

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.9605 OF 2015

The New India Assurance Company Ltd
Office at : 1st Floor, New India Centre,
Co-operaage Road, Mumbai
At present;
The Regional Manager,
The New India Assurance Company Ltd
Office at : 3rd Floor, New India Centre,
Co-operaage Road, Mumbai

.. Petitioner

V e r s u s

1. Smt. Dhannodevi @ Shila Subhash Giri
Age 32 years, occ. Nil
- 2 Master Sonu @Muinda Subhash Giri
Age 15 years, occ. Nil
- 3 Master Monu Subhash Giri
Age 13 years, occ. Nil
- 4 Master Vikash Subhash Giri
Age 11 years, occ. Nil
- 5 Miss Shalu Subhash Giri
Age 9 years, occ. Nil

The Applicant Nos. 2 to 5 being minors,
through the Applicant No.1 as the mother
and Next friend of the Minor Applicants.

- 6 Smt. Rajder Jagar Nath Giri
Age 75 years, occ. Nil
All R/o. Kamraj Nagar, Galli No.8,
Ghatkoper (East), Mumbai

Permanent Address :
H.No.94, Vill/Mohalla-Baralpur,
Tahsil-Machhlishahar, Dist. Jaunpur

7 The Ex-Engineer (TR) City
Brihan Mumbai Maha Nagar Palika
Executive Engineer Transport,
City Worli Garage, Dr. E. Moses Road,
Worli, Mumbai-400 018 .. Respondents.

Ms. Jyoti Bajpayee Pandey for the Petitioner.
None for the Respondents.

CORAM : M.S. SONAK, J.
DATE : 19 JANUARY, 2016

P.C. :

1 The challenge in this petition is to the order dated 12 June 2015 made by the Motor Accident Claim Tribunal, Mumbai, disabling the owner and the petitioner-insurance company from leading the evidence on the point of negligence and non-involvement of the vehicle in the accident at the stage of consideration of Application under Section 163A of the said Act. The section reads thus :

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 or 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.

2 Sub-section 2 of Section 163A of the said Act inter alia provides that 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. In view of this provision, it is clear that issue of negligence is really not an issue that is required to be gone into while deciding the application u/s 163A of the said Act. In all fairness, the learned Counsel for the petitioner also did not contend that the petitioner-insurance company is required to be permitted to lead any evidence on the aspect of negligence.

3 However, the learned Counsel for the petitioner contended that the owner as well as Insurance Company can always be permitted to demonstrate that the vehicle in question was not at all involved in the accident and, therefore, the impugned order, atleast to the extent it disables the petitioner from leading the evidence on the part of “non involvement of the vehicle in the accident”, is ultra vires and is required to

be interfered with.

4 Although there is some substance in the contention of the learned Counsel for the petitioner, in the facts and circumstances of this case, there is no necessity of granting petitioner opportunity to lead the evidence on the aspect of non involvement of the vehicle in question. If the pleadings are perused, then it is evident that defence of non involvement has not been raised. It is settled position in law that there cannot be any variance between the pleadings and proof.

5 If the responses submitted by the petitioner-insurance company as well as the owner of the vehicle are perused, then, it is clear that there is no case set out with regard to non - involvement of the vehicle in question. The case set out is that there was no negligence on the part of the owner of the vehicle and it is claimed that it was auto rickshaw which, in rash and negligent manner, dashed against the vehicle in question, which is a dumper which was correctly parked upon the road. Admittedly the Auto Rickshaw has dashed against the dumper , leading to the accident. Therefore, this not the case of non-involvement of the vehicle but rather defence raised is that vehicle though involved, was not really responsible for the accident. The defence is that owner by properly parking dumper on the road, was not really negligent, therefore, not

responsible for the accident. As noted earlier, such an issue is irrelevant for the purpose of proceedings under Section 163A of The Motor Vehicles Act, 1988. The impugned order also take into consideration admissions in the pleadings as aforesaid. The evidence is to be led by the parties, cannot travel beyond their pleadings.

6 Therefore, there is no jurisdictional error in the making of the impugned order. The petition is, therefore, dismissed. There shall be no order as to costs.

(M.S. SONAK, J.)