

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 19.07.2016

CORAM

THE HON'BLE MR. JUSTICE S.MANIKUMAR
AND
THE HON'BLE MR. JUSTICE M.VENUGOPAL

C.M.A. No.1832 of 2015

1. Rani
2. Chithra
3. Sathish Kumar
4. Minor Niruba ... Appellants/Petitioners
(Represented by her mother,
1st appellant)

vs

1. Sivanathan
(1st Respondent ex-parte in lower Court
and hence, notice may be dispensed with)
2. The Oriental Insurance Company Ltd.,
Siddhaveerappa Chetty Street,
Dharmapuri-1. ... Respondents/Respondents

Appeal filed under Section 173 of the Motor Vehicles Act, 1988, against the fair and decretal order dated 30.09.2005 passed in M.C.O.P.No.201 of 2003, on the file of the Motor Accidents Claims Tribunal (Additional District Judge), Dharmapuri.

For Appellant ... Mr.Ma.P.Thangavel

For 2nd Respondent .. Mr.N.Vijayaraghavan

JUDGMENT

(Judgment of the Court was delivered by S.MANIKUMAR, J.)

Wife, daughters and son of the deceased have preferred a claim for compensation of the death of 52 year old Man, said to have worked as Senior Assistant in State Bank of India.

2. It is the case of the claimants that on 12.09.2002, while the deceased was proceeding near Annalampatty in the 1st respondent's motorcycle, bearing Registration No.TN 29 M 1722,

from Harur to Bethur, to perform the work assigned by the 1st respondent, there was a head-on-collision with another two-wheeler, coming in the opposite direction. He sustained injuries and succumbed to the same in the hospital, on the same day. In this regard, a case in Cr.No.762 of 2002, for the offences under Sections 304(A) IPC., has been registered on the file of Harur Police Station. According to the legal representatives, the deceased was engaged as a Senior Assistant in State Bank of India and earned Rs.18,296.21 per month. They claimed compensation of Rs.16,19,500/-.

3. The owner of the vehicle remained absent and he has been set ex-parte before the lower Court.

4. The 2nd respondent-Insurance Company, in their counter affidavit, submitted that as the accident occurred due to the negligence of the deceased and when the criminal case has been registered against him, the claim petition is not maintainable. They further submitted that a claim under Section 140 of the Motor Vehicles Act alone, is maintainable and at best, the claimants can be awarded the statutory amount. Without prejudice to the above, they disputed the age, avocation and income of the deceased and also the compensation claimed under various heads.

5. Before the Tribunal, wife of the deceased examined herself as PW.1 and marked Ex.P1 - FIR, Ex.P2 - Post-Mortem Certificate, Ex.P3 - Insurance Policy, Ex.P4 - Driving Licence and Ex.P5 - Salary Certificate. No oral or documentary evidence has been adduced on behalf of the 2nd respondent-Insurance Company.

6. On evaluation of pleadings and evidence, the Tribunal found that the accident occurred due to the negligence of the deceased. Therefore, the Tribunal held that the claim petition, made under Section 163-A of the Motor Vehicles Act, 1988, is not maintainable, dismissed the same.

7. Assailing the correctness of the award, Mr.Ma.P.Thangavel, learned counsel for the appellants submitted that the 2nd respondent-Insurance Company has failed to prove that the deceased was at fault and having not obtained any permission from the Tribunal, under Section 170 of the Motor Vehicles Act, 1988, the 2nd respondent-Insurance Company is not entitled to defend the claim, on any ground, other than the defences stipulated under Section 149(2) of the Motor Vehicles Act, 1988.

8. Learned counsel for the appellants further submitted that the benefits under Section 163-A of the Motor Vehicles Act, are applicable to the appellants, even assuming without admitting that the deceased was found to be the tortfeasor and on a conjoint reading of the provisions of Section 163-A and Second Schedule to the Motor Vehicles Act, 1988, the appellants, who are victims of fatal accident, cannot be deprived of the statutory benefits, under social welfare legislation and accordingly, they should be compensated, under Section 163-A of the Act.

