

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 19th September, 2012

+ **MAC.APP. 946/2011**

NATIONAL INSURANCE COMPANY LTD. Appellant

Through: Mr. L.K.Tyagi, Adv.

versus

THAN SINGH & ORS. Respondents

Through: Mr. Rajneesh Kumar Jha, Adv. for R-1.

CORAM:

HON'BLE MR. JUSTICE G.P.MITTAL

J U D G M E N T

G. P. MITTAL, J. (ORAL)

1. This Appeal is directed against a judgment dated 17.09.2011 passed by the Motor Accident Claims Tribunal (the Claims Tribunal) whereby in a Petition under Section 163 of the Motor Vehicles Act, 1988 (the Act) a compensation of ₹3,27,360/- was awarded in favour of the Respondent No.1.
2. According to the case set up by the First Respondent (Petitioner before the Claims Tribunal) on 26.07.2009 he (the Claimant) was driving truck NoDL-1LE-3781 from Delhi to Kanpur. The truck rammed against a Roadways bus No.UP-91-9687 due to the failure of the steering of the truck resulting into injuries to the First Respondent (the Claimant).
3. During inquiry before the Claims Tribunal a contention was raised that since the first Respondent (the Claimant) himself was driving the truck in question, he stepped into the shoes of the owner and was not entitled to

any compensation. In the alternative, it was stated that if at all the First Respondent was to get any compensation it could be only as an employee under the Workmen's Compensation Act for having suffered an employment injury.

4. The Claims Tribunal relied on a judgment passed by the learned Single Judge of this Court in *Raniya @ Rami Devi & Ors. MAC APP No.501/2000*, decided on 13.07.2011 and held that in case of an employee *Ningamma & Anr. v. United India Insurance Company Limited*, (2009) 13 SCC 710 would not be applicable and the employee would be entitled to get compensation under the Workmen's Compensation Act.
5. The distinction between award of compensation on the basis of '*liability without fault*' under Section 140 of the Act and payment of compensation under Section 163-A of the Act was drawn by the Supreme Court in *National Insurance Company Limited v. Sinitha & Ors.*, 2011 (13) SCALE 84. It was held that compensation under Section 140 of the Act shall be payable irrespective of the fact whether the accident takes place because of victim's own negligence whereas victim's own negligence would be a defence to a Petition under Section 163-A of the Act. I extract Paras 13, 14, 15 and 16 of the report hereunder for ready reference:-

“13. In the second limb of the present consideration, it is necessary to carry out a comparison between Sections 140 and 163-A of the Act. For this, Section 163-A of the Act is being extracted hereunder:

Section 163-A. *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 or the authorized 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.

A perusal of Section 163(A) reveals that Sub-section (2) thereof is in pari materia with Sub-section (3) of Section 140. In other words, just as in Section 140 of the Act, so also under Section 163-A of the Act, it is not essential for a claimant seeking compensation, to "plead or establish", that the accident out of which the claim arises suffers from "wrongful act" or "neglect" or "default" of the offending vehicle. But then, there is no equivalent of Sub-section (4) of Section 140 in Section 163-A of the Act. Whereas, under Sub-section (4) of Section 140, there is a specific bar, whereby the concerned party (owner or insurance company) is precluded from defeating a claim raised under Section 140 of the Act, by "pleading and establishing", "wrongful act", "neglect" or "default", there is no such or similar prohibiting clause in Section 163-A of the Act. The additional negative bar, precluding the defense from defeating a claim for reasons of a "fault" ("wrongful act", "neglect" or "default"), as has been expressly incorporated in Section 140 of the Act (through Sub-section (4) thereof), having not been embodied in Section 163-A of the Act, has to have a bearing on the interpretation of Section 163-A of the Act. In our considered view

the legislature designedly included the negative clause through sub-section (4) in Section 140, yet consciously did not include the same in the scheme of Section 163-A of the Act. The legislature must have refrained from providing such a negative clause in Section 163-A intentionally and purposefully. In fact, the presence of Sub-section (4) in Section 140, and the absence of a similar provision in Section 163-A, in our view, leaves no room for any doubt, that the only object of the Legislature in doing so was, that the legislature desired to afford liberty to the defense to defeat a claim for compensation raised under Section 163-A of the Act, by pleading and establishing "wrongful act", "neglect" or "default". Thus, in our view, it is open to a concerned party (owner or insurer) to defeat a claim raised under Section 163A of the Act, by pleading and establishing anyone of the three "faults", namely, "wrongful act", "neglect" or "default". But for the above reason, we find no plausible logic in the wisdom of the legislature, for providing an additional negative bar precluding the defense from defeating a claim for compensation in Section 140 of the Act, and in avoiding to include a similar negative bar in Section 163A of the Act. The object for incorporating Sub-section (2) in Section 163A of the Act is, that the burden of pleading and establishing proof of "wrongful act", "neglect" or "default" would not rest on the shoulders of the claimant. The absence of a provision similar to Sub-section (4) of Section 140 of the Act from Section 163A of the Act, is for shifting the onus of proof on the grounds of "wrongful act", "neglect" or "default" onto the shoulders of the defense (owner or the insurance company). A claim which can be defeated on the basis of any of the aforesaid considerations, regulated under the "fault" liability principle. We have no hesitation therefore to conclude, that Section 163A of the Act is founded on the "fault" liability principle.

