

Shephali

REPORTABLE

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO. 1022 OF 2013

1. **SURESH SAKHARAM KADAM**
Aged 40 years (father of the deceased)
2. **RANJANA SURESH KADAM**
Aged 36 years (mother of the deceased)
3. **KAMAL SURESH KADAM**
Aged 19 years (sister of the deceased)
All residing at Saiprasad Building, R. No.1,
1st Floor, Bhatwadi, Kisan Nagar No. 3,
Wagle Estate, Thane 400 604

... Appellants
(Orig. Claimants)

~ VERSUS ~

1. **THE TRANSPORT MANAGER**
Thane Municipal Transport Undertaking
Thane Municipal Coprn, Wagle Estate
Depot, Thane 400 604 (owners of
passenger bus No MH-04-G-5076)
2. **AREX TRAVELS & LOGISTICS**
C/o Lessee TMT Undertaking, Shop No.
5, Rd No. 27/34, Wagle Estate Depot,
Thane (W)
3. **ORIENTAL INSURANCE CO LTD**
Shreepal Complex, 2nd Floor, MG Road,
Ghatkopar (W), Mumbai 400 086

... Respondents
(Orig. Opponents)

APPEARANCES

FOR THE APPELLANTS	Mr AM Gokhale, <i>Advocate</i>
FOR RESPONDENT NO. 1	Mr MV Limaye, <i>Advocate</i>
FOR RESPONDENT NO. 3	Mr DS Joshi, <i>Advocate</i>

CORAM : G.S.Patel, J.

JUDGMENT RESERVED ON : 23 June 2017

JUDGMENT PRONOUNCED ON : 27 June 2017

JUDGMENT:

1. 8th April 2007 was an ill-fated day in Dinesh Suresh Kadam's short life of 22 years. At about 4:30 pm that Sunday afternoon, he was on his way to the township of Vasai to the north-west. He worked as a lift mechanic, and his employer, Fly Tech Elevators at Ghodbunder Road in Thane, had asked him to attend to a call from a client in Vasai. He set off on a company-owned motorcycle. A fellow worker and employee of Fly Tech, Sachin Shantaram Lad, was riding pillion. The two were travelling north-west along Ghodbunder Road. Near the Gaimukh Shiv Mandir area, a stretch that runs roughly east-west, just south and to the west of Vasai creek, Dinesh's motorcycle seems to have hit a patch of gravel or sand. It skidded. He lost control. The motorcycle hit the road divider. A bus leased to the Thane Municipal Corporation by Arex Travel & Logistics was, at that time, moving on the opposite side of the road. Here, the rival narratives diverge: the claimants say the motorcycle and Dinesh collided with the bus. The Thane Municipal

Corporation and its insurer say Dinesh never hit the bus. The bus driver saw Dinesh's motorcycle skid and topple, saw the two passengers on it fall, and stopped the bus. This is the centre of the case. The motorcycle may have collided with the bus — the evidence on this is conflicting — but if it did, this was *after* Dinesh was thrown off it and injured. Dinesh was not, the Respondents say, injured on account of an collision with the bus. There was thus no accident 'arising out of the use of' the bus.

2. Dinesh suffered grievous injuries. He was hospitalized at the Criticare Hospital in Thane. He died on 11th April 2007.

3. His parents and then unmarried sister filed this claim under Section 163-A of the Motor Vehicles Act, 1988. They claimed the accident was due to a collision between the motorcycle and the bus. They claimed compensation of Rs.4,50,000/- from the Thane Municipal Corporation, its bus lessor Arex Travel, and the insurer, Oriental Insurance Co Ltd.

4. The Motor Accidents Claims Tribunal, Thane dismissed the claim, and it did so with costs. Having heard Mr Gokhale for the Appellants, Mr Limaye for the Thane Municipal Corporation and Mr Joshi for Oriental Insurance, I am not persuaded that the judgment of the MACT Thane calls for any interference except to the limited extent of dispensing with the award of costs. This family should not be further traumatized. Two parents lost their son. A sister lost her brother. Whatever be the outcome of their claim, it cannot be said to be frivolous or mischievous, nor an abuse of the

process of the court. With the fairness for which they are known, both Mr Limaye and Mr Joshi instantly agree that the order of costs may be set aside.

