

BEFORE THE MEMBER ::::::::::: MACT ::::::::::: DHUBRI

MAC Case No.253/2008

Parties:-

Sujita Karmakar

..Claimant

Vs.

1.Sri Sunudhar Karmakar
(Owner of the Motor Cycle No.AS-17/7869)

2.The Oriental Insurance Company Limited
(Insurer of the Motor Cycle No.AS-17/7869)

..Opp.

Parties

Present: - Sri Rajib Goswami, Member, MACT, Dhubri

Appearance:-

Sri P. Patwari, Advocate for the claimant

Sri B.N. Agarwal, Advocate for OP No.2

Date of hearing : 29-11-2017

Date of judgment: 07-12-2017

Judgment

This is an application filed u/s.166 of the M.V. Act, 1988 by the claimant, Sujita Karmakar claiming compensation for the death of her husband Basudev Karmakar in a Road Traffic Accident.

The claimant's case in brief is that on 17-12-2007 at about 9:00 PM her husband Basudev Karmakar was on his way back home from Dhepdhepi on his two wheeler bearing registration No.AS-17/7869 accompanied by Ananta Karmakar sitting pillion on the said two wheeler. On the way at village Uttar Raipur on NH-31, the said two wheeler met with an accident. Both the rider and pillion rider had fallen down on the road and sustained grievous injuries. Basudev Karkamar the husband of the claimant had succumbed to his injuries at Mitra Nursing Home, Siliguri where he had undergone treatment for the injuries sustained before his death. Hence this claim petition claiming compensation of Rs. 15,00,000/-.

The OP No.1, Sunudhar Karmakar the owner of the motor cycle No.AS-17/7869 and Oriental Insurance Company Limited, the insurer of the vehicle had contested the case by submitting their respective written statements in the case.

OP No.1 in his written statement had claimed that the present case by the claimant is not maintainable in law. It is further contended by the answering OP that the motor cycle involved in the accident bearing registration No.AS-17/7869 was duly insured with Oriental Insurance Company Limited, Dhubri Branch in his name and the policy had been valid from 08-12-2007 to 07-12-2008, covering the period the accident had taken place. Thus according to answering OP, being the insured, he is entitled to get indemnified for the compensation to be paid to be third party.

The answering OP No.2 again maintained that the case is not maintainable u/s 166 of the MV Act since the accident had taken place due to negligence of the person riding the motor cycle that was

involved in the accident and no other vehicle was involved in the accident. Further it is contended by the answering OP that as documents regarding the insured were not made available to them either by the insured as required u/s 134 (c) of the MV Act or by the I.O. of the criminal case within 30 days of recording of the FIR as required u/s 158 (6) of the MV Act, the answering O.P. is not aware of any subsisting contract of insurance with the owner of the offending vehicle as contract of insurance is subject to compliance of section 64 VB of Insurance Act, proof of payment of premium etc. Further, the answering OP claims protection u/s 170 of the MV Act and the defence of exemption on the proof of breach of specified conditions of policy envisaged in Section 147 and 149 (2) (a) (i) of the M.V. Act. Thus, the answering O.P. is not liable to indemnify the insured in the payment of compensation to the third party.

Upon above pleadings following issues were framed:

- 1 Whether the accident had taken place due to rash negligent driving of vehicle No.AS-17/7869 (Motor Cycle) and the husband of the claimant had died in the said accident?
- 2 Whether the offending vehicle was insured with M/s. Oriental Insurance Company Limited at the time of accident?
- 3 What shall be the just and proper compensation and by whom payable?
- 4 Whether the claimant is entitled to get the relief as prayed for?

During the course of the enquiry, the claimant examined herself and one another witness. OP No.2 adduced one witness.

I have heard Sri P. Patwary, learned counsel for the claimant and Sri B.N. Agarwal, learned counsel for OP No.2.

I have also carefully gone through the case record including the evidence, both oral and documentary.

DECISION AND REASONS THEREOF

ISSUE NO. 1 AND 2 : Both these issues are taken up together as both these issues are inter-related.

CW-1, Sujita Karmakar, the wife of Basudev Karmakar claimed in her evidence that on 17-12-2007 her husband was riding a Motor Cycle bearing registration No.AS-17/7869 and the said motor cycle had met with an accident on NH-31 at village Uttar Raipur leading to the death of her husband on 20-12-2007.

In her cross examination CW-1 admitted to one Sunudhar Karmakar being owner of the said Motor Cycle and her husband had been authorized by the owner to ride the said Motor Cycle on the day of the alleged occurrence.

