
(2013) 07 KL CK 0021

In the High Court Of Kerala

Case No : M.A.C.A. No. 764 of 2012

United India Insurance Company Limited

APPELLANT

Vs

Anil Kumar and Others

RESPONDENT

Date of Decision : 04-07-2013

Acts Referred:

Motor Vehicles Act, 1988 — Section 110(1), 140, 144, 147, 149(1)

Citation : (2014) 1 ACC 878 : (2014) ACJ 1 : (2014) 1 AnWR 335 : (2013) 3 ILR (Ker) 444 : (2013) 3 KLJ 339 : (2013) 3 KLT 732

Hon'ble Judges : Thomas P. Joseph, J

Bench : Single Bench

Advocate : Mathews Jacob and P. Jacob Mathew, for the Appellant; M.T. Sureshkumar, V.V. Raja, K.N. Radhakrishnan and P.B. Krishnan (Amicus Curiae), for the Respondent

Final Decision : Dismissed

Judgement

Thomas P. Joseph, J.—Could the insurer of a vehicle raise defences available to it under Sec. 149(2) of the Motor Vehicles Act, 1988 (for short, "the M.V. Act") in a proceeding under Sec. 163A of the said Act? That is the question raised for a decision in this appeal. The first respondent while travelling on the pillion of a motor cycle sustained injuries on 04.05.2000 due to that vehicle overturning. The second respondent was riding the motor cycle at the relevant time. The first respondent filed O.P (M.V.) No. 138 of 2001 in the Motor Accident Claims Tribunal, Pathanamthitta (for short, "the Tribunal") under Sec. 163A of the M.V. Act. The appellant claimed that it has issued only an Act Only policy with respect to the vehicle involved and that the said policy did not cover risk of gratuitous passengers travelling in the motor cycle. The Tribunal assessed compensation payable to the first respondent. It refused to go into the plea raised by the appellant as to its liability taking the position that the non-obstante clause in Sec. 163A of the M.V. Act overrides all other provisions of the M.V. Act and hence as held by the Gujarat High Court in *New India Assurance Company Limited Vs. Chauhan Harishing Padamsingh and Others*, , the appellant cannot raise the plea

that as it has issued only an Act Only policy, it is not liable. The appellant was directed to deposit the compensation.

2. The learned Senior Advocate for the appellant has contended that the non-obstante clause in Sec. 163A of the M.V. Act would not preclude the insurer from taking up defences available to it under Sec. 149(2) of the M.V. Act. According to the learned Senior Advocate, the non-obstante clause is only to the extent of exonerating a claimant under Sec. 163A of the M.V. Act from pleading and proving wrongful act, neglect or default of the owner of the offending vehicle. It is contended that since Ext. B1, policy issued with respect to the vehicle involved is only an Act Only policy, it is not required to cover risk of the insured with respect to a gratuitous passenger carried in the motor cycle. The learned Senior Advocate has placed reliance on the decisions in National Insurance Co. Ltd. Vs. Swaran Singh and Others, , Deepal Girishbhai Soni and Others Vs. United India Insurance Co. Ltd., Baroda, , United India Insurance Co. Ltd., Shimla Vs. Tilak Singh and Others, and Smt. Yallwwa and Others Vs. National Insurance Co. Ltd. and Another, .

3. The learned counsel for the first respondent has contended that the non-obstante clause in Sec. 163A of the M.V. Act overrides other provisions in the M.V. Act including Sec. 149(2) and hence the insurer is not entitled to take up defences under Sec. 149(2) in a proceeding under Sec. 163A of the M.V. Act. The learned counsel has drawn my attention to the object of the legislature in enacting Sec. 163A of the M.V. Act. It is argued that when a claim is made under Sec. 163A of the M.V. Act, so far as the insurer is concerned the only question is whether it has issued a policy of insurance with respect to the offending vehicle and if the answer is in the affirmative the question whether it is only an Act Only Policy or there is violation of the policy condition etc., does not arise for a decision. The learned counsel has placed reliance on the decision in New India Assurance Co. Ltd. v. Chauhan Harisingh Padamsingh & Ors. (supra).

