

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

FIRST APPEAL NO.2829 OF 2013

The New India Assurance Company Ltd.
A subsidiary of the General Insurance
Corporation of India and a company
Incorporated under the Companies Act
having one of its Divisional office at
Adalat Road, Aurangabad
Through its Manager (Legal Hub) &
Authorized signatory

... APPELLANT

VERSUS

1. Shakuntala w/o Raju Shelke,
Age: 35 years, Occ.: Household,
R/o. Lasurgaon, Tq. Vaijapur,
Dist. Aurangabad
2. Raju Parasram Shelke
Age: 42 years, Occ.: Labour,
R/o as above.
3. Master Vikas s/o Raju Shelke
Age: 5 years,
u/g of claimant Nos.1 & 2.
4. Jyoti d/o Raju Shelke,
Age: 12 years, Occ.: Student R/o as above.
5. Soni d/o Raju Shelke,
Age : 8 years,
Occ.: Student R/o as above.
6. Sanjay Sudarshan Jaiswal,
Age: Major, Occ.: Business,

R/o. Lasur Station,
Tq. Gangapur, Dist. Aurangabad

7. Rahul Rameshrao Punekar,
Age: 25 years, Occ.: Business,
R/o. Lasur Station,
Tq. Gangapur, Dist. Aurangabad

... **RESPONDENTS**

.....
Mr. A.B. Kadethankar, Advocate for appellant.
Mr. A.R. Borulkar, Advocate for Respondent Nos.1 to 5.
.....

CORAM : SMT. VIBHA KANKANWADI, J.

**Date of reserving
the judgment : 11th September, 2019.**

**Date of pronouncing
the judgment : 22nd October, 2019.**

JUDGMENT :

. Present appeal has been filed by original respondent No.2-Insurance Company challenging the judgment and award passed in M.A.C.P. No.175 of 2012 (Old M.A.C.P. No.04/2009) by Motor Accident Claims Tribunal, Vaijapur dated 26.08.2013 whereby petition under Section 163-A of the Motor Vehicles Act, 1988 came to be partly allowed with proportionate costs against the insurance company.

2. The original claimants who are the parents, brother and sisters of one Ganesh Raju Shelke had come with the case that deceased Ganesh was proceeding on a motor cycle bearing registration No. MH-20-BB-5895 on 01.09.2008 towards village Sawangi from Lasur Station. At that time, he was dashed by another vehicle bearing registration No. MH-20-AU-5898 which had come in opposite direction. The said motor cycle was driven by one Santosh Pawar. According to the claimants, Ganesh was driving the motor cycle in normal speed. However, after the accident, he had sustained multiple injuries on his head and other parts of the body. He died on the spot itself. Respondent No.1 is the owner of the motor cycle which was driven by the deceased and the said motor cycle was insured with respondent No.2. Respondent No.3 is the owner of the other motor cycle bearing No. MH-20-AU-5898. After the accident, one Ramdas Shejul had reported the accident to police station and both the drivers i.e. deceased as well as said Santosh Pawar have been prosecuted by police. Claimants had claimed compensation of Rs.4,00,000/- under the said petition under Section 163-A of the Motor Vehicles Act.

3. Respondent No.1 failed to file written statement. Respondent Nos.2 and 3 have filed separate written statements. They have denied age

and other particulars of Ganesh. They have also denied the involvement of both the vehicles in the accident. It has been contended by the insurance company that both the drivers had no valid and effective driving licence to drive respective motor cycles. It is contended that there is breach of terms of policy by respondent No.1. It was also contended by the insurance company that the insurance policy which was taken by respondent No.1 was “liability only policy” which does not cover any occupant who is gratuitously occupying the motor cycle. The claimants themselves have come with the case that with the consent of respondent No.1, the deceased was driving the said motor cycle. Under such circumstance, risk of the deceased was not covered by respondent No.2.

4. Respondent No.3 has contended that there was no negligence on the part of the driver of his motor cycle, but the accident took place due to the sole negligence on the part of deceased.

