to decline the relief. We also notice that though the income stated in the claim petition would make the claim beyond the schedule, the compensation claimed is within the schedule. Adding to that, the Tribunal calculated the compensation and arrived at a conclusion that the income of the deceased was only Rs. 3,000/- per month, i.e. Rs. 36,000/- per annum. Negligence against the driver was pleaded and proved to sustain the claim u/s 166. However, in the light of the decision reported in *Ningamma's case* (supra), we are not going into that aspect, but we would like to mention that because of the non-mentioning of the objection before the Tribunal, the claimants are highly prejudiced and this claim for compensation has to be dragged to this court causing heart burns to the claimants as well as undue hardship. A remand of the case after this long distance of time would amount to insult to injury and denial of justice. Therefore, we decline the request of the appellant for a remand. As regards the request of the learned counsel for appellant to reserve the liberty to realise the compensation amount from the 7th respondent owner, we find that we can leave open the issue. We also record that the learned counsel for the 7th respondent would submit that the 8th respondent driver had valid driving licence at the time of the accident. Ext. B4 would show that the police had filed a petty case against the 7th respondent alleging that he had permitted the 8th respondent to drive the van without a badge. Mere allegation in Ext. B4 would not amount to any proof to arrive at a conclusion. Whatever that may be, in the event 8th respondent had no driving licence at the

time of accident, the appellant is at liberty to seek appropriate remedies, if so advised, after satisfying the award.

In the result, this appeal is disposed of leaving liberty to the appellant to get the compensation amount realised from the 7th respondent owner, in the event the 8th respondent had no driving licence at the time of accident. The appellant is directed to deposit the compensation amount, within three months before the Tribunal with interest and costs as directed by the Tribunal. No order as to costs.