5. Mr Gokhale's submission for the Appellants fall in two parts. First, he submits that the evidence is clear that the accident was due to a collision between the motorcycle and the bus, and that Dinesh's injuries are attributable to, and a result of, that collision. It makes no difference, he says, if the bus was moving or at a standstill. Second, he submits that the entire argument on the question of Dinesh's negligence, or contributory negligence, is wholly irrelevant. This was a claim under Section 163-A of the MV Act, and the claimants did not need to plead or prove negligence or default. When he died, Dinesh was earning Rs.3,000/- a month, which brought him within the Rs.40,000 per annum cap for Section 163-A to apply.

6. Mr Limaye and Mr Joshi join issue on the first submission. What they say is this: *there was no accident involving the bus at all*. The bus never hit Dinesh. The motorcycle hit a patch of sand, true; it skidded and its riders fell, also true; it hit the road divider and came before the bus, yes. But the bus driver, a witness before the MACT, is clear that he stopped his bus, and that the bus never struck Dinesh (or *vice versa*). It was the driver and the conductor who took the injured to hospital. Their answer centres on the interpretation of the words "due to an accident involving the use of the motor vehicle" in sub-section (1). Any nicer considerations (what if the bus was simply parked? Or immobilized while a tyre was being changed? Or broken down and awaiting towing) also do not

arise. As Mr Limaye quite pithily put it: “our bus was not involved in the accident at all.”

7. Section 163-A reads:

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 of 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.

(Emphasis added)

8. To address the first submission from Mr Gokhale, we must turn to the evidence before the Tribunal. In particular, we must have regard to the evidence of three witnesses and one document. The three witnesses, in sequence, are (1) Dinesh's father, Suresh; (2) the pillion rider Sachin; and (3) the bus driver Mohammed Rafique Sayyed. The only document to be considered, and it is the one on which the entirety of Mr Gokhale's case rests, is the spot panchanama.

9. The evidence of Suresh Kadam is soon despatched. He claimed there was a collision, but he was not an eye-witness, and the MACT quite correctly lent no credence to his testimony in this regard.

10. Sachin Lad's testimony is at Ex.45.¹ He accepted that he was riding pillion, that the motorcycle skidded and this was, he agreed in cross-examination, because it hit a sandy patch. He fell on the road. Dinesh was dragged along with the motorcycle. He then claimed the motorcycle hit the Thane Municipal Transport, or TMT, bus coming in the opposite direction. He did not, however, recall whether the TMT bus driver stopped after seeing the motorcycle skidding. This, as we shall see, is crucial.

11. Sayyed, the bus driver, too gave evidence, at Ex.51. He said he was driving at a moderate speed. As he approached the Gaimukh Shiv Mandir area, he saw Dinesh's motorcycle on the opposite side of the road. Sayyed deposed there was road-work going on: there

¹ Appeal paper book, *pp.* 46-47.

were stones in the middle of the road as part of the concreting work. The motorcycle, he said, was travelling at high speed. It hit the divider and jumped it. The motorcycle fell on its right, and Dinesh on his left. Sayyed said he immediately stopped the bus. The motorcycle fell in front of the bus. Importantly, he said the motorcycle did not come into contact with the bus at all. He and the bus conductor helped the injured and sent them hospital in a Tata Sumo vehicle. Sayyed was cross-examined. He flatly denied that the motorcycle skidded and collided with the bus.² This is to be contrasted with Suresh Kadam's cross-examination, where he says he was not an eye-witness, had never visited the accident spot and, importantly, that he did not know if the bus was involved in the accident or not.³

12. In this context, I return to the pillion rider's, Lad's, evidence, and I do so because I believe it is necessary to juxtapose it with what the others said. In cross-examination, Lad clearly said

"I do not remember whether driver of the TMT bus stopped it after noticing our motorcycle skidded towards other side of the road."

He then went on to say:

"It is true that driver and conductor of the bus sent us to the hospital. It is not true to say that Dinesh sustained injuries because of the dash of the bus."