4. Adv. Sri. P.B. Krishnan, the learned counsel who was appointed as amicus curiae has brought to my notice the decisions in Oriental Insurance Co. Ltd. Vs. Rajni Devi and Others, , National Insurance Company Ltd. Vs. Sinitha and Others, , United India Insurance Company Ltd. Vs. Ratheesh, and Oriental Insurance Co. Ltd. Vs. Joseph, . The learned counsel points out that though in paragraph 24 of the decision in United India Insurance Co. Ltd. v. Ratheesh (supra) the Division Bench has taken the view that in a proceeding under Sec. 163A of the M.V. Act once it is shown that the insurer has issued a policy of insurance, other questions raised by the insurer are not required to be gone into in view of the non-obstante clause in Sec. 163A, the decision of the Full Bench in Oriental Insurance Co. Ltd. v. Joseph (supra) does not approve that view. The learned counsel has also brought to my notice conflicting views two other High Courts have taken in the matter-- New India Assurance Co. Ltd. Vs. Muna Maya Basant, where a Division Bench of the Gujarat High Court took the view that the insurer is not entitled to take up defences under Sec. 149(2) in a proceeding

under Sec. 163A of the M.V. Act; and, Dipali Chattopadhyay and Another Vs. New India Assurance Co. Ltd. and Others, where a Division Bench of the Calcutta High Court has taken the view that it is open to the insurer to raise such defences.

5. Though the learned counsel for the first respondent has a contention that there is no evidence to show whether Ext. B1 is only an Act Only policy or is a comprehensive policy, I am not inclined to accept that contention. A copy of Ext. B1 is given to me for perusal and I find that it is only an Act Only Policy. I proceed on the basis that Ext. B1 is an Act Only policy which does not cover liability in respect of a gratuitous passenger carried in the vehicle.

6. Secs. 163A and 163B of the M.V. Act are introduced in the M.V. Act by Sec. 51 of the Motor Vehicles (Amendment Act), 1994 (for short, "the Amending Act"). The provision relevant for consideration here is Sec. 163A and it reads as under:

(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 of 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.

(2) In any claim for compensation under sub-sec. (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

7. The background in which Secs. 163A and 163B are introduced in the M.V. Act is relevant for consideration. In the Prefatory note of the Amending Act, it is stated that Government considered a large number of representations received after finalisation of the report of the Review Committee, from the transport operators and public for making amendments in the M.V. Act. The important suggestions made by the Transport Development Council related to among other things,

Providing adequate compensation to victims of road accidents without going into the long drawn procedure.

8. The Law Commission in its 119th Report has, in paragraph 1.7 recommended as under:

By 1980, a wind was blowing that compensation to the victims of motor accidents should be by way of social security and the liability to pay the same must be "No-fault" liability. The law, as it stands at present, save the provision in Chapter VIIA, inserted by the Motor Vehicles (Amendment) Act, 1982, enables

the victim or the dependents of the victim in the event of death to recover compensation on proof of fault of the person liable to pay compensation and which fault caused the harm such as bodily injury or death. In the event of death of a victim of a motor accident and the consequent harm caused to his dependents, the question whether the person responsible for the action causing harm had committed a fault or it was an inevitable accident, is hardly relevant from the point of view of victim or his/her dependents. The expanding notions of social security and social justice envisaged that the liability to pay compensation must be a "No-fault" liability. The Law Commission of India undertook an examination of this concept and submitted its report in May, 1980. The Law Commission recommended that a new section 92A should be inserted in the Motor Vehicles Act, by which the doctrine of liability without fault should be introduced in the Act and strict liability imposed in regard to death or bodily injury caused by an accident of the nature specified in Sec. 110(1) with the ceiling on "No-fault" liability of Rs. 1,00,000/-. It appears that this recommendation was accepted with a modification by providing "No-fault" liability in the event of death in the amount of Rs. 15,000/- and in respect of permanent disablement of any person, upto Rs. 7,500/-. It appears that the recommendation as to strict liability does not appear to have been accepted.