9. Per contra, Mr.N.Vijayaraghavan, learned counsel for the 2nd respondent-Insurance Company submitted that when the deceased himself was the tort-feasor, a claim under Section 163-A is not maintainable. Without prejudice to the same, he submitted that a claim under Section 163-A could be entertained only in respect of those victims, whose income is Rs.40,000/- per annum or less, and in respect of persons, whose income more than Rs.40,000/- per annum, the Tribunal can only adjudicate a claim, under Section 166 of the Motor Vehicles Act and not under Section 163-A.

10. Learned counsel for the 2nd respondent-Insurance Company submitted that as the accident occurred due to the rash and negligent driving of the deceased, the appellants/claimants are entitled to only a sum of Rs.50,000/- under Section 140 of the Motor Vehicles Act and that the Claims Tribunal has rightly dismissed the claim petition, filed under Section 163-A of the Motor Vehicles Act.

11. Heard the learned counsel for the parties and perused the materials available on record.

12. In Deepal Girishbhai Soni and others Vs. United India Insurance Co.Ltd., Baroda, reported in 2004 (5) SCC 385, relied on by the Tribunal, the Hon'ble Supreme Court explained the difference between a claim for compensation under Section 163-A and 166 of the Motor Vehicles Act, with reference to the various considerations, including the scheme of the Act.

13. In New India Assurance Company Ltd., Vs. Umesh Kumari and others reported in 2010 (2) ACC 98, New India Assurance Company Ltd., tested the correctness of the order of the Tribunal, granting compensation to the claimants therein, on account of death, in a road transport accident. The contention of the insurance company was that no liability can be fastened, as the deceased was not a third party and therefore, the claim petition filed under Section 163-A of the Motor Vehicles Act was not maintainable. Section 163-A of the Motor Vehicles Act, 1988, lays down that the owner of the motor vehicle or the authorised insurer shall be liable to pay compensation in case

of death or permanent disability due to an accident arising out of the use of motor vehicles as indicated, in the second schedule and the same was pressed into service to contend that the legal heirs cannot maintain a claim against the owner and the insurer. The deceased Pavankumar was a son of the owner. The policy was a comprehensive policy. Referring to paragraph 21 in Ningamma and another v. Union India Insurance Co. Ltd., reported in 2009 ACJ 2020, which reads that, Section 147 of the Motor Vehicles Act provides that the policy of insurance can also cover cases against any liability which may be incurred by the insurer in respect of death or fatal injury to any person including owner of the vehicle or his authorised representative carried in the vehicle or arising out of the use of the vehicle in the public place and having regard to the receipt of premium covering both owner cum driver, a learned Judge of the Punjab and Haryana High Court held that

"the aforesaid phrase would obviously mean to cover owner or driver of the vehicle. Moreover, it is the case of the appellant itself that Pawan Kumar deceased cannot be treated as a third party being son of the owner and he has to be termed as owner itself as he has stepped into the shoes of the owner by borrowing the vehicle with permission of the owner. If that is so, Pawan Kumar deceased has to be treated as owner of the vehicle and in that eventuality, the aforesaid clause of comprehensive policy would cover the claim of the claimant and on that basis of the aforesaid clause of the policy, the appellant is liable to pay the compensation."

14. In National Insurance Co.Ltd., vs. Sinitha and others, reported in 2012 ACJ 01, one X was riding a motor cycle. Y was the pillion. While giving way to a bus coming from the opposite direction, the motor cycle hit a big laterite stone lying on the tar road and due to the impact, the motor cycle overturned, resulting injuries both the rider and the pillion. The motor cyclist died. Wife, children and parents of the motor cyclist filed a claim petition before the Tribunal under Section 166 of the Motor Vehicles Act. The claim petition was subsequently amended under Section 163-A of the Motor Vehicles Act. The Tribunal allowed the claim petition and quantified the compensation. National Insurance Company, insurer of the motor cycle, preferred an appeal. One of the contentions raised before the High Court was that the Tribunal erred in awarding Rs.5,000/- towards pain and suffering which was impermissible under Section 163-A of the Act. Even without notice to the claimants the aforesaid amount was ordered to be deducted. The compensation awarded under the other heads was confirmed. Not satisfied with the decision, National Insurance Co.Ltd., preferred a further appeal to the Hon'ble Supreme Court. The first contention advanced before the Hon'ble Supreme Court was

