(2009) 06 KL CK 0105

In the High Court Of Kerala

Case No : MACA No. 1794 of 2008

United India Insurance Co. Ltd. — APPELLANT

Vs

Vijayarajan and Others — RESPONDENT

Date of Decision : 22-06-2009

Acts Referred:

Central Motor Vehicles Rules, 1989 — Rule 3
Constitution of India, 1950 — Article 141
Motor Vehicles Act, 1988 — Section 162, 163A, 163A(1), 165(1), 166

Citation : (2010) ACJ 280 : AIR 2009 Ker 205 : (2009) 3 KLT 269

Hon'ble Judges : M.L. Joseph Francis, J;K.M. Joseph, J

Bench : Division Bench

Advocate : A.R. George, for the Appellant; T.V. George, K.N. Balachandra Kaimal, Jimmy George and V.K. Sunil, for the Respondent

Final Decision : Allowed

Judgement

Joseph, J.—Appellant is the 2nd respondent in a petition filed u/s 163A of the Motor Vehicles Act. Respondents 1 to 4 are the claimants. They are the legal representatives of one Anilkumar who died in a motor vehicle accident. It was their case that the said Anilkumar was riding his motor cycle towards his residence and it hit accidentally on a concrete electric post which stood on the eastern side of the road and he sustained injuries to which he succumbed. The 5th respondent in the appeal is the registered owner and the appellant was the insurer. The claim was raised for Rs. 4,99,500/-. The Tribunal has placed reliance of the Full Bench judgment of this Court reported in National Insurance Co. Ltd. Vs. Malathi C. Salian, and held that the plea that the appellant is not liable cannot be sustained and accordingly, it was found that the application u/s 163A is maintainable. It is accordingly that the Tribunal allowed the claim petition in part and awarded a sum of Rs. 2,70,000/-with 8% interest from the date of filing of the petition till the date of realisation from the appellant and the owner of the motor cycle. It is feeling aggrieved by the same, the present appeal is filed.

2. We heard learned Counsel for the appellant Sri. A. R. George, as also learned Counsel for the respondents Sri. Jimmy George. Learned Counsel for the appellant would submit that being an application u/s 163A of the Motor Vehicles Act it is not open to the Tribunal to award compensation to the claimants in a case where the deceased had admittedly borrowed the vehicle from its owner-driver and caused the accident which ultimately culminated in his death. In support of this plea, he relied on the decision of the Apex Court in Civil Appeal Nos. 3538/09 and 3540/09. Therein, the Apex Court was considering a case where the deceased was driving a motor cycle which he borrowed from its real owner and it was a case that when it was proceeding on the road, a bullock cart proceeding ahead of the said motor cycle stopped suddenly and consequently the deceased dashed against it sustaining fatal injuries and dying on the way to the hospital. It is apposite to refer paragraphs 16, 17, 18, 19, and 20. They read as follows:

16. The aforesaid decisions make it quite clear that the Parliament by introducing Section 163A in the MVA provided for payment of compensation on structured formula basis by mandating that the owner of a motor vehicle or the authorised insurer would be liable to pay compensation, as indicated in the Second Schedule in the case of death or permanent disablement due to accident arising out of the use of the motor vehicle, to the legal heirs or the victim, as the case may be in a claim made under Sub-section (1) of Section 163A of the MVA. In order to prove a claim of this nature the claimant would 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 of neglect or default of the owner of the vehicle concerned.

17. However, in the facts of the present case, it was forcefully argued by the counsel appearing for the respondent that the claimants are not the ''third party'', and therefore, they are not entitled to claim any benefit u/s 163A of the MVA. In support of the said contention, the counsel relied on the decision of this Court in the case of Oriental Insurance Co. Ltd. Vs. Rajni Devi and Others, and New India Assurance Company Ltd. Vs. Sadanand Mukhi and Others, .

18. In the case of Oriental Insurance Co. Ltd. Vs. Rajni Devi and Others, , 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 in 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 163A 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 163A 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 163A of the MVA. In our considered opinion, the ratio of the aforesaid decision 4s 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.

19. We have already extracted Section 163A of the MVA hereinbefore; A bare perusal of the said provision would make it explicitly clear that persons like the deceased in the present case would step into the shoes of the owner of the vehicle. In a case wherein the victim died or where he was permanently disabled due to an accident arising out of the aforesaid motor vehicle in that event the liability to make payment of the compensation is on the insurance company or the owner, as the case may be as provided u/s 163A. But if it is proved that the driver is the owner of the motor vehicle, in that case the owner could not himself be a recipient of compensation as the liability to pay the same is on him. This proposition is absolutely clear on a reading of Section 163A of the MVA. Accordingly, the legal representatives of the deceased who have stepped into the shoes of the owner of the motor vehicle could not have claimed compensation u/s 163A of the MVA.

