

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

FIRST APPEAL NO. 1895 OF 2019

Ramchand s/o Sobhraj Kishnani

Aged about 57 years,

Occupation : Business,

Resident of Block No.311/12,

Near Kishnani Chowk, Jaripatka,

Nagpur – 440014

}

.. Appellant

Versus

1. Ghanshyam s/o Jumdomal Ranglani

Aged about : Major,

Occupation : Nil,

Resident of Indira Gandhi Colony,

Indora, Jaripatka, Nagpur – 440014

2. The Branch Manager

Iffco Tokio General Insurance

Company Limited

Shriram Shyam Tower,

Behind NIT Building,

Kingsway, Nagpur

}

.. Respondents

 Mr. S. S. Dewani, Advocate for appellant

Mr. S. G. Karmarkar, Advocate for respondent No.1

Ms A. S. Athalye, Advocate for respondent No.2

<u>CORAM</u>	:	<u>V.G.BISHT, J.</u>
<u>RESERVED ON</u>	:	<u>28/03/2022</u>
<u>PRONOUNCED ON</u>	:	<u>11/04/2022</u>

JUDGMENT:

This is an appeal filed by the appellant/original petitioner against the judgment and award passed by the Member, Motor Accident Claim Tribunal-2, Nagpur in Motor Accident Claim Petition

No. 54 of 2008, partly decreeing the claim petition.

(2) The brief **facts** are as under:

The appellant herein is a businessman. The motor accident took place on 18.03.2006 at Mouza Gumthala area on National Highway, Tah. Kamptee, District Nagpur. On the fateful day, the petitioner was driving the vehicle namely, Toyota Qualis bearing registration No. MH-31/CM-1337 and was returning to Nagpur. The appellant's two friends, namely, Hemant Poptani and Mr. Suresh Gyanchandani were also traveling in the car on that fateful day.

(3) At about 4:30 am, while the appellant was returning to Nagpur on National Highway No. 6, which was a narrow road of around 30 Ft. without any divider, a truck which was coming from opposite direction tried to overtake another vehicle which was in front of it, resulting into encroachment on other lane of the road where appellant was driving his vehicle towards Nagpur. Due to rash and negligent driving of the Truck, the appellant was required to immediately apply breaks and tilt his vehicle towards left. Since the main road had kaccha road of around 5 ft. on both the sides this

resulted into loss of control of the vehicle and resultantly the appellant's vehicle dashed against a Babul Tree. Had the petitioner not tilted his vehicle towards left, the same would have resulted into a dash with the truck which would have caused more devastating consequences.

(4) According to the appellant, after the accident he was not in a position to state the details of the accident to the Police Authorities. The Police Authorities, therefore, on their own without verifying and investigating the accident, prepared the documents. They failed to take statement of the appellant as well as other co-passengers of the cars.

(5) The appellant was required to immediately taken to Dr. Chaudhary Hospital situated at area Sakkardara, Nagpur and was admitted for about 15 days. He underwent operation of his right hand and was also given traction therapy for hip joint for a period of three months. Because of the various injuries suffered by the petitioner his right side body was paralyzed. The sciatic nerve of the right leg of the appellant was completely damaged which has resulted into complete non-functioning of his right leg. He is unable to sit, stand and walk

properly and do other daily activities. In all, he suffered medical expenses of Rs.48,45,000/- and other losses. The details of which are given in claim petition. Therefore, the claim petition.

(6) The respondent-insurance company resisted the claim by filing its written statement (Exh. 62). The Insurance company denied all the averments raised in the claim petition.

(7) By way of specific pleadings, the insurance company contended that gratuitous driver and/or owner's representative and/or person/s who was driving the vehicle borrowed pursuant to the relationship between the owner, is not a third party and cannot be treated as third party against the insurer. The insurer of the said vehicle and his risk is not covered under the policy.

(8) Since the appellant has not joined the driver, owner and insurer of actual offending vehicle who is claimed to be solely responsible for the accident the claim petition is bad in law for mis-joinder and non-joinder of necessary and proper parties.