(Emphasis added)

2 Appeal paper book, p. 45.

3 Appeal paper book, p. 43.

13. This is, in my view, fatal to Mr Gokhale's case. Lad was an eye-witness. He was, in that sense, involved in the accident. He was the pillion rider. If anyone could controvert Sayyed's testimony, it was Lad. Sayyed says he stopped the bus. Lad has no recollection one way or the other. Sayyed's testimony must therefore be accepted. Then there is the final statement where Lad accepts that Dinesh's injuries were not due to a collision with the bus. Mr Gokhale says this is an inadvertent typographical error; if so, it ought to have been corrected there and then, or, at any rate, before final arguments and before judgment was delivered. An appeal court cannot be expected to supply evidence contrary to the record. But to give the Appellants the benefit of doubt, I will for now put even that admission or concession aside and not allow it to factor into the final result today.

14. The oral testimony is, therefore, this: Suresh Kadam had no knowledge of the involvement of the bus, and candidly said so. Lad could not say if the bus had stopped or not. Sayyed was emphatic that he stopped the bus and there was no collision, and his testimony remained unshaken in cross.

15. What else did the Appellants bring out before the Tribunal? Ex 34 is the report Sayyed filed.⁴ It reflects his statement that Dinesh's motorcycle slid out from under him on the sandy patch, hit the divider and felled both rider and pillion. The spot panchanama also confirms this, and the version that it was the motorcycle, but the two-wheeler slid further and was dragged along. At best,

4 Appeal paper book, p. 54.

therefore, the motorcycle hit the bus but *after* Dinesh was thrown off it and injured. Dinesh's injuries are, therefore, not shown to be attributable to a collision with the bus. This is why the MACT concluded that it was unproved that the accident occurred "out of the use of" the TMT bus.

16. It is on this that the entire case turns. Returning to Section 163-A, we must have regard to these words 'out of the use of' and give them some reasonable meaning. Accidents vary widely. It is entirely possible that a passenger, driver or rider is injured *before* the collision; and those injuries might be fatal, but might not be attributable to the collision itself. A vehicle may spin out of control and throw its passengers out, and the vehicle may then hit another; or, as in this case, the rider of the motorcycle and his pillion passenger might have fallen with the motorcycle then being dragged a distance to hit another vehicle. For Section 163-A to apply, the injury or fatality must be the result of the collision, and a consequence of it. A collision after the occurrence of the injury, and independent of the injury, is not an accident 'arising out of the use of' the offending vehicle at all, simply because the offending vehicle was not involved in the injury- or fatality-causing incident. There is no material on the record of this appeal to show that Dinesh was entangled with the motorcycle when (and if) it hit the bus, or that his injuries were caused by that collision and not by his fall on the road. This has nothing at all to do with fault-liability or no-fault liability, negligence or contributory negligence. It is simply a matter of establishing causality, and that requirement is not dispensed with by Section 163-A. It is a threshold requirement, and it is indispensable: a claimant must show that the injury or death was a

result of an accident 'arising out of the use of a motor vehicle'. It must be shown that the accident caused the injury or death. A collision *after* the injury is not an accident 'arising out of the use of the motor vehicle'.

17. The MACT framed four issues. The first, whether the claimants proved that Dinesh died in the motor accident arising out of the use of the TMT bus, was answered in the negative. The second was whether the opponents proved that the accident was Dinesh's fault. The MACT answered this in the affirmative. The MACT therefore declined to make an award and dismissed the petition.

18. On the second submission, Mr Gokhale is correct to this extent, that negligence or default need not be pleaded or proved; and sub-Section (2) makes this abundantly clear. The reason is that this is a special provision engrafted in a welfare statute to provide quick and cost-effective remedy to the needy. It allows for the award of a predetermined amount as final compensation, not subject to adjustment, without insisting on a protracted trial and without proof of negligence. It is in the nature of a social security scheme and is a self-contained code, distinct from Section 166 and Section 140.⁵

19. The first of the issues framed was thus, as we have seen, correctly addressed. The second issue is, consequently, entirely moot; it matters little whether Dinesh was or was not at fault.

⁵ *Deepal Girishbhai Soni & Ors v United India Insurance Co Ltd*, (2004) 5 SCC 385 : 2004 ACJ 934.