that a legal representative is not entitled to raise any claim for compensation, because the accident in question occurred solely due to the negligence of the deceased. Reliance was also placed on FIR, Postmortem Certificate, Observation Mahazar. Earlier, the Tribunal, held that X was responsible for the accident. On the contra, placing reliance on a decision of this Court in Oriental Insurance Company Ltd., Vs. Hansrajbhai V. Kodala, reported in 2001 ACJ 827 (SC), the learned counsel for the claimants therein submitted that compensation determined under Section 163-A of the Act was under no fault liability. It was therefore submitted that the issue as to whether there was any 'wrongful act' 'neglect' or 'fault' at the hands of the deceased X was irrelevant for determining a claim under Section 163-A of the Act. While considering as to whether the claim, under Section 163-A and 166 of the Act fall under no fault liability principle where there is no need to prove 'wrongful act', 'neglect' or 'fault', as the case may be, and whether a claim under Section 163-A of the Act is maintainable notwithstanding Section 140 of the Act is deals with no fault liability. The Hon'ble Supreme Court, after considering the statutory provisions, Sections 140, 163-A, 166, at paragraphs 11, to 13, 15, 16 to 19, held as follows:-

"11. Having arrived at the conclusion that the issue in hand has to be decided independently, we will now venture to determine whether a claim made under Section 163A of the Act is a claim under the "fault" liability principle, or under the "no-fault" liability principle. We are satisfied, that if a claim for compensation under a provision, is not sustainable for reason of a "fault" on account of any one or more of the following i.e., "wrongful act", "neglect" or "default", the provision in question would be governed by the "fault" liability principle. Stated differently, where the claimant in order to establish his right to claim compensation (under a particular provision) has to establish, that the same does not arise out of "wrongful act" or "neglect" or "default", the said provision will be deemed to fall under the "fault" liability principle. So also, where a claim for compensation can be defeated on account of any of the aforesaid considerations on the basis of a "fault" ground, the same would also fall under the "fault" liability principle. On the contrary, if under a provision, a claimant does not have to establish, that his claim does not arise out of "wrongful act" or "neglect" or "default"; and conversely, the claim cannot be defeated on account of any of the aforesaid considerations; then most certainly, the provision in question will fall under the "no-fault" liability principle.

12. For determination of the issue under consideration, namely, whether Section 163A of the Act is governed by the "fault" or the "no-fault" liability principle, it is first relevant for us to examine Section 140 of the Act, so as to determine whether it has any bearing on the interpretation of Section 163A of the Act. Section 140 aforesaid is being extracted hereunder :

"140. Liability to pay compensation in certain cases on the principle of no fault.-

(1) Where death or permanent disablement of any person has resulted from an accident arising out of the use of a motor vehicle or motor vehicles, the owner of the vehicle shall, or, as the case may be, the owners of the vehicles shall jointly and severally, be liable to pay compensation in respect of such death or disablement in accordance with the provisions of this section.

(2) The amount of compensation which shall be payable under sub-section (1) in respect of the death of any person shall be a fixed sum of fifty thousand rupees and the amount of compensation payable under that sub-section in respect of the permanent disablement of any person shall be a fixed sum of twenty-five thousand rupees.

(3) In any claim for compensation under sub-section (1), the claimant shall not be required to plead and establish that the death or permanent disablement in respect of which the claim has been made was due to any wrongful act, neglect or default of the owner or owners of the vehicle or vehicles concerned or of any other person.