14. There is also another reason, which supports the aforesaid conclusion. Section 140 of the Act falls in Chapter X of the Motor Vehicles Act, 1988. Chapter X of the Motor Vehicles Act, 1988 is titled as "Liability Without Fault in Certain Cases". The title of the chapter in which Section 140 falls, leaves no room for any doubt, that the provisions under the chapter have a reference to liability "... without fault ...", i.e., are founded under the "no-fault" liability principle. It would, however, be pertinent to mention, that Section 163A of the Act, does not find place in Chapter X of the Act.

Section 163A falls in Chapter XI which has the title "Insurance of Motor Vehicles Against Third Party Risks". The Motor Vehicles Act, 1988 came into force with effect from 1.7.1989 (i.e., the date on which it was published in the Gazette of India Extraordinary Part II). Section 140 of the Act was included in the original enactment under chapter X. As against the aforesaid, Section 163A of the Act was inserted therein with effect from 14.11.1994 by way of an amendment. Had it been the intention of the legislature to provide for another provision (besides Section 140 of the Act), under the "no-fault" liability principle, it would have rationally added the same under Chapter X of the Act. Only because it was not meant to fall within the ambit of the title of Chapter X of the Act "Liability Without Fault in Certain Cases", it was purposefully and designedly not included thereunder.

15. The heading of Section 163A also needs a special mention. It reads, "Special Provisions as to Payment of Compensation on Structured Formula Basis". It is abundantly clear that Section 163A, introduced a different scheme for expeditious determination of accident claims. Expeditious determination would have reference to a provision wherein litigation was hitherto before (before the insertion of Section 163A of the Act) being long drawn. The only such situation (before the insertion of Section 163A of the Act) wherein the litigation was long drawn was under Chapter XII of the Act. Since the provisions under Chapter XII are structured under the "fault" liability principle, its alternative would also inferentially be founded under the same principle. Section 163A of the Act, catered to shortening the length of litigation, by introducing a scheme regulated by a pre-structured formula to evaluate compensation. It provided for some short-cuts, as for instance, only proof of age and income, need to be established by the claimant to determine the compensation in case of death. There is also not much discretion in the determination of other damages, the limits whereof are also provided for. All in all, one cannot lose sight of the fact that claims made under Section 163A can result in substantial compensation. When taken together the liability may be huge. It is difficult to accept, that the legislature would fasten such a prodigious liability under the "no-fault" liability principle, without reference to the "fault" grounds. When compensation is high, it is legitimate that the insurance company is not fastened with liability when the offending vehicle suffered a "fault"

("wrongful act", "neglect", or "defect") under a valid Act only policy. Even the instant process of reasoning, leads to the inference, that Section 163A of the Act is founded under the "fault" liability principle.

16. At the instant juncture, it is also necessary to reiterate a conclusion already drawn above, namely, that Section 163A of the Act has an overriding effect on all other provisions of the Motor Vehicles Act, 1988. Stated in other words, none of the provisions of the Motor Vehicles Act which is in conflict with Section 163A of the Act will negate the mandate contained therein (in Section 163A of the Act). Therefore, no matter what, Section 163A of the Act shall stand on its own, without being diluted by any provision. Furthermore, in the course of our determination including the inferences and conclusions drawn by us from the judgment of this Court in Oriental Insurance Company Limited v. Hansrajbhai v. Kodala, (2001) 5 SCC 175, as also, the statutory provisions dealt with by this Court in its aforesaid determination, we are of the view, that there is no basis for inferring that Section 163A of the Act is founded under the "no-fault" liability principle. Additionally, we have concluded herein above, that on the conjoint reading of Sections 140 and 163A, the legislative intent is clear, namely, that a claim for compensation raised under Section 163A of the Act, need not be based on pleadings or proof at the hands of the claimants showing absence of "wrongful act", being "neglect" or "default". But that, is not sufficient to determine that the provision falls under the "fault" liability principle. To decide whether a provision is governed by the "fault" liability principle the converse has also to be established, i.e., whether a claim raised thereunder can be defeated by the concerned party (owner or insurance company) by pleading and proving "wrongful act", "neglect" or "default". From the preceding paragraphs (commencing from paragraph 12), we have no hesitation in concluding, that it is open to the owner or insurance company, as the case may be, to defeat a claim under Section 163A of the Act by pleading and establishing through cogent evidence a "fault" ground ("wrongful act" or "neglect" or "default"). It is, therefore, doubtless, that Section 163A of the Act is founded under the "fault" liability principle. To this effect, we accept the contention advanced at the hands of the Learned Counsel for the Petitioner."

