

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

FIRST APPEAL NO.191 OF 2017

Mrs. Safiakhatoon Kamal Ahmed
Khan and Ors.

...Appellants

Versus

Farooq Merchant and Anr.

...Respondents

...

Mr. Amol Gatne and Ms Swati Mehta for the Appellants.

Mr. Rajesh Kanojia with Ms Nitika Singh and Riddhi Chavan i/b. M/s.
Res Juris for Respondent No.2.

CORAM: SMT. ANUJA PRABHUDESSAI, J.

DATED : 28th JUNE, 2022.

ORAL JUDGMENT :-

1. By this appeal under Section 173 of the Motor Vehicles Act, 1988, the Appellants have challenged the judgment dated 17/03/2016 passed by the Claims Tribunal, Mumbai dismissing M.A.C.P No.645 of 2006, filed under Section 166 of the M.V. Act.

2. The Appellant No.1 is the mother and Appellant Nos.2 and 3 are the siblings of the deceased-Mohd. Iftikhar Kamal Ahmed Khan, who expired in a motor vehicular accident on 27/09/2005. It is the case of the Appellants (hereinafter referred to as 'the Claimants') that on 27/09/2005 the deceased, the rider of the motor cycle No.MH-03-

AC-2119, was proceeding towards Bandra Reclamation. The Claimants alleged that the deceased was unable to control the vehicle and due to his rash and negligent driving the motorcycle dashed against a road divider resulting in death of the rider as well as the pillion rider.

3. The Claimants had alleged that the deceased was 21 years of age, he was self employed and was earning Rs.5,000/- per month. The Claimants therefore filed a claim petition under Section 166 of the M.V. Act seeking compensation of Rs.10,00,000/-.

4. Respondent No.1, the owner of the motor cycle filed his written statement wherein he stated that the vehicle was insured under policy No.VTC-00504037-000-00. He further stated that he had sold the vehicle to the deceased on 12/09/2005.

5. Respondent No.2-Insurance Company denied its liability to pay any compensation on the ground that the accident had occurred due to rash and negligent driving of the deceased. He was the rider of the motor cycle and was not a third party within the meaning of Section 147 of the M.V. Act. Respondent No.2 further claimed that the risk of driver was not covered under the policy.

6. The Claims Tribunal upon considering the evidence on record observed that the deceased was the rider of the vehicle involved in the accident. He had driven the vehicle in a rash and negligent manner and he was solely responsible for the accident. The Tribunal observed that since the death was caused due to negligence of the rider the claim petition under Section 166 of the M.V. Act was not maintainable and accordingly dismissed the petition. Being aggrieved by the judgment, the Claimants have filed this appeal under Section 173 of the M.V. Act.

7. Mr. Amol Gatne, learned counsel for the Appellant-Claimants concedes that in the facts and circumstances of the case, the claim petition under Section 166 of the M.V. Act was not maintainable. He however, submits that it is permissible to convert the petition under Section 166 to petition under Section 163-A of the M.V. Act. In support of this contention he has relied upon the decision of this Court in ***New India Assurance Co. Ltd. vs. Ashabai Kalyan Kothi and Ors. 2008 (6) Bom.C.R. 89.*** Relying upon a three Judge Bench decision of the Hon'ble Supreme Court in ***United India Insurance Company Limited vs. Sunil Kumar and Anr. (2019) 12 SCC 398,*** learned counsel for the

Appellant submits that Section 163-A provides for grant of compensation on the basis of structured formula without any reference to fault liability. He submits that this decision has not been considered in *Ramkhiladi Vs. United Insurance Co. Ltd. 2020 (2) SCC 550*. Learned counsel for the Appellant has also relied upon the decisions in *National Insurance Co. Ltd. vs. Sinita 2012 (2) SCC 356*, *Chandrakanta Tiwari vs. New India Assurance Company Limited and Anr., (2020) 7 SCC 386*, *Shivaji and Another vs. Divisional Manager, United India Insurance Company Ltd. and Ors., (2019) 12 SCC 395* to contend that in an application under Section 163-A of the M.V. Act, the question of negligence cannot be delved into as the issue of negligence is wholly irrelevant in proceedings under Section 163-A of the M.V. Act. He has also relied upon the decision of the learned Single Judge of the Karnataka High Court in *H. Subbraya Bhat vs. Sulochana Bhat H. 2021 SCC Online Kar 14956* , to contend that petition under Section 163-A is maintainable even when the deceased is not a third party.