(4) A claim for compensation under sub-section (1) shall not be defeated by reason of any wrongful act, neglect or default of the person in respect whose death or permanent disablement the claim has been made nor shall the quantum of compensation recoverable in respect of such death or permanent disablement be reduced on the basis of the share of such person in the responsibility for such death or permanent disablement.

(5) Notwithstanding anything contained in sub-section (2) regarding death or bodily injury to any person, for which the owner of the vehicle is liable to give compensation for relief, he is also liable to pay compensation under any other law for the time being in force : Provided that the amount of such compensation to be given under any other law shall be

reduced from the amount of compensation payable under this section or under section 163A." For the instant determination, only sub-sections (3) and (4) are relevant. A perusal of sub-section (3) reveals, that the burden of "pleading and establishing", whether or not "wrongful act", "neglect" or "default" was committed by the person (for or on whose behalf) compensation is claimed under Section 140, would not rest on the shoulders of the claimant. In other words the onus of proof of "wrongful act", "neglect" or "default" is not on the claimant. The matter however does not end with this. A perusal of sub-section (4) of Section 140 of the Act further reveals, that the claim of compensation under Section 140 of the Act cannot be defeated because of any of the "fault" grounds ("wrongful act", "neglect" or "default"). This additional negative bar, precluding the defence from defeating a claim for reasons of a "fault", is of extreme significance, for the consideration of the issue in hand. It is apparent, that both sides are precluded in a claim raised under Section 140 of the Act from entering into the arena of "fault" ("wrongful act" or "neglect" or "default"). There can be no doubt, therefore, that the compensation claimed under Section 140 is governed by the "no- fault" liability principle.

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

"Section 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 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 163A 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 163A 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 163A of the Act. The additional negative bar, precluding the defence 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 163A of the Act, has to have a bearing on the interpretation of Section 163A 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 163A of the Act. The legislature must have refrained from providing such a negative clause in Section 163A intentionally and purposefully. In fact, the presence of sub-section (4) in Section 140, and the absence of a similar provision in Section 163A, 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 defence to defeat a claim for compensation raised under Section 163A 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 defence 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 defence (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.

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 Ltd., v. Hansrajibhai V.Kodala* (supra), 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.

17. Having recorded our conclusions herein above, it is essential for us to determine whether or not the compensation awarded to the claimants/respondents in the present controversy, by the Tribunal, as also, by the High Court, is liable to be set aside on the plea of "negligence" raised at the hands of the petitioner. The award rendered by the Tribunal, as also, the decision of the High Court in favour of the claimants/respondents is, therefore, liable to be reappraised keeping in mind the conclusions recorded by us. In case, the petitioner can establish having pleaded and proved negligence at the hands of the rider Shijo, the petitioner would succeed. The pleadings filed before the Tribunal at the hands of the petitioner, are not before us. What is before us, is the award of the Tribunal dated 19.4.2005. We shall endeavour to determine the plea of negligence advanced at the hands of the learned counsel for the petitioner from the award. The Tribunal framed the following issues for consideration :

- "1) Who are responsible for the accident?
- 2) What, if any is the compensation due and who are liable?
- 3) What is the annual income of the deceased?
- 4) Whether the OP (2280/00) is maintainable under Section 168A of the N.V. Act?"

It is difficult to understand the true purport of the first issue framed by the Tribunal. A person may be "responsible" for an act, yet he may not be "negligent". Illustratively, a child who suddenly runs onto a road may be "responsible" for an accident. But was the child negligent? The answer to this question would emerge by unraveling the factual position. A child incapable of fending for himself would certainly not be negligent, even if he suddenly runs onto a road. The person in whose care the child was, at the relevant juncture, would be negligent, in such an eventuality. The driver at the wheels at the time of the accident is responsible for the accident, just because he was driving the vehicle, which was involved in the accident. But considering the limited facts disclosed in the illustration can it be said that he was negligent? Applying the limited facts depicted in the illustration, it would emerge that he may not have been negligent. Negligence is a factual issue and can only be established through cogent evidence. Now the