(9) According to the insurance company, the documents

on record filed and relied upon by the appellant would suggest that that it was the appellant who was responsible for the accident in question. Thus for all these reasons the claim petition is liable to be rejected.

(10) On the basis of the rival pleadings, the learned Member framed issues (Exh. 64) and after appreciating the evidence led by the rival parties gave findings that the appellant had not proved that accident took place due to rash and negligent driving on the part of the offending truck driver, that the risk of the appellant was not covered under the insurance policy of Qualis Car bearing registration No. MH-31/CM-1337 and that the claim petition was bad-in-law for non joinder of necessary parties. However, the learned Member was pleased to direct the insurance company to pay an amount of Rs.25,000/- only towards no fault liability. Therefore, the present appeal.

SUBMISSIONS

(11) Mr. S. S. Dewani, learned counsel for the appellant, at the very outset, submits that the learned Member failed to consider

that earlier the petition was filed under Section 163-A of the Motor Vehicle Act, 1988 (For short ‘the Act’) which did not require to plead negligence of the petitioner, since that being a special provision. It is only after the conversion of the petition into Section 166 of the Act, the petitioner was bound to bring to the knowledge of the Court relevant facts showing circumstances in which the accident occurred. This being so, the findings of the learned Member of bringing new facts for first time by amendment is absolutely erroneous.

(12) The learned counsel next submits that the learned Member also failed to take into consideration the evidence of two prominent eye witnesses of the accident stating that the alleged accident had occurred due to the fault of the truck driver only who was not traceable after the accident. Since the health condition of the appellant was critical, there was no occasion for the appellant to lodge any police complaint against the driver of the said offending truck and, therefore, in such circumstances the objection of non-joinder of truck owner or driver as party in the proceedings was blown out of proportion.

(13) The learned counsel then next submits that the

learned Member failed to take into consideration “Clause 3” of the policy which clearly covered the claim of the appellant under the head “third party” and this being so claim of the appellant was perfectly maintainable although it is alleged that the appellant was the gratuitous passenger but the insurance company could not prove the same by adducing cogent and convincing evidence. Thus, for all these reasons, the appeal deserves to be allowed, argued learned counsel for the appellant. The learned counsel for the appellant has filed on record the compilation of the judgments in support of his submissions.

(14) Ms A. S. Athalya, learned counsel for the insurance company has filed written notes of argument alongwith the compilation of judgment. Perused.

BACKGROUND OF LITIGATION

(15) It is not in dispute that earlier the petitioner had filed claim petition under Section 163-A of the Act. It is also not in dispute that this Court vide order dated 20.12.2017 passed an order in First Appeal No. 743 of 2014 with Civil Application (CAF) No. 4466 of 2017, thereby quashing the impugned judgment and order and remanding back the matter to the Tribunal for trial afresh. While doing

so, this Court had further directed the Trial Court to permit amendment of pleadings by rival parties provided the request for the same is made in accordance with law. The parties were also given opportunity to adduce additional evidence, if any, including recalling of the witness. It was also directed to take into consideration the evidence already available on record. I am pointing out this fact because one of the reason for discarding the plea of petitioner by the learned Member is that all the facts later on were brought on record for the first time and that too only after remanding back the matter to the Tribunal under Section 166 of the Act.

(16) After the conversion of the petition into Section 166 of the Act, in my considered view, the petitioner was bound to bring to the knowledge of the Court relevant facts to show the circumstances in which the accident occurred. The said fact could not have been brought on record at the time of filing of petition under Section 163-A of the Act for the reason that under Section 163-A of the Act it is not the requirement of law to plead or establish that the death or permanent disablement had occurred due to wrongful act or negligence of the owner of the vehicle or any other person.

(17) Sub-Section (2) of Section 163-A lays down that in claim for compensation under Sub-Section (1) the claimant shall not be required to plea or establish that the death or permanent disablement in respect of which the claim has been made was due to any wrongful act or negligence or default of the owner of the vehicle or vehicles concerned or of any other person. In view of this, there is merit in the submission of learned counsel for the appellant that under Section 163-A of the act the appellant could not have pleaded the negligence not only for himself or for the others. All that was required on the part of learned Member was to appreciate and ascertain the truthfulness or otherwise of the pleadings on the touch stone of the evidence led by the parties. It seems that learned Member also failed to take into consideration the law relating to the amendment.