CW-2, Ananta Kumar Karmakar in his affidavit admitted to being the pillion rider on the Motor Cycle deceased Basudev Karmakar was riding on 17-12-2007. According to CW-2 the said Motor Cycle bearing registration No.AS-17/7869 had met with an accident at village Uttar Raipur on NH-31 near Manasha Mandir due to mechanical defect. According to CW-2 deceased Basudev Karmakar had died on 20-12-2007.

In his cross examination CW-2 reiterated to Sunudhar Karmakar a relative of deceased being the owner of the two wheeler. CW-2 claimed that the accident had occurred due to mechanical failure of the Motor Cycle as the engine got locked and the two wheeler capsized on the road. He pleaded ignorance as to whether the deceased had been authorized by the owner to ride the Motor Cycle or not.

Now, it is established from the evidence of CW-1 and CW-2 above that the deceased victim had died when the Motor Cycle, he was riding, met with an accident. It is further established that no other vehicle was involved in the accident and the rider deceased Basudev Karmakar was not the owner of the above two wheeler.

Now, coming to Section 166 of MV Act or for that matter 163-A of the MV Act pave the way for claiming compensation for the death or bodily injury of third person. In the present case the present claim petition has been filed by the claimant u/s 166 of the MV Act. Section 165 envisages that “(1) A State Government may, by notification in the Official Gazette, constitute one or more Motor Accidents Claims Tribunals (hereafter in this Chapter referred to as Claims Tribunal) for such area as may be specified in the notification for the purpose of adjudicating upon claims for compensation in respect of accidents involving the death of, or bodily injury to, persons arising out of the use of motor vehicles, or damages to any property of a third party so arising, or both.”

Explanation ---- For the removal of doubts, it is hereby declared that the expression “claims for compensation in respect of accidents involving the death of or bodily injury to persons arising out of the use of motor vehicles” includes claims for compensation under Section 140 [and Section 163-A]

(2).....

(3).....

(4).....

Thus, it is clear from the provision u/s 165 of the MV Act that the statutory provision with regard to payment of compensation by a tribunal relates to a third person. This being the position the issue to be taken up is whether the present claim petition by the claimant, the wife of deceased victim is maintainable u/s 166 of the MV Act. In this regard I have heard learned counsel for both sides.

The Id advocate for the Oriental Insurance Company, the insurer of the offending two wheeler in course of his submission in the light of the evidence of DW, the branch manager of Oriental Insurance Company Ltd contended that the Basu Dev Karmakar was not a third party so far the policy of the Motor Cycle is concerned and not entitled to claim any compensation from the insurer,OP-2. According to Ld advocate comprehensive policy only covers damage to the vehicle of the insured and the liability involving third party but does not cover loss of life of the owner. In support of his contention the Id counsel put reliance upon the legal principle in Nigamma and Ans. Vs. United India Insurance Company Limited, reported in 2009 (13) SCC 710, the question that arose for consideration before the Hon'ble Apex Court was whether the legal representatives of a person who was riding a Motor Cycle, after borrowing from the real owner met with an accident without involving any other vehicle, would be entitled to compensation u/s 163-A of the M.V. Act and also whether the insurer who issued the Insurance Policy would be bound to indemnify the deceased or his legal representatives. The Apex court held that a person cannot be both claimant and also a tortfeasor liable to pay compensation with respect to a claim. In the present case the claimant's (CW-1'S) deceased husband would step in to the shoes of the owner of the Motor Cycle.

The learned advocate also put reliance on the legal principle came up for discussion in the decision of the Honb'le Apex Court in New India Assurance Company Limited Vs. Sadanand Mukhi, reported in AIR 2009 SCC 1788, wherein the son of the owner/insured was driving the vehicle who died in an accident, was not regarded as third party. In the present decision the Apex Court had taken into consideration its earlier decision in Oriental Insurance Company Limited v. Jhuma Saha as reported in 2007 (9) SSC 263 wherein it was held "the question which arises for consideration is that the deceased himself being negligent, the claim petition u/s 166 of the MV Act, 1988 would be maintainable. In para-11 of the said decision it was held that the 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 the property. Thus if the insured cannot be fastened with any liability under the MV Act the question of insurer being liable to indemnify the insured, therefore does not arise." It was further more held as such in the said decision;

"13. The additional premium was not paid in respect of the entire risk of death or bodily injury of the owner of the vehicle. If that be so, Section 147 (b) of the MV Act which in no uncertain terms covers a risk of a third party only would be attracted in the present case."

