(2022) 12 GAU CK 0004

In the Gauhati High Court

Case No : MAC Appeal No. 400 Of 2017, Cross Objection No. 2 Of 2018

United India Insurance Company Ltd. APPELLANT

Vs

Jayanti Gupta RESPONDENT

Date of Decision : 02-12-2022

Acts Referred:

Motor Vehicle Act, 1988 — Section 110AA, 147, 147(2), 163A, 163A(1), 166

Citation : (2022) 12 GAU CK 0004

Hon'ble Judges : Malasri Nandi, J

Bench : Single Bench

Advocate : R Goswami, M Dutta, M Choudhury

Final Decision : Allowed/Dismissed

Judgement

1. Heard Mr R Goswami, learned counsel appearing for the appellant/Insurance Company and Mr M Dutta, learned counsel appearing on behalf of the respondent Nos. 1 to 3/claimants. Also heard Ms M Choudhury, learned counsel appearing on behalf of the respondent No. 6/Oriental Insurance Company Limited.

2. Since the appeal and cross objection relate to the Judgment and Award dated 05.06.2014, passed by the learned Member, MACT, Golaghat, in MAC Case No. 64/2007, they are being disposed of by this common judgment.

2. The appellant/ Insurance Company has challenged the Judgment and Award dated 05.06.2014, passed by the learned Member, MACT, Golaghat, in MAC Case No. 64/2007, on the ground by holding both the vehicles responsible for causing the accident and passed the judgment accordingly, with the direction to the present Insurance Company, along with the other Insurance company to pay compensation @ 70:30 respectively.

3. The brief facts of the case is that the respondents/claimants have filed a claim petition under Section 163 (A) of the MV Act, stating, interalia, that on 21.02.2007, at about 09:15 pm, while the husband/son of the claimants was returning to his house at Khumtai Tea Estate from Bokakhat by riding his

motorcycle, bearing Registration No. AS-05-B-0617, through NH-37 and while he reached near Bihora, under Bokakhat PS, the rider of the said motor cycle met with an accident with a vehicle bearing Registration No. AS-01-L/0138 (Oil Tanker), as a result of which, the husband/son of the claimants, Jay Shankar Gupta, sustained grievous injuries on his person and died at Bokakhat CHC. His Post Mortem Examination was done at Civil Hospital, Golaghat. It is alleged that the accident took place due to rash and negligent driving of the oil tanker, bearing Registration No. AS-01-L/0138, but the claimants had filed the petition under Section 163(A), but not under Section 166 of MV Act.

4. The owner and driver of oil tanker have submitted their written statements, wherein they stated that on the date of accident, the vehicle i.e., the Oil tanker, was duly insured with the Oriental Insurance Company and the compensation, if any, be paid by the insurer of the said vehicle and prayed to exonerate owner and driver of the said vehicle.

5. The Oriental Insurance Company, i.e., the insurer of the oil tanker, bearing No. AS-01-L/0138 also submitted written statement, wherein, it is admitted that the said oil tanker was duly insured under the Oriental Insurance Company, at the relevant time of accident but denied the fact that there was any rash and negligent driving on the part of the driver of the oil tanker. It is also alleged that the accident took place due to rash and negligent driving of the motor cycle driven by the deceased himself.

6. Admittedly, CW-1 and CW-2, i.e., the mother and wife of the deceased were not present when the accident took place. Exhibit-1, accident information report shows that the accident occurred on 21.02.2007 over National Highway, Bihora and one Jay Shankar Gupta died in connection with Bokakhat PS UD Case No. 10/2007 and the vehicle bearing No. AS-05-B-0617 motor cycle and oil tanker bearing No. AS-01-L/0138, were shown to be the vehicles involved in the accident.

7. The learned counsel for the appellant/insurance company has argued that the judgment and award passed by the learned Member, MACT, Golaghat, was against the relevant provisions of Motor Vehicles Act, 1988 (hereinafter, referred to as “MV Act”) which sets out the requirements of an insurance policy. Under Section 147 of the MV Act, a statutory policy of insurance is required to cover the legal liability incurred by the owner and driver of the vehicle of the third party. In the present case, the deceased, who was the owner of the offending vehicle was not a third party and as such the Insurance Company is not liable to pay any compensation.

8. It is also the submission of the learned counsel for the appellant that the learned Member, after having held that the accident occurred due to the fault of the oil tanker ought not to have held that the deceased had also contributed to the cause of accident. The learned Member failed to appreciate that the claim petition was filed under Section 163 A of the MV Act, and therefore, there was no

need to go for adjudication of rash and negligence of the victim, once the involvement of the offending vehicle is established. Therefore, the decision of the learned Member, MACT, who fastened the liability for compensation upon the appellant/insurer, in spite of absence of any pleadings and evidence against the appellant insurer, is not sustainable in law.