case in hand. In the present case also, the negligence of Shijo shall have to be determined from the factual position emerging from the evidence on record. Issue no.(1) framed by the Tribunal therefore, may not provide an appropriate answer to the issue in hand. Besides there being no issue framed by the Tribunal for adjudicating "negligence" in the accident under reference, it is also clear that the petitioner-Insurance Company did not seek the courts intervention on such a plea. It is also relevant to mention, that no witness was produced by the petitioner-Insurance Company before the Tribunal. During the course of hearing, learned counsel for the petitioner only relied upon the conclusions drawn by the Tribunal on issue no.(1). For this, our attention was drawn to paragraph 8 of the award rendered by the Tribunal which is being extracted hereunder :

"8. Issue No.1 : This issue arises now only in O.P. 2281/2000. PW1 admitted that she has seen the accident. Exhibits A1 to A5 and Exhibit A10 are records from the connected criminal case charge sheeted under Sections 279, 337 and 304A, IPC as against the deceased Shijo. They are the copies of the FIR, post mortem certificate, scene mahazor, report of inspection of the vehicle, final report and the inquest report, respectively. In the absence of contra evidence I find that the deceased Shijo was responsible for the accident."

The Tribunal in holding, that the rider Shijo was responsible for the accident, had placed reliance on copies of the first information report, post mortem certificate, scene mahazor, report of inspection of vehicle, inquest report and final report. Neither of these in our considered view, can constitute proof of "negligence" at the hands of Shijo. Even if he was responsible for the accident, because the motorcycle being ridden by Shijo had admittedly struck against a large laterite stone lying on the tar road. But then, it cannot be overlooked that the solitary witness who had appeared before the Tribunal had deposed, that this has happened because the rider of the motorcycle had given way to a bus coming from the opposite side. Had he not done so there may have been a head-on collusion. Or it may well be, that the bus coming from the opposite side was being driven on the wrong side. This or such other similar considerations would fall in the realm of conjectural determination. In the absence of concrete evidence this factual jumble will remain an unresolved tangle. It has already been concluded hereinabove, that in a claim raised under

Section 163A of the Act, the claimants have neither to plead nor to establish negligence. We have also held, that negligence (as also, "wrongful act" and "default") can be established by the owner or the insurance company (as the case may be) to defeat a claim under Section 163A of the Act. It was therefore imperative for the petitioner-Insurance Company to have pleaded negligence, and to have established the same through cogent evidence. This procedure would have afforded an opportunity to the claimants to repudiate the same. Has the petitioner discharged this onus? In the present case, only one witness was produced before the Tribunal. The aforesaid witness appeared for the claimants. The witness asserted, that while giving way to a bus coming from opposite side, the motorcycle being ridden by Shijo, hit a large laterite stone lying on the tar road, whereupon, the motorcycle overturned, and the rider and the pillion-rider suffered injuries. The petitioner insurance-company herein did not produce any witness before the Tribunal. In the absence of evidence to contradict the aforesaid factual position, it is not possible for us to conclude, that Shijo was "negligent" at the time when the accident occurred. Since no pleading or evidence has been brought to our notice (at the hands of the learned counsel for the petitioner), it is not possible for us to conclude, that the inverse onus which has been placed on the shoulders of the petitioner under Section 163A of the Act to establish negligence, has been discharged by it. We, therefore, find no merit in the first contention advanced at the hands of the learned counsel for the appellant.

18. The second contention advanced at the hands of the learned counsel for the petitioner was, that Shijo being the rider of the motorcycle, cannot be treated as a third party. It was pointed out, that the claim under Section 163A can only be raised at the behest of a third party. It seems, that the instant determination raised at the hands of the learned counsel for the petitioner, is based on the determination rendered by this Court in Oriental Insurance Company Ltd., v. Jhuma Saha (2007) 9 SCC 263, wherein, this Court held as under :

"10. The deceased was the owner of the vehicle. For the reasons stated in the claim petition or otherwise, he himself was to be blamed for the accident. The accident did not involve motor vehicle other than the one which he was driving. The question which arises for consideration is that the deceased himself being negligent, the claim petition under

Section 166 of the Motor Vehicles Act, 1988 would be maintainable." According to the learned counsel for the petitioner, since the rider of the vehicle involved in the accident was Shijo himself, he would stand in the shoes of the owner, and as such, no claim for compensation can be raised in an accident caused by him, under Section 163A of the Act.