8. Per contra, Mr. Rajesh Kanojia, learned counsel for the Respondent- Insurance Company submits that the deceased, who was the rider of the offending vehicle was not a third party and as such the Insurance -Company is not liable to pay any compensation. He submits

that the income of the deceased as per the case of the Claimants exceeds Rs.40,000/- per annum and as such the petition under Section 163-A is not maintainable. He has relied upon the decision of the Hon'ble Supreme Court in *Deepal Girishbhai Soni and Ors vs. United India Insurance Co. Ltd., Baroda, 2004 (5) SCC 385*. Learned counsel for the Respondent-Insurance Company submits that the decisions relied upon by the learned counsel for the Claimants are distinguishable. He submits that in the instant case no other vehicle was involved in the accident and since the deceased was himself responsible for the accident, the legal representatives of the deceased cannot maintain a claim either under Section 166 or 163-A of M.V. Act. Reliance has been placed on the decision of the Hon'ble Supreme Court in *Ramkhiladi* (supra).

9. I have perused the records and considered the submissions advanced by the learned counsel for the respective parties. It is not in dispute that on the relevant date the deceased was the rider of the motor cycle No.MH-03-AC-2119. The said motorcycle was owned by Respondent No.1 Farooq Merchant and insured by the Respondent No.2 -Insurance Company. The Respondent No.1 had stated in his written statement that he had sold the said motorcycle to the deceased

on 12/09/2005 and had handed over all the documents to the deceased on the same date. However, there is nothing on record to indicate that the offending vehicle was transferred in the name of the deceased. Since the vehicle is registered in the name of Respondent No.1, he continues to be the owner of the offending vehicle.

10. It is the case of the Claimants that on the relevant date while the deceased was proceeding to Bandra reclamation along with a pillion rider, the motorcycle dashed against a road divider resulting in death of the rider as well as the pillion rider. There was no involvement of any other vehicle in the said accident. It is also pertinent to note that the Claimants have averred that the accident was caused due to rash and negligent driving of the deceased. In such circumstances the first and foremost question for consideration is whether the Claim petition under Section 166 of the M.V. Act is maintainable.

11. The claim under Section 166 of M.V. Act is based on fault liability principle as such proof of negligence is *sine qua non* to maintain a petition under Section 166 of M.V. Act. In ***National Insurance Company Ltd. Vs. Ashalata Bhounik, (2018) 9 SCC 801*** the

deceased was the owner-cum-driver of the vehicle in question. The accident had occurred due to rash and negligent driving of the vehicle by the deceased. No other vehicle was involved in the accident. The deceased being the owner of the offending vehicle was not a third party and was a victim of his own action of rash and negligent driving. In such circumstances the Hon'ble Supreme Court held that the legal representatives of the deceased could not have maintained the claim petition under Section 166 of M.V. Act. The Hon'ble Supreme Court referred to the decision in ***Oriental Insurance Company Ltd. vs. Jhuma Saha (Smt.) and Ors. (2007) 9 SCC 263*** wherein, on similar facts, it was held that *“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 to the 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.”*

12. In the instant case, the deceased was the rider of the motorcycle involved in the accident. The motorcycle driven by the deceased had dashed against a road divider. No other vehicle was involved in the accident. The deceased had expired as a result of the

injuries sustained in a self accident. The Claimants have themselves averred that the accident was caused due to rash and negligent driving of the deceased. Under such circumstances, the claim petition under Section 166 of the M.V. Act is not maintainable.

13. The next question is whether the petition under Section 166 can be allowed to be converted to the petition under Section 163-A of the M.V. Act and whether in facts and circumstances of the case the petition under Section 163-A would be maintainable.

14. In *Deepal Girishbhai Soni* (supra) the Hon'ble Supreme Court while considering the scope and object of Section 163-A has held that by inserting Section 163-A, the parliament intended to provide for making of an award consisting of a predetermined sum without insisting on a long drawn trial or without proof of negligence in causing the accident. Chapter XI was thus enacted for grant of immediate relief to a section of people, whose annual income is not more than Rs.40,000/- having regard to the fact that in terms of section 163-A of the Act r/w Second Schedule appended thereto, compensation has to be paid on a structured formula not only having regard to the age of the victim and his income but also the other factors

relevant thereto. It is held that although the Act is a beneficial one and deserves liberal construction with a view to implementing the legislative intent but it is trite that where such a beneficial legislation has a scheme of its own and there is no vagueness or doubt therein, the Court would not travel beyond the same and extend the scope of the statute on the pretext of extending the statutory benefit to those, who are not covered thereby. The Hon'ble Supreme Court did not approve the view in *Oriental Insurance Company Ltd. vs. Hansrajhai V. Kodala and Ors. (2001) 5 SCC 175* that if a person invokes provision under Section 163-A, the annual income of Rs.40,000/- shall be treated as a cap. The Hon'ble Supreme Court has held that proceeding under Section 163-A being a social security provision, providing for a distinct scheme, only those whose annual income is upto Rs.40,000/- can take the benefit thereof. All other claims are required to be determined in terms of Chapter XII of Act.