20. In the judgment under appeal, however, the Tribunal considered at some length the arguments advanced on the question of Dinesh's negligence. It seems to have accepted the proposition that Section 163-A will not aid a person who is not himself a victim of the accident, and did so on the basis of the Karnataka High Court judgment in *Appaji v M Krishna & Anr.*⁶ It is true that *Appaji* refers to *Oriental Insurance Co Ltd v Hansrajhai V Kodala*,⁷ but the observations in *Appaji* that a victim of his own rashness has no recourse under Section 163-A, and that it was not the legislative intent, the Court said, to allow compensation to those responsible for the accident in the first place are not drawn from *Kodala* at all. Indeed, a three-Judge bench of the Supreme Court in *Deepal Girishbhai Soni & Ors v United India Insurance Co Ltd*,⁸ while affirming *Kodala* (except on the question of the 'cap' under Section 163-A) on a reference where *Kodala* was doubted, said in paragraph 66 (of the SCC report), while analysing the scheme of the section:

66. We may notice that Section 167 of the Act provides that where death of, or bodily injury to, any person gives rise to claim of compensation under the Act and also under the Workmen's Compensation Act, 1923, he cannot claim compensation under both the Acts. The Motor Vehicles Act contains different expressions as, for example, "under the provision of the Act", "provisions of this Act", "under any other provisions of this Act" or "any other law or otherwise". In Section 163-A, the expression "notwithstanding anything contained in this Act or in any other law for the time being in force" has been used, **which goes to show that Parliament intended to insert a non**

6 2003 SCC OnLine Kar 826 : 2004 ACJ 1289.

7 (2001) 5 SCC 175 : 2001 ACJ 827.

8 (2004) 5 SCC 385 : 2004 ACJ 934.

obstante clause of wide nature which would mean that the provisions of Section 163-A would apply despite the contrary provisions existing in the said Act or any other law for the time being in force. Section 163-A of the Act covers cases where even negligence is on the part of the victim. It is by way of an exception to Section 166 and the concept of social justice has been duly taken care of.

(Emphasis added)

21. In 2012, the two-judge Bench of the Supreme Court in *National Insurance Co Ltd v Sinitha*,⁹ apparently without noticing the three-judge Bench decision in *Deepal Girishbhai Soni*, held that under Section 163-A it was always open to the opponent to put up a defence of negligence by the victim or claimant. The correctness of the decision in *Sinitha* was doubted in *United India Insurance Co Ltd v Sunil Kumar & Anr*,¹⁰ and the matter referred to a larger bench of the Supreme Court. Thus, it would seem that *Appaji* is impliedly over-ruled by *Deepal Girishbhai Soni*.

22. The MACT also relied heavily on the decision of a learned single Judge of this Court in *HDFC Chubb General Insurance Co Ltd v Shantidevi Rajbalsingh Thakur & Anr*,¹¹ in particular for its observations in paragraph 44. While allowing the appeal and setting aside a judgment that made an award under Section 163-A for the death of a gratuitous driver of an insured motor cycle, the learned single Judge in *HDFC Chubb* said:

9 (2012) 2 SCC 356.

10 (2014) 1 SCC 680 : 2013 ACJ 2856.

11 2007 SCC OnLine Bom 592 : 2008 ACJ 1280.

44. Though the application is under section 163-A, which does not require proof of negligence for claiming compensation, the requirements of the policy and the limits of liability of the insurance company would be under section 147 of M.V. Act and no other. Consequently, the term 'any person', as including only a third party which, upon a consideration of the aforesaid cases excludes the gratuitous driver, a gratuitous passenger, the employee of the owner or a pillion rider in the absence of a specific cover must apply to the driver of the motor cycle who met with the fatal accident also. Upon the same analogy, therefore, the 'victim' under section 163-A would exclude these persons. It would include only third parties which are taken to be pedestrians, passers-by and such other persons not in the motor vehicle and who specifically could not be covered under the insurance policy. **It would also not include a person himself negligent and on whose account even the owner would not be vicariously liable as he cannot claim damages.** As held in the case of United India Insurance Co. Ltd. v. Kantabai, 1991 ACJ 22 (Bombay), by the Division Bench of this court it is difficult to entertain the contention that the liability in respect of tortfeasor himself would be covered by the insurance company and that such tortfeasor (or his legal heir) could sue the insurance company under the contract of indemnity or under law of Torts to pay compensation. Hence no driver can claim compensation for the accident de son tort. Consequently, the liberal construction of section 163-A of the M.V. Act sought by the advocate of respondent No. 1 cannot be granted, ignoring the very purpose of the legislation and which would render it liable to large scale abuse of drivers neither confirming with standards of care and caution and owners not taking cover against such action by a special contract with insurance

companies upon payments of the requisite premium to cover such risks.