9. Incorporation of Secs. 163A and 163B in the M.V. Act by the Amending Act was on account of the social obligation to provide compensation for accident victims without going into the long drawn procedure. Sec. 163A of the M. V Act is *pari materia* with Sec. 140 of the said Act which corresponded to Sec. 92A of the M.V. Act of 1939. Sec. 140 of the M. V Act deals with liability to pay interim compensation in certain cases on the principle of No-fault. The Tribunal is empowered to pass interim orders under Sec. 140 of the M.V. Act to provide compensation to the persons referred to therein. Sec. 144 of the M.V. Act states, the provisions of this Chapter (i.e., Chapter 10 which takes in Sec. 140) shall have effect notwithstanding anything contained in any other provision of this Act or of any other law for the time being in force.

10. It was once felt that in view of Sec. 144 of the M.V. Act which states that the provisions of Chapter 10 would have effect notwithstanding anything contained in any other provision of the said Act or any other law for the time being in force, the insurer of the offending vehicle is not entitled to take up defences available to it under Sec. 149(2) of the M.V. Act. There were conflicting decisions on that question. A Full Bench of the Karnataka High Court in *M/s. United India Insurance Company, Bangalore Vs. Imman Aminasab Nadaf and others*, took the view that even in a proceeding under Sec. 92A of the Act (which is the forerunner of the present Sec. 140) if the insurer raises a plea that it is not liable, the Tribunal has to consider that question *prima facie* and decide the contention.

11. That dispute is settled by the decision of the Supreme Court in *Yallwwa v. National Insurance Co. Ltd.* (*supra*). Referring to the defences which an insurer is

entitled to take up in an application under Sec. 140 of the M.V. Act, the Supreme Court has held,

one of the defences available to the insurer is breach of conditions specified in the policy and that when such a defence is raised, the Tribunal is required to go into the said question (even in a proceeding under Sec. 140 of the M.V. Act) and that Sec. 140 does not contemplate that an insurance company shall also be liable to deposit the amount while it has no fault whatsoever in terms of Sub-sec. (2) of Sec. 147 of the Act

In paragraph 16, the Supreme court proceeds to say,

when a statutory liability has been imposed upon the owner, in our opinion, the same cannot extent the liability of an insurer to indemnify the owner, although in terms of the insurance policy or under the Act, it would not be liable therefore.

In paragraph 17, it is observed,

in a given case, the statutory liability of an insurance company, therefore, either may be nil or a sum lower than the amount specified under Sec. 140 of the Act. Thus, when a separate application is filed in terms of Sec. 140 of the Act, in terms of Sec. 168 thereof, an insurer has to be given a notice in which event, it goes without saying, it would be open to the insurance company to plead and prove that it is not liable at all

12. I must notice that Sec. 140 of the M. V Act provides for interim relief to a claimant based on no-fault liability where, his application under Sec. 166 of the M. V Act is yet to be finally disposed of. Hence the disputes between the parties could be finally decided in the application under Sec. 166. So far as Sec. 163A of the M.V. Act is concerned, it is not providing any interim relief but a final decision in the application. It is true that the provision starts with a non-obstante clause that the owner of the vehicle or the authorised insurer shall be liable to pay compensation as indicated in the Second Schedule notwithstanding anything contained in the M.V. Act or in any other law for the time being in force or instrument having the force of law. Sub-sec. (2) of Sec. 163A states,

in any claim for compensation under Sub-sec (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.

13. Sub-sec (2) does not preclude the opposite party from proving that the claimant or victim sustained injuries/died on account of his own wrongful act, neglect or default as the Supreme Court has held in *National Insurance Co. Ltd. v. Sinitha* (supra) and followed by the Full Bench in *Oriental Insurance Co. Ltd. v. Joseph* (supra). Reading Sub-secs. (1) and (2) of Sec. 163A, it appears to me that the non-obstante clause in Sub-sec. (1) is only to the extent of making the owner or insurer of the vehicle liable to pay compensation, in the case of death or permanent disablement due to accident arising out of the use of motor vehicle