15. The question whether a petition under Section 163-A could be converted into a petition under Section 166, has been considered by this Court (Coram: A.S. Oka, J. as his lordship then was) in *New India Assurance Co. Ltd. vs. Ashabai Kalyan Kothi and Ors. 2008 (6) Bom.C.R. 89*. It has been held that “*The Tribunal as well as this Court*

always has a power to allow the conversion of a claim petition under Section 163-A into a claim petition under Section 166 of the Act. The procedure is always a handmade of justice. We are dealing with a beneficial legislation which provides for payment of compensation to the legal representatives of the victims of an accident involving a motor vehicle. The power of the tribunal or this court to allow conversion of the claim petition is discretionary. While exercising the discretion of allowing conversion, no doubt the conduct of the claimant will be relevant.”

16. It is thus, well settled that it is permissible to allow conversion of petition under Section 166 to 163-A provided the maximum annual income does not exceed Rs.40,000/-. In the instant case the Claimants have alleged that the deceased was earning an income of Rs.5,000/- per month. Since the annual income exceeds Rs.40,000/-, the Claimants cannot take benefit of the provision under Section 163-A of the M.V. Act. In view of the decision of the Hon'ble Supreme Court in **Deepal Soni** (supra) it is not possible to accept the submission of learned counsel for the Claimants that the Claimants can be permitted to convert the petition under Section 166 to 163-A by bringing down the income to Rs.40,000/- per annum.

17. The deceased, who was the rider of the offending vehicle expired in a self accident and not being a third party, the claim against the owner or the insurer of the offending vehicle is not maintainable. This principle is enunciated in ***Ningamma and Anr. Vs. United India Insurance Co. Ltd. (2009) 13 SCC 710.*** The deceased in the said case was a rider of the motorcycle which had collided with the bullock cart. The legal representatives of the deceased had filed an application under Section 163-A of M.V. Act. The Tribunal allowed the said claim petition under Section 163-A. In appeal the award was set aside by the High Court, which was order was challenged before the Hon'ble Supreme Court. While dismissing the appeal the Hon'ble Supreme court has observed that the owner of the vehicle or his legal representatives or the borrower of the vehicle cannot raise a claim for an accident in which there was no negligence on the part of the insured vehicle. It was held that the borrower of the vehicle steps into the shoes of the owner and therefore the borrower of the vehicle or his legal representatives are not entitled for compensation from the insurer. This decision has been followed in ***Ramkhiladi*** (supra).

18. Mr. Gatne, learned counsel for the Appellant submits that

judgment of a three Judge Bench in ***Sunil Kumar*** (supra) has not been considered in ***Ramkhiladi*** (supra) and as such judgment in ***Ramkhiladi*** (supra) is not a binding precedent. He has also relied upon the decision of learned Single Judge in ***H. Subraya Bhat*** (supra), wherein on similar facts, relying upon the decision of *Chandrakanta Tiwari* (supra), the Karnataka High Court has held that “*The Hon’ble Apex Court in the case of SUNIL KUMAR (supra) has held that in a proceeding under Section 163-A of the Act, it is not open for the insurer to raise any defence of negligence on the part of the victim and also in the case of Chandrakanta Tiwari vs. New India Assurance Company Limited (2020) 7 SCC 386 it is held that as cause of action as per Section 163-A is use of the motorcycle, cause of action alone which need to be established without any requirement to prove fault on the part of the driver, whether it be the owner or any other person. Therefore from the aforesaid judgments it is clear that the deceased may be a rider or a pillion rider, under Section 163-A there is no difference and there is no defence available to the Insurance Company to plead negligence on the part of the deceased.*”

19. It is pertinent to note that in ***Sunil Kumar*** (supra) the question before the Hon’ble Supreme Court was whether in a claim

proceedings under Section 163-A it is open for the insurer to raise the defence/plea of negligence. The Hon'ble Supreme Court after considering the previous decisions in the case of *Sinitha, Deepal Soni* and *Hansrajbhai Kodala* (supra) has held that Section 163-A is based on the concept of no fault liability and to permit the insurer to raise the defence of negligence would be to bring a proceeding under Section 163-A on a par with the proceeding under Section 166 of the Act, which would not only be self contradictory but also defeat the very legislative intention.

20. In *Chandrakanta Tiwari* (supra), the deceased was a pillion rider. The legal representatives of the deceased had filed a petition under Section 163-A alleging that the accident was caused due to rash and negligent driving of the Respondent No.2, who was also the owner of the motorcycle. The Tribunal allowed the claim holding that the claimants are not required to plead and prove that the death was caused due to wrongful act negligence of the owner-cum-driver of the vehicle. The High Court set aside the said judgment on the ground that the Claimant had failed to examine the owner/ driver of the vehicle. The said order was set aside by the Hon'ble Supreme Court holding that in petition under Section 163-A the Claimant need not plead or

establish that the death in respect of which the claim was made, was due to any negligence or default of the owner of the vehicle or any other person. Similar view has been taken by the Apex Court in **Shivaji** (supra).