(Emphasis added)

23. The *HDFC Chubb* decision of 5th July 2007 makes no reference at all to the much earlier decision of 18th March 2004 in *Deepal Girishbhai Soni*, and is directly contrary to it. The view in *HDFC Chubb* is also directly contrary to the view of a larger Bench of this Court (AP Shah and SA Bobde JJ, as they then were), in *Latabai Bhagwan Kakade & Ors v Mohammed Ismail Mohd Saab Bagwan & Ors*.¹² I will need to quote from this at some length:

18. **The only other question which now remains to be considered is when section 163-A clearly stipulates that it is not necessary for the claimants to plead and prove negligence, would it be open for the owners of the vehicles/insurance companies to establish that the accident occurred due to negligence of the victim or he has contributed to the negligence.** It is evident from the legislative history of section 163-A that the section is in the nature of a beneficial legislation enacted with a view to confer the benefit of expeditious payment as per structured formula by way of compensation to the victims of accidents arising out of the use of motor vehicle on the basis of no fault liability. **In the matter of interpretation of a beneficial legislation the approach of the courts is to adopt a construction which advances the beneficial purpose** underlying the enactment in preference to a construction which tends to defeat the purpose. The object or purpose of introducing section 163-A is to give compensation to the victims of the motor vehicles

12 2001 SCC OnLine Bom 567 : 2002 ACJ 407.

accidents or to their relatives, i.e., a fixed compensation on the basis of Table/Second Schedule without going into a long drawn trial. A combined reading of sub-sections (1) and (2) of section 163-A shows that the victim or his heirs are entitled to claim from the owners/insurance companies compensation for the death or permanent disablement suffered due to the accident arising out of the use of the motor vehicle without proof of any fault or negligence in contrast to section 166 providing for getting compensation on the basis of fault liability where the claimant is required to prove wrongful act, neglect or default of the owner of the vehicle or vehicles concerned. **Thus section 163-A lays down that if it is established by the claimants that the death or disablement was caused due to accident arising out of the use of the motor vehicle, then they will be entitled to receive compensation as per the Second Schedule as a matter of right without a long drawn trial. If we accept the interpretation suggested by the insurance companies it would mean that the claimants will have to necessarily prove the element of negligence on the part of the driver of the vehicle although the legislature has clearly stipulated that it is not necessary for the claimants to plead or prove negligence on the part of the driver of the motor vehicle because if the owner of the vehicle or the insurance company is permitted to prove contributory negligence or default on the part of the victim or claimants, naturally the claimants will have to lead evidence in rebuttal to prove the negligence on the part of the driver of the motor vehicle. Surely the legislature did not intend to create such a situation as it would defeat the very object of introducing the provision of section 163-A conferring a cheap, efficacious and speedy remedy on the claimants to claim compensation on the basis of no fault liability as per the structured formula**

contained in the Second Schedule. We are of the view that since the owner of the vehicle or insurance company is made liable to pay compensation irrespective of the fact whether the driver of the vehicle is at fault, there is no question of owners of vehicles or insurance companies being allowed to lead any evidence to prove the negligence and/or contributory negligence on the part of the victim.

19. The object of enacting section 163-A and the Second Schedule is to avoid long drawn litigation and inordinate delay in payment of compensation to the victim or his heirs who are in dire need of relief. If such affected claimant opts for accepting the lump sum compensation based on structured formula, instead of a higher compensation to which he may consider himself entitled, he would get relief at the earliest. This no fault liability has been introduced on the basis of the suggestion of the Law Commission to the effect that the expanding notions of social security and social justice envisage that liability to pay compensation must be on 'no fault liability' as observed by the Apex Court in *Ramanbhai Prabhatbhai's* case, 1987 ACJ 561 (SC), i.e., "in order to meet to some extent the responsibility of the society to the deaths and injuries caused in road accidents". However, the law before insertion of section 163-A was giving a limited benefit to the extent provided under section 140 for no fault liability and determination of the compensation amount on no fault liability was taking a very long time. That mischief is sought to be remedied by introduction of section 163-A and the delay is sought to be avoided to a large extent by affording benefit to the victims on structured formula basis. **If it is held that the right of the owner of the vehicle or the insurance company to prove negligence or wrongful act or default of the victim is kept alive whole purpose of introducing of section 163-A by the legislature will be**

frustrated. If this right is to be recognised as implied or to be read in the context of section 163-A, then we do not think that there would remain any difference between sections 163-A and 166.