9. In support of the submission of the learned counsel for the appellant/ Insurance Company, has placed reliance on the following case-laws:-

1. (2001) 2 SCC 9 (Kaushnuma Begum –Vs- New India Assurance Company Limited).

2. AIR 2004 SC 4767 (Dhanraj v. New India Assurance Company Limited)

3. (2007) 9 SCC 263 (Oriental Insurance Company Limited v. Jhuma Saha & Ors.)

10. By referring to the judgment of Mohammad Siddique and Anr. –Vs. National Insurance Company Limited & Ors., reported in (2020) 3 SCC 57, learned counsel for the claimants/respondents submitted that in absence of any evidence to show the wrongful act on the part of the deceased, had contributed either to the accident or the nature of the injuries sustained, the victim could not have been held guilty of contributory negligence. In the instant case, there is no evidence to attract contributory negligence on the part of the deceased.

11. Learned counsel for the claimants/respondents also contended that the claimant had not made any allegation against the Insurer of the motorcycle, i.e., United India Insurance Co. Ltd. and also did not seek any compensation from the appellant. Therefore, the findings of the learned Tribunal fastening 30% liability upon the appellant is without any pleadings as well as on evidence.

12. It is also submitted that the learned Tribunal had taken wrongly the income of deceased as Rs. 40,000/-, whereas, it is very much available in the case record that the deceased was a diploma holder in motor driving and he was working as a professional driver at Khumtai Tea Estate, who used to earn Rs. 4,500/- per month. As such the judgment and order is liable to be modified and the compensation amount should be enhanced by considering the income of the deceased as Rs. 4,500/- per month.

13. The learned counsel for the claimants/respondents also stressed his argument on the point of interest. It is submitted that the Tribunal has committed error by awarding 6% interest, instead of 9% interest per annum and learned counsel also referred a case law of Hon’ble Apex Court on that point, i.e. Supe Dei (Smt) & Ors. –Vs- National Insurance Co. Ltd., reported in (2009) 4 SCC 513.

14. I have considered the submissions of the learned counsel for both the parties and also perused the record and the relevant documents available in the record.

15. Admittedly, the claimants have filed a claim petition under Section 163 A of the MV Act, claiming compensation for the death of their son/husband. In a

proceeding under Section 163 A of the MV Act, it is not required to prove rash and negligent driving on the part of the driver of the offending vehicle. One copy of FIR is available on record, which reveals that the FIR was lodged by one ASI of Police, stating inter alia that on 22.02.2007, at about 09:00 pm, while Jay Shankar Gupta, who was proceeding towards Khumtai Tea Estate from Bokakhat Town by riding his motorcycle, bearing No. AS-05-B-0617, in a rash and negligent manner, he knocked down on the back side of the stationery oil tanker, bearing No. AS-01-L/0138, which was standing on the road due to mechanical defect, as a result of which, he sustained grievous injuries on his person and subsequently died on the spot.

16. On the basis of the ejahar, a case was registered vide Bokakhat PS UD Case No. 10/2007, dated 27.02.2007.

17. One witness, namely, Nagen Chandra Bharali was examined from the side of the appellant/Insurer of the motor cycle, who deposed in his evidence that the vehicle bearing No. AS-05-B-0617, which was involved in the alleged accident, was duly insured with the United India Insurance Company. It is admitted that at the relevant time of accident, the said motorcycle was driven by the deceased himself. As per terms and conditions of the policy, the claimant is not entitled to get compensation, as the deceased was himself insurer and he does not come under the definition of third party under Section 147 (2) of the MV Act. According to terms and conditions of the policy, the liability of the insurer is to indemnify the insured only. The owner not being third party, the insurer of the vehicle is not liable to pay compensation.

18. In his cross-examination, DW-1 replied that at the time of incident, the motor cycle bearing No. AS-01B-0617 was duly insured with the United India Insurance Company, under two-wheeler package policy. The said policy covers personal accident of the owner cum driver and Rs. 50/- (Rupees Fifty) Only was paid as extra premium, for covering the risk of owner and driver. As per Exhibit-4, the terms and conditions of the policy, if owner and driver dies, they would be entitled for compensation on limited liability.

19. Admittedly, no one has witnessed the occurrence of accident. CW-1 and CW-2, wife and the mother of the deceased had not seen the accident. It is seen that no FIR was lodged by the claimant or their family members in connection with the accident of the deceased. After the accident, FIR was lodged by one ASI of Police, on the basis of GD Entry made on the date of accident. Though it is stated in the claim petition that accident occurred due to rash and negligent driving of oil tanker, bearing No. AS-01B-0617, on the contrary, FIR discloses that on account of rash and negligent driving of the motorcycle rider, the accident had occurred. Be that as it may, the fact remains that the rider of the motorcycle died in the accident. Except the evidence of PW-1 and PW-2 and the FIR, no document is placed that the rider was not negligent in riding the motorcycle.

