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

Date of Decision: 2nd March, 2016

+ **MAC.APP. 142/2007 & 3341/2007**

ORIENTAL INSURANCE CO. LTD. Appellant

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

versuss

SHAKUNTALA & ANR Respondents

Through: Mr. Mayank Mohan, Adv.

CORAM:

HON'BLE MR. JUSTICE R.K.GAUBA

JUDGMENT

R.K.GAUBA, J (ORAL):

1. Dalip Kumar, aged about 20 years, died as a result of injuries suffered on account of accident involving scooter bearing registration no.DL-4SAA-9024 (the scooter) which he was riding at the time having skidded near Keshopur bus stand, Vikaspuri on 26.03.2005. It is an admitted case that the scooter was owned by his father Ayodhya Prasad (the second respondent herein). His mother Shakuntala (first respondent) filed a claim petition invoking Section 163-A of the Motor Vehicles Act, 1988 (the MV Act) on 26.05.2005 before the motor accident claims tribunal (the tribunal) which registered it as suit no.91/2005. She impleaded the appellant/insurance company as the first respondent and her husband (the owner/insured of the scooter) as the second respondent. The claim case was resisted by the

insurance company, *inter-alia*, on the grounds that the deceased himself was negligent in as much as he was under influence of alcohol at the time of accident and further that the insurance company could not be held liable under the insurance policy taken out by the owner against third party risk. The tribunal held inquiry and while rejecting the contentions of the insurance company awarded compensation in the sum of ₹4,04,000/- with interest at the rate of six percent (6%) per annum directing the insurance company to pay.

2. The insurance company, by appeal at hand, reiterates its submission that under third party insurance taken out by the registered owner (second respondent), only an Act policy, it could not be called upon to indemnify the owner in the fact situation at hand wherein he himself is one of the dependants and further because the deceased (son of the owner) having borrowed the vehicle from him had stepped into his shoes.

3. The insurance company relied on the judgments of Supreme Court in *New India Assurance Company Ltd. vs. Sadanand Mukhi & Ors.*, (2009) 2 SCC 417 and *Ningamma & Anr. vs. United India Insurance Company Ltd.*, (2009) 13 SCC 710.

4. The fact situation in the cases of *Sadanand Mukhi* (supra) and *Ningamma* (supra) were similar. In *Sadanand Mukhi* (supra), the motorcycle was owned by the father of the deceased and an Act only policy had been taken out by him in terms of Section 147 of the MV Act. The claim petition had been filed by the parents arising out of death resulting from the motorcycle having skidded on account of a street dog having come

in its way. In *Ningamma* (supra), the deceased was travelling on a motorcycle which he had borrowed from its real owner, it having struck against a bullock-cart that had come in its path, resulting in death.

5. In *Sadanand Mukhi* (supra), the Supreme Court observed as under:

“...Contract of insurance of a motor vehicle is governed by the provisions of the Insurance Act. The terms of the policy as also the quantum of the premium payable for insuring the vehicle in question depends not only upon the carrying capacity of the vehicle but also on the purpose for which the same was being used and the extent of the risk covered thereby. By taking an ‘act policy’, the owner of a vehicle fulfils his statutory obligation as contained in Section 147 of the Act. The liability of the insurer is either statutory or contractual. If it is contractual its liability extends to the risk covered by the policy of insurance. If additional risks are sought to be covered, additional premium has to be paid. If the contention of the learned counsel is to be accepted, then to a large extent, the provisions of the Insurance Act become otiose. By reason of such an interpretation the insurer would be liable to cover risk of not only a third party but also others who would not otherwise come within the purview thereof. It is one thing to say that the life is uncertain and the same is required to be covered, but it is another thing to say that we must read a statute so as to grant relief to a person not contemplated by the Act. It is not for the court, unless a statute is found to be unconstitutional, to consider the rationality thereof. Even otherwise the provisions of the Act read with the provisions of the Insurance Act appear to be wholly rational.

Only because driving of a motor vehicle may cause accident involving loss of life and property not only of a third party but also the owner of the vehicle and the insured vehicle itself, different provisions have been made in the Insurance Act as also the Act laying down different types of insurance policies. The amount of premium required to be paid for each of the policy is governed by the Insurance Act. A statutory regulatory authority fixes the norms and the guidelines.” (emphasis supplied.)

6. While holding that the insurance company could not be called upon to indemnify against the aforementioned fact situation, the Supreme Court took note of the view taken earlier in cases reported as *Oriental Insurance Co. Ltd. v. Jhuma Saha*, (2007) 9 SCC 263 and *United India Insurance Co. Ltd. v. Davinder Singh*, (2007) 8 SCC 698.