20. In the case of *Ramdevsingh V. Chudasma v. Hansrajbhai V. Kodala*, 1999 ACJ 1129 (Gujarat), a Division Bench of Gujarat High Court has categorically held that under section 163-A the owner or insurance company cannot plead and prove negligence or default of the victim. The Division Bench observed:

“From the above differences in sections 163-A and 166 of the Motor Vehicles Act, the intention of the legislature becomes clear. Provision for compensation is a benevolent object of the legislature. To achieve that benevolent object, which had a number of hurdles to be crossed, the legislature has introduced section 163-A in the Act. The fact remains that by the use of motor vehicle when the accident takes place the victim is either injured or may be fatal. If a breadwinner of the family is taken away or if he is made crippled, the family of the dependants are required to be continued to be maintained from the next day and thereafter. If the accident is fatal one and breadwinner in the family is the victim how the members of the family/dependants will get their bread? Does a solace satisfy the hunger or need of the person? Making necessary provision in the legislation like section 166 has proved to be solace only as long drawn litigation takes place. To avoid the same and to provide instant and immediate

relief as it appears from the Statement of Objects and Reasons and the report of the Committee, section 163-A is introduced by the legislature to provide for immediate relief regardless of fault. This deviation from the common law is only with a view to adopt or reach the human need of the society. **If we read that the owner of the vehicle or the insurance company is entitled to defend the claim by advancing proof of wrongful act or neglect or default of the victim as it is not specifically prohibited in sub-section (2), then again, we are falling in the trap which the legislature has tried to avoid or get rid thereof of section 166 of the Act.**

Introduction of no fault is as a part of social justice. For the purpose of achieving social justice, legislature has departed from usual common law. An additional benevolent provision is added in a beneficial legislation for award of compensation..."

xx xxxx

"The question of negligence is not required to be gone into. **There be negligence or not but the involvement of the vehicle makes them liable. In substance, it can be said that the scope of section 163-A is that as soon as the accident occurs, it is signing of the blank cheque by the owner of the vehicle drawn on the insurer of the vehicle endorsed in favour of the claimants to be filled in by the Tribunal bearing in mind the structure provided in the Second Schedule of the Motor Vehicles Act.** On receiving the

necessary information, the Tribunal shall decide the multiplier and come to the conclusion about the income and a figure will be filled in the cheque, meaning thereby, award may be passed. This discharges the social responsibility of the State. When it was before the legislature to add or not section 163-A it has been made clear from the object that an adequate compensation to the victim of road accidents without going into long drawn procedures be provided. Hence, in the object, they have used the word adequate, while in the Act in section 168 the word 'just' is provided. The word 'adequate' was used by the legislature in its 'Statement of Objects and Reasons' but did not transgress further in the section incorporated by the legislature. Instead of either just or adequate compensation be provided, legislature predetermined the same and placed in the statute book the Second Schedule for the same. As we have discussed earlier, 'predetermined' means decided in advance. Therefore, the question of it being 'just' or 'adequate' does not remain open or at large for the Tribunal to decide and has given an example at that stage. The legislature has behaved in a specific manner and based on experience and catena of decisions of High Courts and Apex Court has introduced a Schedule providing for a predetermined compensation. For an application under section 163-A, forum is provided under section 165 of the Act but procedure is not prescribed as it is one prescribed under

section 168 when an application under section 166 is filed. This suggests that a summary procedure is contemplated for award on the basis of predetermined compensation provided in Schedule. Central Government has made it open vide sub-section (3) of section 163-A to amend the same to keep pace with the varying cost of living in the country. On a proper reading of section 163-A, an application made thereunder is required to be decided on affidavits and the documents annexed thereto. There will be no scope for any long drawn trial as there would be no issues which need to lead evidence by either of the parties.

Vide sub-section (2) of section 163-A the question of negligence will not be an issue for deciding the said application.