6. Similar view was taken by the Punjab and Haryana High Court in FAO No.1413/2000 titled *General Manager, Chandigarh Transport Undertaking-I, Chandigarh & Anr v. Kanwaljit Kaur & Ors.*, decided on 09.05.2011.
7. In the instant case, no evidence was produced by the First Respondent in the shape of any Mechanical Inspection Report to show that the accident resulted on account of some mechanical failure / defect in the vehicle which was being driven by the First Respondent himself. Thus, the accident was caused on account of the First Respondent's own negligence.
8. Applying the ratio of *Sinitha*, a Claim Petition under Section 163-A of the Act is not maintainable.
9. At the same time, irrespective of his own fault or negligence, the First Respondent could file a Petition for grant of compensation before the Commissioner, Workmen's Compensation for an injury suffered by him during the course of his employment.
10. Admittedly, the permanent disability suffered by the First Respondent, that is, 37% permanent locomotor impairment of right lower limb does not fall under any item in Part II of the Schedule I. Thus, the compensation would be payable as defined under Section 4 sub-Section (1) (c) (ii) of the Workmen's Compensation Act.
11. While awarding compensation in case of partial permanent disablement, the Commissioner, Workmen's Compensation has to keep in mind the loss of earning capacity of the employee and not physical incapacity. Same principle is applied in the Motor Vehicles Act, 1988 as held by the

Supreme Court in *Raj Kumar v. Ajay Kumar & Anr.*, 2011 (1) SCC 343. In *Raj Kumar* the Supreme Court brought out the difference between permanent disability and functional disability resulting in the loss of earning capacity. It was laid down that the compensation on account of loss of earning capacity has to be granted in accordance to the nature of job undertaken by the victim of a motor accident. Paras 11 and 14 of the report are extracted hereunder:

“11. What requires to be assessed by the Tribunal is the effect of the permanent disability on the earning capacity of the injured; and after assessing the loss of earning capacity in terms of a percentage of the income, it has to be quantified in terms of money, to arrive at the future loss of earnings (by applying the standard multiplier method used to determine loss of dependency). We may however note that in some cases, on appreciation of evidence and assessment, the Tribunal may find that percentage of loss of earning capacity as a result of the permanent disability, is approximately the same as the percentage of permanent disability in which case, of course, the Tribunal will adopt the said percentage for determination of compensation (see for example, the decisions of this Court in Arvind Kumar Mishra v. New India Assurance Co. Ltd. 2010 (10) SCC 254 and Yadava Kumar v. D.M., National Insurance Co. Ltd. 2010 (10) SCC 341.

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14. For example, if the left hand of a claimant is amputated, the permanent physical or functional disablement may be assessed around 60%. If the claimant was a driver or a carpenter, the actual loss of earning capacity may virtually be hundred percent, if he is neither able to drive or do carpentry. On the other hand, if the claimant was a clerk in government service, the loss of his left hand may not result in loss of employment and he may still be continued as a clerk as he could perform his clerical functions; and in that event the loss of earning capacity will not be 100% as in the case of a driver or carpenter, nor 60% which is the actual physical disability, but far less. In fact, there may not be any need to award any compensation under the head of 'loss of future

earnings', if the claimant continues in government service, though he may be awarded compensation under the head of loss of amenities as a consequence of losing his hand. Sometimes the injured claimant may be continued in service, but may not found suitable for discharging the duties attached to the post or job which he was earlier holding, on account of his disability, and may therefore be shifted to some other suitable but lesser post with lesser emoluments, in which case there should be a limited award under the head of loss of future earning capacity, taking note of the reduced earning capacity."

12. In the instant case, the First Respondent examined Dr. Dhruba Narayan Borah as PW-1. He proved the Disability Certificate Ex.PW-1/A. He testified that the patient (the First Respondent) had weakness in the affected limbs. He could drive a motor car but with difficulty. The First Respondent was not engaged in car driving but was engaged in truck driving. He is a professional driver for a commercial vehicle. In the absence of any specific evidence with regard to the loss of earning capacity, I have to make some guess work and would hold that there is 37% loss of earning capacity. By applying the principle as given in Section 4 of the W.C. Act, the loss of earning capacity comes to ₹ 1,49,340/- ($3300/- \times 60\% \times 203.85 \times 37\%$).
13. The Learned counsel for the First Respondent also concedes that the First Respondent is entitled to compensation only under the Workmen's Compensation Act. Although, no Petition was filed by the First Respondent before the Commissioner, Workmen's Compensation, but since this Court is an Appellate Court against any order passed by the Commissioner under the Workmen Compensation Act, I would award him a compensation of ₹1,49,340/- which is payable to him under the Workmen's Compensation Act. The awarded amount shall carry interest @ 7.5% per annum from the date of filing of the Petition till its payment.

14. The excess amount of ₹ 1,78,290/- along with proportionate interest and the interest accrued, if any, during the pendency of the Appeal shall be refunded to the Appellant Insurance Company.
15. The awarded amount along with interest shall be released in favour of the First Respondent in terms of the order passed by the Claims Tribunal.
16. The statutory deposit of ₹25,000/- be refunded to the Appellant Insurance Company.
17. The Appeal is allowed in above terms.
18. Pending Applications also stand disposed of.

(G.P. MITTAL)
JUDGE

SEPTEMBER 19, 2012

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