5. Taking into consideration these rival contentions issues have been framed. Claimants have laid oral as well as documentary evidence. The insurance company has examined its officer and produced a policy on record. Taking into consideration the evidence and after hearing both sides, the learned tribunal has come to the conclusion that both the said

motor cycles were involved in the accident, both the drivers were having valid and effective driving licence to drive the motor cycle, deceased was not travelling from the said motor cycle gratuitously, petition under Section 163-A of the Motor Vehicles Act was maintainable and therefore, the claimants are entitled to get compensation. Compensation of Rs.3,94,000/- together with interest at the rate of 7.5% per annum from the date of the petition till actual realisation of the amount has been granted. Only respondent Nos.1 and 2 have been held liable to pay compensation jointly and severally. Hence, present appeal by original respondent No.2.

6. Heard learned Advocate Mr. A.B. Kadethankar for the appellant-Insurance Company and learned Advocate Mr. A.R. Borulkar for respondent Nos.1 to 5-Original claimants. Advocate for respondent Nos. 6 and 7 though served, failed to appear when the submissions were heard.

7. Learned Advocate appearing for the appellant submitted that the tribunal has not taken into consideration the fact that though two motor cycles were involved in the accident, yet claimants had filed petition under Section 163-A of the Motor Vehicles Act, wherein the point of negligence cannot be gone into. The crime was registered against both the drivers. Therefore, it ought to have been held that the petition under

Section 163-A of the Motor Vehicles Act was not maintainable. Even if it is held that it is maintainable, yet the tribunal did not consider that the policy which respondent No.1 had taken was “Act only” policy which did not cover risk of gratuitous passenger. Deceased was driving the motor cycle with the consent of respondent No.1, therefore, he cannot be termed as ‘third party’. The evidence laid by insurance company has been wrongly interpreted. The statement made in the cross examination by R.W.-Sanjiv that the act policy covers risk of third person has been misinterpreted by holding deceased in the present case as ‘third party’. The ratio laid down in **New India Assurance Company Ltd. Vs. Lilabai Shrimant Misal & Ors., [2015 (1) Bom. C.R. 620]** by this Court wherein by taking note of the decisions in **T.V. Jose (Dr.) Vs. Chacko P.M., [2001 A.C.J. 2059]** and **New India Assurance Co. Ltd. Vs. Asha Rani, [AIR 2003 SC 607]** was considered and it has been held that “from the aforesaid discussion it can be said that it is settled law that if no premium is paid in respect of passenger of a private car, there will not be coverage to the risk to them. When there is no coverage of risk, no premium is paid, liability cannot be fastened on the Insurance Company to pay compensation.” As the tribunal has wrongly considered deceased Ganesh as ‘third party’, reliance has been placed on the decisions in which it is stated that the insurance company cannot deny

its liability to pay compensation to the 'third party'. In this case, the learned tribunal ought to have exonerated the insurance company.

8. Per contra, the learned Advocate appearing for the original claimants supported the reasons given by the tribunal and submitted that it was the contract between respondent Nos.1 and 2 in respect of insurance and therefore, the deceased was a 'third party'. Further in view of the fact that the petition was under Section 163-A of the Motor Vehicles Act, there was no question for the tribunal to go into the aspect as to who was negligent. The learned Advocate appearing for the claimants prayed for dismissal of the appeal.

9. Taking into consideration the above said submissions, a fact is required to be firstly noted that there is no dispute regarding death of Ganesh in the said vehicular accident. It is also not in dispute that even Ganesh had been prosecuted by police. Claimants had filed the said claim under Section 163-A of the Motor Vehicles Act and therefore, the tribunal could not have been gone into the aspect of who was negligent. What was required to be proved for a petition under Section 163-A of the Motor Vehicles Act was, the involvement of the said vehicle in the accident. When the involvement of the motor cycle which was owned by respondent No.1 is

not in dispute, then definitely the petition was maintainable under Section 163-A of the Motor Vehicles Act.

10. When the petition was maintainable the next question that would arise as to whether the insurance company, with whom admittedly the motor cycle owned by respondent No.1 was insured on the date of the accident, can be held responsible to pay the compensation. The learned tribunal has considered the deceased as 'third party' and therefore, that character, when has been challenged by the insurance company, will have to be adjudicated first. Chapter XI of the Act bears a heading "Insurance of motor vehicles against third party risks". The definition of 'third party' is an inclusive one since Section 145-G only indicates that 'third party' includes the Government. In **Oriental Insurance Company Vs. Meena Variyal & Ors.** decided by the Apex Court on 02.04.2007, it has been observed that "it is Section 146 of the Motor Vehicles Act that makes it obligatory for an insurance to be taken out before a Motor Vehicle could be used on the road. The heading of that Section itself is "Necessity for insurance against third party risk". No doubt, the marginal heading may not be conclusive. It is section 147 of the Act that sets out the requirement of policies and limits of liability. It is provided therein that in order to