(18) In *Vasant Balu Patil and ors. .v/s. Mohan Hirachand Shah and ors., reported in (2016) 1 SCC 530*, it has been categorically held that once the amendment has been allowed, the same relates back to the date of filing of the suit/claim. Admittedly, in the present case the amendment was allowed by the learned Member and therefore, it was bounden duty of the learned Member to asses the

evidence qua the pleadings of both the parties in proper prospective. There was no reasons to speculate or jump into the surmises that the facts brought on record by the petitioner in respect of mode of accident were fabricated or imaginary. Having cleared this, it is now time to find out whether petitioner has been able to establish rashness or negligence on the part of offending vehicle.

RASHNESS & NEGLIGENCE AND

NON-JOINDER OF NECESSARY PARTY

(19) Petitioner in his evidence (Exh. 68) states that on the day of accident he was driving the vehicle namely Toyota Qualis bearing registration No. MH-31/CM-1337 under the authority and permission of the respondent No.1. At the relevant time his two friends, namely, Mr Hemant Poptani and Mr. Suresh Gyanchandani were also traveling in the Car on that fateful day when accident occurred sometime around 4:30 a.m. while he was returning towards Nagpur on National Highway No.6 which was a narrow road of around 30 Ft. including both sides. That is to say the vehicles were supposed to ply from both sides on that road of 30 Ft including those who were going towards Nagpur and those who were going from Nagpur. At that

point of time another Truck that was coming from opposite side tried to overtake another vehicle which was in front of it resulting into encroachment of other lane where he was driving his vehicle towards Nagpur within permissible speed limit.

(20) It is his further evidence that due to rash and negligent driving of the Truck he was required to immediately apply break by tilting his vehicle towards left as the main road had kaccha road of around 5 Ft. on both sides of main concrete road resulting into loss of control of the vehicle and ultimately the vehicle dashed against a Babul tree. It is his further evidence that had he not tilted his vehicle towards left, the same would have resulted into a dash with Truck which would have caused more devastating consequences. In this unavoidable circumstances, he tilted his vehicle towards left side of the road to avoid collision with Truck and in this attempt his Car dashed against a Babul tree resulting into serious injuries to him.

(21) What appears at a gripping glance from the evidence of petitioner is that while he was returning to Nagpur he found a Truck coming from opposite direction. The said Truck i.e. offending truck in an attempt to overtake another vehicle which was in

front of it went on encroaching on the other lane of the road from which the petitioner was coming from the opposite direction (of the Truck) and in a spur of moment and as also to avoid head on collision not only he was required to apply the break instantly but was also imminently to swerve the vehicle on his left side leading to his vehicle on kaccha road and dashing against a Babul tree. Had it not been his presence of mind, in all probability, there could have been unimaginable consequences as the same would have resulted into a head on collision with offending truck, who was trying to overtake another vehicle in front of it.

(22) I may note here that there is absolutely no cross examination to this material narration of facts, at the hands of respondent, leading to the manner in which the accident in question took place.

(23) It is also to be noted here that at the relevant time there were two friends of the petitioner who were traveling in the said Car driven by the petitioner. Those two friends, namely, Hemant Poptani and Mr. Suresh Gyanchandani are duly examined by the petitioner in support of his claim petition.

(24) Mr Suresh Premchand Gyanchandani (Exh. 79) and Mr. Hemant Poptani (Exh. 83) have deposed in their respective examination-in-chief in consonance with the examination-in-chief of the petitioner. Again there is absolutely no cross examination to their respective examination-in-chief particularly in respect of the manner in which the accident took place. There is absolutely no discussion on this aspect at the hands of learned Member as to how the evidence of these two witnesses are not useful and reason for discarding the same. It seems that learned Member had pre-judged the case of the petitioner keeping in mind the filing of earlier petition under Section 163-A of the Act and was not able to reconcile with the fact as to why the new facts, which were not pleaded in petition under Section 163-A, came to be pleaded later on, ignoring of the requirement of clause (2) of Section 163-A of the Act and also fact that amendment was allowed by him only. The approach of the learned Member needless to say is highly perverse and objectionable. From the above discussion it is clear that it was the rashness and negligence on the part of the driver of the said offending Truck which triggered the accident in question.