as indicated in the Second Schedule no matter, what would be the compensation payable as per any other provision in the M.V. Act or any other law in force and exonerating the claimant from pleading and proving (unlike in an application under Sec. 166 of the M.V. Act) that death or permanent disablement was due to the wrongful act, neglect or default of the owner of the vehicle. The thrust of the non-obstante clause in Sec. 163A is to the liability of the owner or insurer of the vehicle to pay compensation as per the structured formula. It is difficult to accept the proposition that the non-obstante clause in Sub-sec. (1) of Sec. 163A would render all other provisions of the M.V. Act otiose in which case, one has to say that Sec. 170 of the said Act which enables the insurer to take up defences on behalf of the insured should also be denied to the insurer. In such a situation, it is possible for the claimant and the insured to collude and bring an action under Sec. 163A of the Act and in such a situation, whether there is violation of the policy conditions or not, whether the policy issued is only an Act Only policy or not, whether a motor accident has occurred or not, once it is admitted by the insurer that it has issued a policy with respect to the vehicle allegedly involved, it would be liable to pay compensation. I am not inclined to think that the legislative intent in providing the non-obstante clause in Sub-sec. (1) of Sec. 163A was to create such a situation.

14. In *National Insurance Company Ltd. v. Swaran Singh* (supra) a Bench of the Supreme Court consisting of three Judges has laid down the defences that are available to the insurer under sec. 149(1) and (2) of the Act. The summary of the findings is given in pages 814 and 815, it is stated,

Insurer is entitled to raise a defence in a claim petition filed under S. 163A or S. 166 of the Motor Vehicles Act, 1988, inter alia, in terms of S. 149(2)(a)(ii) of the said Act.

15. In *Deepal Girishbhai Soni v. United India Insurance Co. Ltd* (supra), in paragraph 48, it is held as under:

By reason of the S. 163-A, therefore, the compensation is required to be determined on the basis of a structured formula whereas in terms of S. 140 only a fixed amount is to be given. A provision of law providing for compensation is presumed to be final in nature unless a contra indication therefore is found to be in the statute either expressly or by necessary implication. While granting compensation, the Tribunal is required to adjudicate upon the disputed question as regard age and income of the deceased or the victim, as the case may be. Unlike S. 140 of the Act, adjudication on several issues arising between the parties is necessary in a proceeding under S. 163-A of the Act.

16. In *Oriental Insurance Co. Ltd. v. Rajni Devi* (supra) the Supreme Court again considered the scope of Sec. 163A of the M.V. Act and liability of the insurer. In paragraph 11, it is observed:

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.

17. It is revealed from paragraph 12 of the said decision that as per terms of the contract of insurance liability of the insurer was confined to Rs. 1,00,000/-. It was held that the insurer is liable to the said extent (alone) and not to any sum exceeding the said amount (notwithstanding that there is a non-obstante clause in Sec. 163A(1) of the Act). The Supreme Court in the said case (which came under Sec. 163A of the Act) was upholding contention of the insurer that its liability under the contract of insurance was limited to Rs. 1,00,000/- meaning thereby that notwithstanding the non-obstante clause in Sec. 163A(1) of the M.V. Act, the insurer was permitted to take up a defence available to it based on the contract of insurance.

18. In *New India Assurance Co. Ltd. v. Chauhan Harisingh Padamsingh & Ors.* (supra) (relied on by the learned counsel for the first respondent and referred to in the award under challenge), the Gujarat High Court has held following its own earlier decision in *National Insurance Co. Ltd. Vs. Rukhshanaben Salimbhai Vora and Another*, that the insurer is not entitled to take defences available to it under Sec. 149(2) in a proceeding under Sec. 163A of the M.V. Act. On going through the said decision it is seen that reference was made to certain decisions of the Supreme Court but those decisions only concerned the object of legislature in incorporating Secs. 163A and 163B in the M.V. Act. The decisions of the supreme Court referred by the Gujarat High Court do not touch the question whether in a proceeding under Sec. 163A of the M.V. Act, the insurer is entitled to take the defences available to it under Sec. 149(2) in view of non-obstante clause in Sec. 163A(1) of the M.V. Act. It is also seen that the Gujarat High Court in paragraph 9 of its decision in *New India Assurance Co. Ltd. v. Chauhan Harisingh Padamsingh & Ors.* (supra) has distinguished the decision of the Supreme Court in *National Insurance Company Ltd. v. Swaran Singh* (supra) in view of the latter decision of the Supreme Court discussed therein (which I state, did not concern the question of defences available to the insurer under Sec. 149(2) of the Act in a proceeding under Sec. 163A of the Act). With respect, disagree with the view of the Gujarat High Court.