The Apex Court in *Sadanand Mukhi (Supra)* had also discussed the legal principle laid down in *United India Insurance Company Limited v. Davinder Singh, 2007 (8) SCC 698* holding:-

"10. It is, thus, axiomatic that whereas an insurance company may be held to be liable to indemnify the owner for the purpose of meeting the object and purport of the provisions of the MV Act, the same may not be necessary in a case where an insurance company may refuse to compensate the owner of the vehicle towards his own loss. A distinction must be borne in mind as regards the statutory liability of the insurer vis`-vis the purport and object sought to be achieved by a beneficent legislation before a forum constituted under the MV Act and enforcement of a contract qua contract before a Consumer Forum."

The Hon'ble Supreme Court in the light of the above legal principle discussed in above decisions held that insurance company was not liable to indemnify the insured the father of the deceased victim, Tasumukhi who had died on 08-09-2000 while riding his motor cycle met with an accident allegedly took place as stray dog came in front of the vehicle.

Now, coming to the argument of the learned advocate for the claimant, the contention of the learned counsel basically revolved

around with regard to the person riding the Motor Cycle involved in the accident being in possession of a valid driving license and since he was not the owner of the two wheeler so far the insurance policy cover is concerned, the owner being the second party and insurance company being the first party and the policy being comprehensive package policy the deceased husband of the claimant is a third party for the purpose of Section 166 of the MV Act.

In support of his claim learned counsel for the claimant had cited following decisions; National Insurance Company Limited v. Sinitha & Others [2012 (1) T.A.C. 234 (SC)], New India Assurance Company Limited v. Radhika [2009 (3) T.A.C. 216 (Ker)], Smt. Sangpari v. F. Lalremruata & Another [2015 (2) T.A.C. 391 (Gau)], Branch Manager, National Insurance Company Limited v. Master Suraj Subba and Another [2013 (4) T.A.C. 32 (Sikkim)], Rikhi Ram and Another v. Sukhrania and Others [2003 (2) T.A.C. 22 (SC)] and United India Insurance Company Limited and Another v. Smt. Sudha Singh and Others [2014 (2) T.A.C. 42 (Pat)].

In the above decision of our Apex Court in National Insurance Company Limited v. Sinitha and Others is not applicable since the issue in appeal had been whether the deceased was a third party for the purpose of Section 163-A of the MV Act. In the present case the fact that the deceased husband of the claimant had been riding the two wheeler that had met with an accident had been established by CW-1 herself and that no other vehicle was involved was also established. Further the present claim petition has been filed u/s 166 of the MV Act requiring proof of negligence.

In the decision in Rikhi Ram and Another v. Sukhrania and Others, 2003 (2) T.A.C. 22 (SC) the issue involved was whether the liability of the insurers ceases so far the third party injured or victim is concerned merely on the ground that the intimation as required as provision of the act regarding transfer of the vehicle was not given to the insurer. The Hon'ble Supreme Court said no. The liability of the

insurer does not cease so far the third party victim is concerned and as such the legal principle discussed is not applicable. So far law laid down in other decisions of Patna High Court, Sikkim High Court and Karnataka High Court relied upon by the learned advocate are again not applicable in the present context of the case as issues in those decisions came up with regard to claim made u/s 163-A of MV Act not u/s 166 of the MV Act as in the present case.

Thus following submissions of learned counsels for both sides I am inclined agree with learned advocate for the OP No.2, Oriental Insurance Company Limited and legal principle discussed in the decision cited by him and hold that Section 165 of the MV Act clearly postulates that the insurer is liable to indemnify the risk of the third party only. Further circumstances speak that it was deceased himself who was driving the motor cycle in rash and negligent manner resulting in the accident in which both the deceased and the pillion rider had fallen down and the rider succumbed to his injuries. Therefore in the absence of negligence on the part of the owner of the vehicle the claimant cannot seek compensation on the basis of provision of the act. The prayer for claimant is dismissed as not maintainable u/s 166 of the MV Act.

ORDER

In the result, claim petition is dismissed.

Dictated & corrected by me

Member, MACT, Dhubri.

Member, MACT, Dhubri.

APPENDIX

MAC No.253/2008

Claimant's witness : CW-1 Sujita Karmakar
CW-2 Ananta Kumar Karmakar
DW-1 Rubul Ch. Pathak

Exhibits

Ext-1 Accident Information Report in Form
No.54
Ext-2 Salary Certificate of the deceased
Ext-3 Copy of Post Mortem Report

Member: MACT: Dhubri.