So far as the question of income is concerned, the same can be decided on affidavits supported by documents if there are any. Income would be personal knowledge of the claimants having necessary evidence to support the same. So far as the question of age is concerned, it will be also within the special knowledge of the claimants and the same can be supported by them by documentary evidence be it by opinion of doctor who performs the post-mortem. So far as the injuries are concerned there will be necessary medical evidence to support the same. Such material evidence may be supported by affidavit of the doctor. Therefore, in our opinion, in view of the provisions of section 163-A there is no scope for any trial and

recording of evidence is intended to be dispensed with and can be dispensed with if the requirements of section 163-A are satisfied."

21. In *Oriental Insurance Co. Ltd. v. Hansrajbhai V. Kodala*, 2001 ACJ 827 (SC), after a detailed examination of the scheme of section 163-A the Apex Court observed as under:

"Lastly, for interpretation and construction of section 163-A, we would refer to its heading and language. The heading is 'Special provisions as to payment of compensation on structured formula basis'. At the outset, we would make it clear that for interpretation of the words of section the language of the heading cannot be used to control the operation of the section, but at the same time being part of the statute it prima facie furnishes some clue as to the meaning and purpose of section [Re: *K.P. Varghese v. I.T.O.*, (1982) 1 SCR 629 at 647], In case of ambiguity or doubt heading can be referred to as an aid in construing the provision. This heading indicates that the legislature has envisaged special provision for paying compensation on structural formula basis instead of paying the compensation by long drawn litigation after establishing fault liability. Section also begins with non obstante clause 'notwithstanding anything contained in this Act or any law for the time being in force'. This would mean that it is not subject to any adjudication of right to claim compensation as provided under the Act. The owner of the motor vehicle or the

authorised insurer would be liable to pay compensation due to accident arising out of the use of motor vehicle."

22. **In view of the foregoing discussion and in the light of the above observations of the Supreme Court we have no hesitation in rejecting the contention that it would be open for the insurance companies or owners of the vehicles even under section 163-A to prove negligence or contributory negligence on the part of the victim.** In the light of the above observations we now proceed to deal with individual cases as under: ...

(Emphasis added)

24. *HDFC Chubb* thus did not reference the decision in *Latabai*, one that was delivered on 26th July 2001. The learned single Judge in deciding *HDFC Chubb* could not possibly have taken a view directly contrary to that of a Division Bench of the same Court in *Latabai*, leave alone contrary to the specific observation of the Supreme Court in *Deepal Girishbhai Soni*. *HDFC Chubb* is, therefore, very likely a decision rendered *per incuriam*. It is not a binding precedent.¹³ As far as this Court is concerned, it is bound by the decision of the three-Judge Bench of the Supreme Court in *Deepal Girishbhai Soni*, and by the decision of the Division Bench in *Latabai*, one that is consistent with *Deepal Girishbhai Soni*.

25. Mr Gokhale is therefore correct in his submission that the finding of negligence or fault on Dinesh's part is entirely

13 *HDFC Chubb* was distinguished in *Bajaj Allianz General Insurance Co Ltd v Kamalbai & Ors*, 2008 SCC OnLine Bom 649 : 2010 ACJ 858, *per* AS Oka J.

unsupported by the law as it presently stands. But that, unfortunately, does not fulfil his purpose. The first argument from Mr Limaye and Mr Joshi stands, even without any finding that Dinesh was in any way responsible or negligent — it rests on this: that there is no evidence to show that Dinesh's death, while undoubtedly tragic, was 'due to an accident arising out of the use of' the TMT bus. As we have seen, there is no evidence of Dinesh being at all injured by the bus; he was injured when he fell, and he fell and was injured before his motorcycle hit the bus, if it ever did. The fact that his motorcycle might, at best, have skittered further under its own momentum after dislodging Dinesh, and *then* collided with the bus will not bring this case within the ambit of Section 163-A.

26. I must, therefore, and with some regret, dismiss the Appeal. However, the order of costs in the impugned judgment is set aside, for reasons previously indicated. This dismissal too is without any order of costs.

27. The First Appeal is disposed of in these terms. It only remains for me to thank Mr Gokhale, Mr Limaye and Mr Joshi for their very able assistance in the matter.

(G.S. PATEL, J.)