19. A view as that of the Gujarat High Court in the cases referred in paragraph 19 above, was taken by a Division Bench of this Court in *United India Insurance Co. Ltd. v. Ratheesh* (supra) There, in paragraph 24 it is held:

The policy of insurance is relevant only to ascertain the status as authorised insurer. Thereafter the terms of the policy become irrelevant and the liability of the authorised insurer is specified in Sec. 163A.

20. I am unable to follow the above view of the Division Bench as the correct position of the law for the following reasons: though the Division Bench has made a passing reference to the decision of the supreme Court in *Deepal*

Girishbhai Soni v. United India Insurance Co. Ltd (supra), there is no reference to the decision in Oriental Insurance Co. Ltd. v. Rajni Devi (supra). The Full Bench of this Court in Oriental Insurance Co. Ltd. v. Joseph (supra) though without referring to the Division Bench decision in National Insurance Co. Ltd. v. Sinitha (supra) has stated in paragraph 9, with reference to the decision in Oriental Insurance Co. Ltd. v. Rajni Devi (supra),

In other words, what their Lordships would mean is, unless the terms of the policy cover a case of present nature, the claim by the heirs of the owner, wherein the owner himself was the victim of the accident cannot be considered under S. 163A. For example, if the owner of the vehicle insures the vehicle by paying additional premium, as personal accident coverage, then by virtue of the terms of contract of insurance, the insurer would be liable to pay compensation depending upon the limits of liability.

In paragraph 11, the Full Bench states:

It is also pertinent to mention that the Tribunal concluded that the policy in question did not cover the rider of the vehicle, there fore, if the rider was not covered, question of indemnifying the owner would not arise. Only in a case where the coverage of rider is included in the policy or where the owner of the policy is covered and the permitted rider takes the position of a owner by virtue of terms of contract then alone the insurer would be liable to pay compensation.

21. The above discussion leads me to the conclusion that the non-obstante clause in Sec. 163A(1) of the M.V. Act does not preclude the insurer from raising defences available to it under Sec. 149(2) of the said Act. The non-obstante clause in Sec. 163A(1) is only to the extent of making the owner or insurer of the vehicle liable, in case of death or permanent disablement to pay compensation as per the structured formula in the Second Schedule and exonerating the claimant from pleading and proving wrongful act, neglect or default of the owner of the vehicle. It follows that the Tribunal was not correct in rejecting the defence of the appellant under Sec. 149(2) of the M.V. Act as untenable.

22. I stated from Ext. B1 that it is only an Act Only Policy. Under Sec. 147 of the M.V. Act a policy of insurance is not required to cover liability with respect to a gratuitous passenger. That the insurer which has take up the statutory liability as per the policy is not liable to indemnify the insured with respect to a gratuitous passenger travelling in a private vehicle is approved in United India Insurance Co. Ltd. v. Tilak Singh (supra). It follows that the appellant is not liable to indemnify the insured since the first respondent was a gratuitous passenger - a pillion rider on the motorcycle. I record my appreciation for the valuable assistance rendered to me by the learned counsel for the parties and Adv. Sri. P.B. Krishnan.

Resultantly the appeal is allowed as under:

(i) Finding of the Motor Accident Claims Tribunal, Pathanamthitta in the award

dated 06.01.2012 in O.P. (M.V.) No. 138 of 2001 that the appellant as insurer of the vehicle is liable, is set aside.

(ii) The first respondent is allowed to realise the amount awarded by the Tribunal from other persons found by the Tribunal liable to pay compensation, jointly and severally.

(iii) The amount deposited by the appellant in the Tribunal under Sec. 173 of the M.V. Act can be withdrawn by it on application.

(iv) Parties are directed to suffer their cost in the appeal.

All pending interlocutory applications will stand dismissed.