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

% *Judgment delivered on: 22nd August, 2013*

+ **MAC.APP. 347/2006**

M/S. NATIONAL INSURANCE CO. LTD. Appellant

Through: Ms.Manjusha Wadhwa, Advocate.

Versus

BIMLA DEVI AND ORS. Respondents

Through: Ms.Monika, Amicus Curiae.

CORAM:

HON'BLE MR. JUSTICE SURESH KAIT

SURESH KAIT, J. (Oral)

1. The present appeal arises out of a judgment dated 27.01.2006 passed by the Motor Accident Claims Tribunal (the learned Tribunal) in Suit No.66/04 preferred under Section 163A of the Motor Vehicles Act, 1988 (hereinafter referred to as 'the Act') by the respondent Nos.1 to 6/claimants for the death of Parmanad, who died in a motor accident occurred on 29.12.2003.

2. Learned counsel appearing on behalf of the appellant/Insurance Company has submitted that the claim petition was filed under Section 163A of the Act, accordingly, the claim could be granted against the third party risk. Since the deceased was driving the TSR taken by him on hire from the

owner/insured of the said TSR, therefore, the learned Tribunal has erred in granting the compensation in favour of the legal heirs of the deceased.

3. He further submitted that the testimony of the wife of the deceased proves that the said Auto was taken on rent at Rs.250/- per day, therefore, the deceased stepped into the shoes of the owner and as per Section 163-A of the Act, owner cannot be considered as a third party.

4. On the other hand, Ms. Monika, learned *Amicus Curiae* appearing on behalf of the respondents/claimants submitted that so far as the accident in question is concerned, the deceased falls under the category of ‘third party’ as he was not the owner of the said TSR. Admittedly, the same belonged to respondent No.7/owner of the vehicle.

5. To support her contentions, learned counsel has submitted that similar issue came before the Apex Court in the case of ***National Insurance Company Ltd. Vs. Sinitha & Ors., I (2012) ACC 524 (SC)***, wherein it is held as under:-

“19. To substantiate his second contention, it would be essential for the petitioner to establish, that Shijo having occupied the shoes of the owner, cannot be treated as the third party. Only factual details brought on record through reliable evidence, can discharge the aforesaid onus. During the course of hearing, despite our queries, learned counsel for the petitioner could not point out the relationship between Shijo and the owner of the motorcycle involved in the accident. Shijo is not shown to be the employee of the owner. He was not even shown as the representative of the owner. In order to establish the relationship between the Shijo and the owner, the petitioner-Insurance Company could have easily produced either the owner himself as a witness, or even the claimants

themselves as witnesses. These, or other witnesses, who could have brought out the relationship between the owner and Shijo, were not produced by the petitioner herein, before the Tribunal. The petitioner has, therefore, not discharged the onus which rested on its shoulders. Since the relationship between the Shijo and the owner has not been established, nor the capacity in which he was riding the vehicle has been brought out, it is not possible for us to conclude, that Shijo while riding the motorcycle on the fateful day, was an agent, employee or representative of the owner. It was open to the petitioner to defeat the claim for compensation raised by the respondents by establishing, that the rider Shijo represented the owner, and as such, was not a third party, in terms of the judgment rendered by this Court in Oriental Insurance Company Limited case (supra). The petitioner failed to discharge the said onus. In view of the above, it is not possible for us to accede to the second contention advanced at the hands of the learned counsel for the petitioner.”

6. She has also placed reliance on the judgement dated 25.05.2012 rendered by the Coordinate Bench of this Court in the case bearing MAC. Appeal No.662/2010, titled as ‘***Oriental Insurance Co. Ltd. Vs. Sabita Devi***’, wherein it has been observed as under:-

2. During inquiry before the Claims Tribunal, it was claimed that the deceased was a self employed person. At the time of the accident, he (the deceased) was driving TSR No.DL-1RG-8259 which met with an accident resulting in fatal injuries to the deceased.

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6. The contentions raised on behalf of the Insurer are:-

(i) The deceased Gyan Kumar Mandal was not an employee of the insured and as third party risk was not covered under the policy of insurance issued by the Insurer, it could not have been fastened with the liability.

(ii) The Claim Petition was filed under Section 163-A of the Act. There should have been deduction of one-third towards the personal and living expenses instead of one-fourth as in a Petition under Section 163-A of the Act, as compensation can be awarded only on the basis of structured formula.

(iii) The compensation awarded towards the non-pecuniary heads was more than what is provided under the Second Schedule to the Act.

7. On the other hand, it is urged by the learned counsel for the Claimants that a premium of `25/- was charged for the driver for covering the risk of the hirer or the driver or of any person hiring the TSR and as such the Insurer is liable to pay the compensation for the death of the driver in this case.

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12. The Seventh Respondent entered the witness box as R2W1 and her testimony that the deceased was paying her `150/- per day as hire charges for hiring the TSR was not challenged by the Claimants. In cross-examination, the Seventh Respondent deposed that the TSR was given to the deceased by Vipin Kumar (Seventh Respondent's representative) and not by her personally.

13. Thus, it may be noticed that it was not the specific case of the Claimants that he was an employee driving the TSR either on salary basis or on commission basis. The owner's (Seventh Respondent's) testimony that the deceased used to get TSR on hire basis at the rate of `150/- per day being not challenged either by the Claimants or by the Insurer, it cannot be said that there was any relationship of Master and Servant or that the deceased was an employee under the Seventh Respondent.

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16. In the circumstances, the Insurer was not entitled to avoid the liability on the ground that the deceased was neither covered as a third party nor as an employee, the deceased

being hirer was covered by the contract of Insurance and the insurer was under obligation to indemnify the insured.”

7. PW2 ASI Kunwar Pal Singh, who investigated the FIR No. 304/03 deposed that on 29.12.2003, at about 12.25 AM, he received an information that a TSR was hit by some other vehicle, but the said vehicle could not be traced.

8. In view of the statement of PW2, it is established that the deceased Parmanand received fatal injuries in a road accident involving an unknown vehicle and the TSR driven by the deceased himself.

9. As per Section 163A (1) of the Act, the owner of the motor vehicle and the insurer are liable to pay the compensation due to an accident arising out of the use of said motor vehicle. However, there is no specific bar under Section 163A that if the deceased himself was driving the vehicle and out of use of which he received fatal injuries, his legal representatives cannot claim compensation from the owner and insurer of the said vehicle.

10. In view of the above discussion and the dictum of the Hon'ble Supreme Court in the case of *Sinitha* (*supra*), I do not find any merit in the instant appeal as the issue raised in this appeal is no more *res integra*.

11. Accordingly, the instant appeal is dismissed with no order as to costs.

12. Consequently, statutory amount be released in favour of the appellant/Insurance Company.

13. It is pertinent to mention here that as none was appearing in this matter on behalf of the respondents, therefore, on the last date of hearing,

i.e., 10.05.2013, this Court appointed Ms. Monika, Advocate as *Amicus Curiae* on behalf of the respondents to assist the Court.

14. I record the appreciation for the assistance rendered by the learned *Amicus Curiae* to this Court. The Secretary, Delhi High Court Legal Services Committee, New Delhi is directed to pay a fee of Rs.10,000/- in favour of Ms. Monika, Advocate.

SURESH KAIT, J.

AUGUST 22, 2013

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