comply with the requirements of Chapter XI of the Act, a policy of insurance must be a policy which is issued by an authorized insurer; or which insures the person or classes of persons specified in the policy to the extent specified in sub section (2) against any liability which may be incurred by the owner in respect of the death or bodily injury or damage to any property of a third party caused by or arising out of the use of the vehicle in a public place". Therefore, when it has not been brought on record by the claimants that for what purpose Ganesh had taken the said motor cycle from respondent No.1 on the date of the accident, it will have to be termed that he was driving the said vehicle with the consent of respondent No.1 and in that case, he would be a gratuitous occupant. The policy which is on record at Exhibit-61 clearly states that it is a liability only policy. Note of the observations in **New India Assurance Company Limited Vs. Sadanand Mukhi and others [2009 4 Mh.L.J 13 (SC)]** are required to be considered, wherein it has been held that "the provisions of the Motor Vehicles Act, provide for two types of insurance - one statutory in nature and the other contractual in nature. Whereas the insurance company is bound to compensate the owner or the driver of the motor vehicle in case any person dies or suffers injury as a result of an accident; in case involving owner of the vehicle or others are proposed to be covered, an

additional premium is required to be paid for covering their life and property. 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 fulfills 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 the insurance. If additional risks are sought to be covered, additional premium has to be paid." In this case, the accident had occurred by use of the motor cycle which was being driven by the son of the insured. It was held that the insurance company would have no liability for the death of the son of the insured, as the insurance policy was a statutory policy. It is not correct to say that whosoever becomes victim of an accident arising out of the use of the vehicle would come within the purview of the term "a person" as provided for in Section 147 of the Act. Same ratio was upheld in **Oriental Insurance Company Ltd. Vs. Rajni Devi and Ors. [2008 (5) SCC 736]**. In this case also, the original petition was under Section 163-A of the Motor Vehicles

Act. It was observed "in a case where third party is involved, the liability of the insurance company would be unlimited. ...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 claimants against the insurance company would depend upon the terms thereof... Section 163-A of the Motor Vehicles Act cannot be said to have any application in respect of an accident wherein owner of the motor vehicle himself is involved. The question is no longer res integra. The liability under Section 163-A 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 Motor Vehicles Act. Thus, when the claimants have not explained under which capacity Ganesh was driving the motor cycle owned by respondent No.1, as aforesaid, he would be a gratuitous occupant and therefore, he cannot be termed as 'third party' and the learned tribunal ought not to have allowed the petition as against the insurance company. The ratio laid down in **Lilabai Misal's** case (Supra) wherein the decision in **T.V. Jose** and **Asha Rani** were covered is also applicable. In **T.V. Jose** (Supra) the Apex Court has decided that "Third party policy / Act only policy" does not cover the risk of gratuitous

passengers who are not carried for higher or reward in transport vehicle. Further in **Asha Rani's** case (Supra) it was held that if owner of a passenger carrying private vehicle wants to cover the risk of such passenger, he must pay premium for covering such risk, then only the insurance company can be made liable to pay compensation. Thus, all these catena of judgments would definitely show that in the present case, the risk of deceased Ganesh who was driving the motor cycle as gratuitous occupant was not covered under the said policy and therefore, respondent No.2 ought not to have been held jointly and severally liable to pay compensation with respondent No.1. Therefore, the appeal deserves to be allowed. It will not be out of place to mention here that the insurance company has not challenged the quantum that has been fixed by the tribunal. Only the liability of the insurance company has been challenged and therefore, I proceed to pass the following order :

ORDER

- I) Appeal is hereby allowed.
- II) The judgment and award passed in M.A.C.P. No.175 of 2012 by learned Member, Motor Accident Claims Tribunal, Vaijapur

dated 26.08.2013 is hereby set aside to the extent of making respondent No.2 - Insurance company liable to pay compensation to the claimants jointly and severally with respondent No.1.

III) The said petition stands dismissed as against respondent No.2.

IV) The amount deposited as per the award, if any, be refunded to the insurance company.

V) No order as to costs.

(SMT. VIBHA KANKANWADI, J.)

SCM