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.

15. In the case on hand, no material evidence has been adduced by respondent-Insurance Company to prove that there was negligence on the part of the deceased, except relying on Ex.P1 - FIR. While adjudicating negligence, as between two drivers, involved in the accident, the Tribunal should have considered

the overall evidence. The Claimants have stated that it is a head on collision of two motorcycles. As per the version of the complainant, he came to know that an accident occurred, involving two vehicles and the injured, Venkatesan, was in fainted condition. So also, the other victim, Krishnan. He has not stated anything to the Police, as to who was negligent in causing the accident. While that be the complaint, it is not known, as to how, the Police has filed the FIR in Cr.No.762 of 2002, under Section 304(A) IPC., against the deceased, Venkatesan. The Tribunal seemed to have formed its finding, solely on this FIR.

16. Admittedly, the 2nd respondent-Insurance Company has not adduced any evidence to prove, whether the deceased was negligent. During cross-examination, PW.1, wife, has denied the suggestion that the accident occurred due to the rash and negligent riding of her husband. Unfortunately, the owner of the motorcycle, bearing Registration No.TN 29 M 1722, involved in the accident, though disputed the contention that the deceased was negligent, did not adduce any evidence. It is well settled that FIR is to set the criminal law in motion. But the aspect of negligence, has to be adjudicated by considering the overall evidence, adduced by the parties to the claim.

17. As per Section 163-A of the Motor Vehicles Act, the computation is based on structured formula. At the time of accident, the vehicle is covered under a comprehensive policy. Even if the deceased was negligent in causing the accident, a claim under Section 166, cannot be made. But in the absence of any evidence on the side of the Insurance Company to prove that the deceased was negligent, petition under Section 163-A, is maintainable, if the claim is restricted on structured formula.

18. Even taking it for granted that the income of the deceased was more than Rs.40,000/-, it is for the claimants to restrict their claim, under Section 163-A of the Motor Vehicles Act, 1988, to compute compensation on the structured formula. Ultimately, it should be the endeavour of the Tribunal/Courts to ensure that the legal representatives of the deceased get just compensation, to whatever, they are entitled, as per law. In view of the decision in National Insurance Co.Ltd., vs. Sinitha and others, reported in 2012 ACJ 01, this Court is of the view that a claim, under Section 163-A of the Motor Vehicles Act, is maintainable.

19. At the time of accident, the deceased was aged 52 years. Annual income taken is Rs.40,000/-. If $1/4^{\text{th}}$ is deducted towards personal and living expenses of the deceased and after applying '11' multiplier, the loss of contribution to the family, works out to Rs.3,30,000/- (Rs.40,000/- x 11 x $3/4$). Considering the age of the 1st appellant/claimant, Rs.75,000/- is

awarded towards loss of consortium. There are three children, including a minor. At the time of accident, appellants 2 and 3 were aged 24 and 19 years respectively. Rs.75,000/- each is awarded under the head, loss of love and affection to appellants 2 and 3. For the minor 4th respondent, Rs.1,00,000/- is awarded towards loss of love and affection. Rs.25,000/- is awarded towards Funeral Expenses. A sum of Rs.10,000/- is awarded under the head transportation. A conventional damage of Rs.2,000/- is awarded under the head damage to clothes.