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 u/s 163A 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.

3. This pronunciation of the law runs counter to the dictum of this Court laid down by the Full Bench but being the decision- of the Apex Court we are bound to follow the Apex Court by Article 141 of the Constitution. Here also like in the facts of the case before the Apex Court, the deceased was not a registered owner of the vehicle. He was using the motor cycle with the permission of its owner. He dashed against an electric post and sustained injuries which culminated in his untimely death. In view of the dictum laid down by the Apex Court, it is clear that the claimants/respondents 1 to 4 could not have successfully maintained the application u/s 163A of the Motor Vehicles Act.

4. Faced with this prospect, learned Counsel for the respondents would submit that this is a case where the deceased would be covered by terms of Ext. B1 policy. He was driving the motor cycle. Ext. B1 policy of insurance would evidence that Rs. 50/-was paid as further premium for ensuring personal accident cover to the owner-driver. He would submit'' that in so far as the deceased was driving the vehicle he must be treated as entitled to the amount which is provided for in the insurance policy.

5. Per contra, learned Counsel for the appellant would contend that the deceased cannot be treated as driver within the meaning of the personal accident cover. According to him, the insurance policy provides for compensation as contained in the policy of insurance, if the accident occurs when it is driven by the owner who is also the driver. In order to resolve this controversy, it is necessary to refer to the terms of the policy. It is true that in the premium an amount of Rs. 50/- has been paid for the compulsory PA to owner-driver and it may at first blush appear to support the case of respondents 1 to 4. However, on a further scrutiny of the elaborate clauses contained in the policy, we feel that the question is to be answered against respondents 1 to 4. The policy speaks about it being a liability only policy and thereafter it provides for dealing with liability with the parties. Thereafter, it provides personal accident cover for owner driver. It is extracted as follows:

Personal Accident cover for Owner Driver - Subject otherwise to the terms exceptions conditions and limitations of this Policy, the Company undertakes to pay compensation as per the following scale for bodily injury/death sustained by the owner driver of the vehicle in direct connection with the vehicle insured or whilst mounting into/dismounting from or travelling in the insured vehicle as a co-driver, caused by violent, accidental external and visible means which independently of any other cause shall within six calendar months of such injury result in:

-- Details Scale of Details of Scale of of in- Compensation Injury Compen- jury sation -- i) Death iii) Loss of ope limb or sight of one 100.00% eye. 50.00%

-- ii) Loss of two iv) Permanent Hmbs or sight Total Disable- of two eyes or ment from in- one limb and juries other sight of one than named eye 100.00% above, 100.00% --

Provided always that:

(1) the compensation shall be payable under only one of the items (i) to (iv) above in respect of the owner driver arising out of any one occurrence and the total liability of the insurer shall not in the aggregate exceed the sum as per schedule during any one period of insurance.

(2) No compensation shall be payable in respect of death or bodily injury directly or indirectly wholly or in part arising or resulting from or traceable to (a) intentional self injury suicide or attempted suicide physical defect or infirmity or (b) an accident happening whilst such person is under the influence of intoxicating liquor or drugs.

This cover is subject to:

(a) the owner driver is the registered owner of the vehicle insured herein

(b) the owner driver is the insured named in this policy.

(c) the owner-driver holds an effective driving license, in accordance with the provisions of Rule 3 of the Central Motor Vehicles Rules, 1889, at the time of the accident.

6. On a perusal of the said clause, it becomes abundantly clear that the contention of the claimants is meritless. After referring to owner-driver, the policy contemplates that compensation is payable subject to fulfillment of certain conditions. They include the requirement that the owner driver is the insured named in the policy and what is further more that the owner driver is a registered owner of the vehicle insured. When one considers the admitted facts of this case, it is clear that neither was the deceased the registered owner of the vehicle nor was he the insured named in the policy. If that be so, it is clear that the contention of respondents 1 to 4 that they are entitled to the compensation which is provided in terms of the personal accident cover to the owner driver is only to be rejected. We do so. The upshot of this discussion is that the claim of respondents 1 to 4 against the appellant is without any justification and the Tribunal clearly erred in ordering the appellant to pay the amount to the respondents. Accordingly, the appeal is allowed and we vacate the direction of the Tribunal against the appellant.