20. The actual dispute in the instant case is, therefore, whether the wife and mother of the rider(deceased) of the motorcycle can maintain a petition by invoking Section 163 A of the Motor Vehicles Act, if the accident had occurred on account of fault of the deceased, rider of the vehicle, can be treated as a third party!

21. In the case of Deepal Girishbhai Soni v United India Insurance Company Limited; reported in (2004) 5 SCC 385, Hon'ble Supreme Court has considered as to who can be considered as "any person" to be understood as a "third party", which reads as under;-

"Section 163A was thus enacted for grant of immediate relief to a section of the people whose annual income is not more than 40,000/- Having regard to the act that in terms of 163 A of the Act, read with Second Schedule appended thereto, compensation is to be made on a structured formula, not only having regard to the age of the victim and his income but also the other factors, relevant therefor. An award made thereunder, therefore, shall be in full and final settlement of the claim as would appear from the different columns contained in the Second Schedule appended to the Act. The same is not interim in nature. The note appended to Column-I, which deals with fatal accidents, makes the position furthermore clear, stating that from the total amount of compensation, one third thereof is to be reduced in consideration of the expenses, which the victim would have incurred, towards maintaining himself, had he been alive. This together with the other heads of compensation as contained in Column 2 to 6 thereof leaves no manner of doubt that Parliament intended to lay a comprehensive skin for the purpose of grant of adequate compensation to a section of victims who would require the amount of compensation without fighting any protracted litigation for proving that the accident occurred owing to negligence on the part of the driver of the motor vehicle or any other fault arising out of a use of a motor vehicle. This Court further observed in Oriental Insurance Company Limited v. Meena Variyal; (2007) 5 SCC 428. In New India Assurance Company Limited –Vs- Asha Rani, this Court had occasion to consider the scope of the expression "any person" occurring in Section 147 of the Act. This Court held that the meaning of the words- "any person" must also be attributed having regard to the contexts in which they have been used, i.e., a "third party". Keeping in view the provisions of the 1988 Act, we are of the opinion that as the provisions thereof do not enjoin any statutory liability on the owner of a vehicle to get his vehicle insured for any passenger travelling in a goods vehicle, the insurer would not be liable therefor. In other words, this Court clearly held that apparently, the words-"any person" are qualified by the setting in which they occur and that any person is to be understood as a third party."

22. However, while considering the words – "any person" to be understood as a "third party" has been clearly stated that the driver cannot be stated as a third party. If only one vehicle is involved in the accident, the rider cannot be considered as a third party, because he has to be considered as a tort-feaser, as

on account of his negligence in driving the accident had occurred.

23. It would be useful to refer to the Judgment of Ningamma & Another –Vs- United India Insurance Company Limited; reported in (2009) 13 SCC 710; which reads as under:-

"The aforesaid decisions make it quite clear that the parliament by introducing Section 163A in the MV Act provided for payment of compensation on structured formula basis by mandating that the owner of a motor vehicle or the authorized 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 163 A of the MV Act. 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 wrongful act or neglect or default of the owner of the vehicle concerned."

24. However, in the facts of the present case, it was forcefully argued by the learned counsel appearing for the appellant /Insurance Company that the claimants are not the third party and therefore, they are not entitled to get any benefit under the provision of Sub-Section (1) to Section 163A.

25. For a ready reference, Section 163A of the MV Act, may be read as under:-

"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 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. Explanation.—For the purposes of this sub-section, "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."

26. A bare perusal of provision of Section 163 A of the MV Act, would make it explicitly clear that in a case wherein the victim died or where he was permanently disabled due to an accident arising out of the said 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 under Section 163A. 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 MV Act.

27. In the case of in Appaji (since deceased) & Anr. Vs. M. Krishna & Anr.; 2003 SCC Online Karnataka 826 which reads as follows:-

"18. Let us then turn to Section 163A of the Motor Vehicles Act. It envisages payment of compensation for death or permanent disablement due to an accident arising out of the use of motor vehicle to the victim or his legal heirs as the case may be. The term 'victim' has not been defined in the Act. The literal meaning of the word as given in Chambers 20th Century Dictionary is: "a living being offered as a sacrifice; one subjected to death, suffering or ill treatment; a prey; a sufferer". Black's Law Dictionary explains the term thus: "The person who is the object of a crime or tort, as the victim of a robbery is the person robbed". Person whom court determines has suffered pecuniary damages as a result of defendant's criminal activities; that person may be individual, public or private corporation, government, partnership, or unincorporated association.