20. In view of the above, the appellants/claimants are entitled to Rs.6,92,000/- with interest, at the rate of 7.5% per annum, from the date of claim, till the date of realisation, except for the interregnum period of 2471 days in filing a restoration petition in M.P.Sr.No.102468 of 2014, as apportioned hereunder:

Dependency compensation	: Rs.3,30,000/-
Loss of Love and Affection	: Rs.2,50,000/-
Loss of Consortium	: Rs. 75,000/-
Funeral Expenses	: Rs. 25,000/-
Transportation	: Rs. 10,000/-
Damage to clothes	: Rs. 2,000/-

Total	: Rs.6,92,000/-

Out of the compensation awarded by this Court, the 1st appellant-Wife is entitled to Rs.2,02,000/-. Appellants 2 and 3 are entitled to get Rs.1,55,000/- each. With regard to the share of the 4th respondent, she is entitled to get Rs.1,80,000/-.

21. Hence, the Civil Miscellaneous Appeal is allowed. The respondent-Insurance Company is directed to deposit the entire award amount, with proportionate accrued interest and costs, to the credit of M.C.O.P.No.201 of 2003, on the file of the Motor Accidents Claims Tribunal (Additional District Judge), Dharmapuri, within a period of four (4) weeks from the date of receipt of a copy of this order. By this time, the 4th appellant would have attained majority. On such deposit being made, the appellants/claimants are permitted to withdraw the same, by making necessary application before the Tribunal. No costs. Consequently, connected Miscellaneous Petition is also closed.

-s/d-

Assistant Registrar

True Copy

Sub-Assistant Registrar

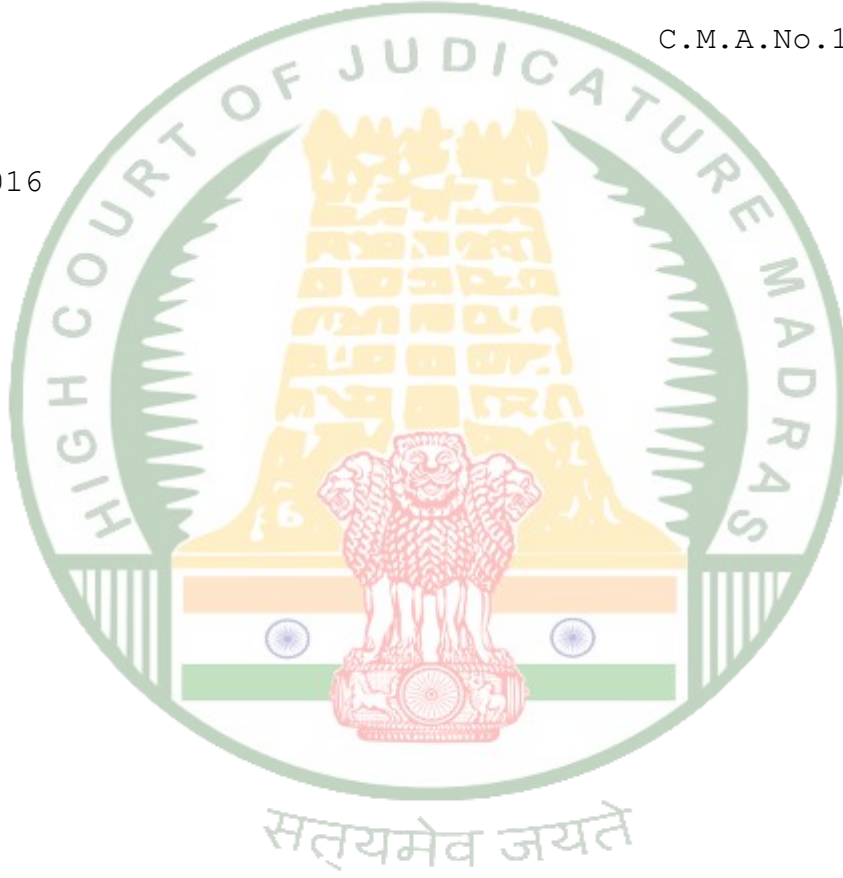
To

The Motor Accidents Claims Tribunal
(Additional District Judge), Dharmapuri.

+1 ccs to Mr.Ma.P. Thangavel Advocate sr 40602
+1 cc to Mr.M.B.Gopalan Associates sr 40718

C.M.A.No.1832 of 2015

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