21. It is to be noted that the principle enunciated in ***Sunil Kumar, Sinitha, Chandrakanta and Shivaij*** (supra) is that in proceeding under Section 163-A the Claimants are not required to plead or establish that death of or permanent disability in respect of which the claim has been made was due to any wrongful act, neglect or default of the driver or the owner of the vehicle. Furthermore in such proceedings it is not open to the insurer to raise the defence of negligence or contributory negligence on the part of the victim. These decisions are not applicable to the facts of the case, as the issue involved in the matter in hand is not about plea of negligence but the question is whether the legal representatives of the deceased, who was a rider of the motorcycle and not a third party, can raise a claim under Section 163-A of the M.V. Act. The issue which is raised in this Appeal is no longer res integra and is squarely covered by the decision of the Hon'ble Supreme Court in ***Ramkhiladi*** (supra) wherein after adverting to the previous pronouncements in ***Ningamma***, the Hon'ble Supreme

Court has held that:-

“9.5 It is true that, in a claim under Section 163A of the Act, there is no need for the claimants to plead or establish the negligence and/or that the death in respect of which the claim petition is sought to be established was due to wrongful act, neglect or default of the owner of the vehicle concerned. It is also true that the claim petition under Section 163-A of the Act is based on the principle of no fault liability. However, at the same time, the deceased has to be a third party and cannot maintain a claim under Section 163A of the Act against the owner/insurer of the vehicle which is borrowed by him as he will be in the shoes of the owner and he cannot maintain a claim under Section 163-A of the Act against the owner and insurer of the vehicle... There cannot be any dispute that the liability of the insurance company would be as per the terms and conditions of the contract of insurance. As held by this Court in the case of Dhanraj v/s. New India Assurance Co. Ltd (2004) 8

SCC 553, an insurance policy covers the liability incurred by the insured in respect of death of or bodily injury to any person (including an owner of the goods or his authorized representative) carried in the vehicle or damage to any property of a third party caused by or arising out of the use of the vehicle. In the said decision, it is further held by this Court that Section 147 does not require an insurance company to assume risk for death or bodily injury to the owner of the vehicle.

9.6 In view of the above and for the reasons stated above, in the present case, as the claim under Section 163A of the Act was made only against the owner and insurance compnay of the vehicle which was being driven by the deceased himself as borrower of the vehicle from the owner of the vehicle and he would be in the shoes of the owner, the High Court has rightly observed and held that such a claim was not maintainable and the claimants ought to have joined and/or ought to have made the claim under section 163A of the Act

against the driver, owner and/or the insurance company of the offending vehicle i.e., RJ-29-2M-9223 being a third party to the said vehicle.

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9.9 Now so far as the submission made on behalf of the claimants that in a claim under Section 163-A of the Act mere use of the vehilce is enough and despite the compensation claimed by the heirs of the owner of the motrocycle which was involved in the accident resulting in his death, the claim under Section 163-A of the Act would be maintainable is concerned, in view of the decision of this Court in Oriental Insurance Co. Ltd. v/s. Rajni Devi (2008) 5 SCC 376, the aforesaid cannot be accepted. In Rajni Devi, it has been specifically observed and held that the provisions of Section 163-A of the Act cannot be said to have any application with regard to an accident wherein the owner of the motor vehicle himself is involved. After considering the decision of this Court in Oriental Insurance Co. Ltd. v/s. Jumma Saha (2007) 9 SCC 263, Dhanraj

(2004) 8 SCC 553, National Insurance Co. Ltd. v/s. Laxmi Narayan Dhut (2007) 3 SCC 700 and Prem Kumari v/s. Prahlad Dev (2008) 3 SCC 193, it is ultimately concluded by this Court that the person cannot be both, a claimant as also a recipient and therefore, the heirs of the owner could not have maintained the claim in terms of section 163-A of the Act....”

22. In the light of the aforesaid exposition of law, I am unable to consider the decision of learned Single Judge of Karnataka High Court in **H. Subraya Bhat** (supra).

23. In the instant case, the income of the the deceased exceeds Rs.40,000/- per annum. Furthermore the deceased not being a third party, claim petition under section 163-A of M.V. Act would not be maintainable. Hence, the claimant cannot be permitted to convert the claim petition from Section 166 to Section 163-A of the M.V. Act.

24. Considering the above facts and circumstances, in my considered view, the Appeal has no merits and is accordingly dismissed.

(SMT. ANUJA PRABHUDESSAI, J.)