19. The right to receive compensation under Section 163A presupposes that the person who makes a claim is a victim or the legal heirs of a victim. The provision on the plain language employed in the same does not entitle a person who is neither a victim nor his/her legal heir to claim any compensation. In other words, one who is the victim of his own actions of rash or negligent driving cannot invoke Section 163A for making a claim. The concern of the legislature and the jurists is understandably for the victim in contradistinction to the victimiser or one who falls a victim to his own action. While road accidents generally affect innocent third parties or those making use of public transport, cases where the owner or driver of the vehicle alone suffers on account of his rash and negligent driving are not uncommon. Drunken driving, speeding in what are high performance new generation of automobiles including two wheelers are accounting for a large number of accidents every day. Quite often these accidents kill or wound even the person who is driving the vehicle. Parliament did not intend to provide for compensation to the person responsible for the accident on structured formula basis in such cases. Neither the provisions of Section 163A nor the background in which the same were introduced, disclose any such intention.

20. The issue can be examined from yet another angle. Section 147 of the Motor Vehicles Act prescribes the requirement of a policy of insurance in order that the same may be said to comply with the provisions of Chapter XI. It, inter alia, envisages a policy of insurance which insures the person or class of persons specified in the policy against any liability which may be incurred by him in respect of the death or bodily injury or damage to any property of a third party arising out of the use of the vehicle in a public place. What is important is that the policy must insure the owner against "any liability which arises against him" on account of any death or injury arising out of a motor accident. In the case of an accident where the person who is killed or injured is himself responsible for

the accident without the involvement of any other vehicle or agency, no liability qua the insured would arise except where the person who is killed or injured is an employee of the insured and the accident arises out of his employment. In any such case, rashness or negligence of the employee may be inconsequential for purposes of holding the employer liable to pay the compensation under the Workmen's Compensation Act. The decision of this court in Y.R. Shanbhag v. Mohammed Gouse; 1991 ACJ 699 (Karnataka), has taken the view that where the driver had sustained injuries due to his own driving he cannot maintain a petition under Motor Vehicles Act, his remedy being under Workmen's Compensation Act, Reference may also be made to another Division Bench decision of this court in B. Prabhakar v. Bachima; 1984 ACJ 582 (Karnataka), where the court observed:-

"From Section 110 AA, it is clear that before an application can be entertained, the accident must have occurred due to the actionable negligence of the owner or the driver of the vehicle.....When the accident has occurred due to actionable negligence of the deceased who was himself the driver, no claim by his legal representatives can be entertained under the Act. That being so Section 110AA will not come into play at all."

21. We need not dilate on the rights and liabilities of the parties in such a case for that aspect even though raised before us does not strictly speaking fall for a detailed examination. Suffice it to say that in a case where no liability arises against the driver or owner of the vehicle on account of the accident no such liability will arise even against the insurance company with whom the vehicle involved in the accident is insured. Section 163A of the Act does not alter that legal position. It does not alter the legal basis on which a liability arises under Section 147 of the Act nor does it provide a different or modified basis for the same. That being so, in the case of an accident where the person killed or injured is himself responsible for the accident, no liability would arise against the insured nor can any such liability be enforced under Section 163A of the Act. For a liability under Section 163A to arise against insurance company, it is essential that such a liability must first arise against the insured and the insurance company under Section 147 of Motor Vehicles Act.”

28. The observations in Appaji (supra) clearly lay down that Section 163A MV Act merely dispenses with the petitioner's (victim's) onus/duty to prove 'negligence' of driver of the offending vehicle. It does not remove/obliterate the most essential element of 'negligence' from the realm of tortious liability for causing injury or damages. In other words, the petitioner still has to assert that he suffered injury or damages on account of negligent driving of offending vehicle by its driver, however, he need not prove such negligence. Grant of compensation to any person in the absence of any assertion of 'negligence' is impermissible because in the absence of any such assertion it is difficult to assume any person to be a 'victim'. If petitioner could not be treated as 'victim', then the law disentitles him from seeking relief under Section 163A of the MV Act either.

29. In view of the aforesaid legal propositions, I am of the opinion that the claim petition lodged by the respondents/claimants is not maintainable and the Judgment and Award of the learned Tribunal is required to be set aside. As the claim petition is not maintainable there is no necessity to consider the cross-objection filed by the claimants for enhancement of compensation.

30. In the result the appeal, filed by the appellant/Insurance Company is allowed and the cross-objection filed by the respondents/claimants is dismissed.

31. The amount, if any, deposited by the appellant/Insurance Company be refunded to the appellant/Insurance Company.

32. Statutory amount in deposit be returned accordingly.

33. Send down the LCR.