7. In *Jhuma Saha* (supra), the Supreme Court held thus:-

"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.

11. 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 property. Thus, if the insured cannot be fastened with any liability under the provisions of the Motor Vehicles Act, the question of the insurer being liable to indemnify the insured, therefore, does not arise."

8. It was furthermore held: (*Jhuma Saha* case, SCC pp, 265066, para 13)

"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 Motor Vehicles Act which in no uncertain terms covers a risk of a third party only would be attracted in the present case." (emphasis supplied)

9. In *Davinder Singh* (supra), it was held as under:-

“ 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 Motor Vehicles 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-a-vis the purport and object sought to be achieved by a beneficent legislation before a forum constituted under the Motor Vehicles Act and enforcement of a contract qua contract before a Consumer Forum.” (emphasis supplied)

10. In the case of *Ningamma* (supra), the Supreme Court followed the view taken, *inter-alia*, in *Sadanand Mukhi* (supra) and observed thus:-

“ On the other hand, the counsel for the respondent has argued that the High Court rightly set aside the judgment and order of the Tribunal since in order to become eligible for compensation for the loss caused due to the use of motor vehicle as provided under Section 163-A of the MVA, the person who has suffered the loss must be a third party under the MVA and since in the present case the deceased or the appellants are not the third party, therefore, judgment rendered by the High Court did not call for any interference. It was further submitted that the driver is a representative of the owner if he was driving under the owner's instructions or permission and is thus owner qua insurance company and not a third party.

In the light of the aforesaid submissions, the question that falls for our consideration is whether the legal representatives of a person, who was driving a motor vehicle, after borrowing it from the real owner meets with an accident without involving any other vehicle, would be entitled to compensation under Section 163-A of MVA or under any other provision(s) of law and also whether the insurer who issued the insurance policy would be bound to indemnify the deceased or his legal representative?

In Oriental Insurance Company Ltd. v. Rajni Devi and Others, (2008) 5 SCC 736, wherein one of us, namely, Hon'ble S.B. Sinha, J. was a party, it has been categorically held that in a case where third

party is involved, the liability of the insurance company would be unlimited. It was also held in the said decision that where, however, compensation is claimed for the death of the owner or another passenger of the vehicle, the contract of insurance being governed by the contract qua contract, the claim of the claimant against the insurance company would depend upon the terms thereof.

It was held in the Oriental Insurance Co. Ltd. case that Section 163-A of the MVA cannot be said to have any application in respect of an accident wherein the owner of the motor vehicle himself is involved. The decision further held that the question is no longer res integra. The liability under section 163-A of the MVA is on the owner of the vehicle. So a person cannot be both, a claimant as also a recipient, with respect to claim. Therefore, the heirs of the deceased could not have maintained a claim in terms of Section 163-A of the MVA.

In our considered opinion, the ratio of the decision in Oriental Insurance Co. Ltd. case is clearly applicable to the facts of the present case. In the present case, the deceased was not the owner of the motorbike in question. He borrowed the said motorbike from its real owner. The deceased cannot be held to be an employee of the owner of the motorbike although he was authorised to drive the said vehicle by its owner, and therefore, he would step into the shoes of the owner of the motorbike. We have already extracted Section 163-A of the MVA hereinbefore. A bare perusal of the said provision would make it explicitly clear that persons like the deceased in the present case would step into the shoes of the owner of the vehicle.

In a case wherein the victim died or where he was permanently disabled due to an accident arising out of the aforesaid motor vehicle in that event the liability to make payment of the compensation is on the insurance company or the owner, as the case may be as provided under Section 163-A. But if it is proved that the driver is the owner of the motor vehicle, in that case the owner could not himself be a recipient of compensation as the liability to pay the same is on him. This proposition is absolutely clear on a reading of Section 163-A of the MVA. Accordingly, the legal representatives of the deceased who

have stepped into the shoes of the owner of the motor vehicle could not have claimed compensation under Section 163-A of the MVA. ”

11. In view of the position of law to above effect, the contention of the appellant must be upheld. The claim petition under Section 163-A of the MV Act could not have been brought against the insurance company in the fact situation mentioned above.

12. Thus, the appeal is allowed. The impugned judgment is set aside.

13. The statutory deposit, if made, shall be refunded.

14. The appeal is disposed of in above terms.

**R.K. GAUBA
(JUDGE)**

MARCH 02, 2016

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