(25) Now the question is about identity of the driver of

the said offending truck. It is the evidence of petitioner that after the accident he was not in a position to state details of the accident to the Police authorities. The Police authorities, therefore, prepared document on their own without verifying and investigating the same. The investigation carried out by the Police authorities itself is faulty and perverse in as much as they failed to record his statement and statement of other co-passengers of the car. Therefore, the entire contents of FIR and spot panchanama being faulty and perverse cannot be relied upon for the purpose of awarding compensation.

(26) There is no cross examination at all to the above piece of evidence. I have also gone through the final report and discharge order (Exh. 112). The same shows name of the petitioner alongwith other witnesses. However, the Police authorities admittedly did not even record statement of any of the witnesses including that of Petitioner and his friends who at the relevant time were traveling alongwith him nor any other material is placed on record to show that it was the petitioner who was driving the vehicle rashly and negligently. On what basis the Police authorities came to the conclusion that the appellant was driving vehicle rashly and

negligently is not made clear. Therefore, one can not escape inevitable conclusion that so called investigation carried out by Police authorities is faulty and cannot be relied on.

(27) For the aforesaid reasons, I may note that the learned Member has held that the claim petition was bad in law for non-joinder of necessary parties. According to the learned Member, the petitioner had not made driver, owner and insurer of alleged/ fictitious offending Truck/vehicle as a necessary party in the petition. I have already discussed the case of the petitioner and the circumstances leading to the accident in question. Keeping in mind the happening of the incident in a fraction of second, the appellant had no occasion to note the details of offending vehicle as the accident had occurred all of sudden. In case of such hit and run accident it is not practically possible to note the number of offending vehicle wherein accident takes place in fraction of second resulting into injury to the victim.

(28) Moreover, the claim of the petitioner could not have been dismissed solely on the ground that the claim petition is bad for non-joinder of the necessary party. In *Oriental Insurance Company Ltd. .v/s. Pritam Rajiv Shetty and anr.* reported in 2006 (3) Mh.L.J.

237 it has been held by this Court that the claim application cannot be rejected on the ground of non-joinder of the necessary party and further that the claim application is not a plaint governed by the Code of Civil Procedure or it is not a Civil suit but it is a special proceedings under the Special Act and, therefore, the law of which strict compliance is required while filing the Civil suit cannot be applied while dealing with the proceedings under the Special Act. Even otherwise I have elaborated the circumstances in which the accident in question took place. For all these reasons it was wrong on the part of the learned Member to hold that the claim application was bad in law for non-joinder of the necessary parties.

(29) This brings me to the question of the determination of permanent disability as claimed by the appellant. In ***Raj Kumar Vs. Ajay Kumar and another : 2011 (2) Mh.L.J. (SC) 569 = (2011) 1 SCC 343***, the Hon'ble Apex Court at paragraph Nos. 6 and 12 observed as under.

*“6. The heads under which compensation is awarded in personal injury cases are the following :
Pecuniary damages (Special Damages)*

(i) Expenses relating to treatment, hospitalization, medicines, transportation, nourishing food and miscellaneous expenditure.

(ii) Loss of earnings (and other gains) which the injured would have made had he not been injured, comprising :

(a) Loss of earning during the period of treatment;

(b) Loss of future earnings on account of permanent disability.

(iii) Future medical expenses.

Non-pecuniary damages (General Damages)

(iv) Damages for pain, suffering and trauma as a consequence of the injuries.

(v) Loss of amenities (and/or loss of prospects of marriage).

(vi) Loss of expectation of life (shortening of normal longevity).”

“12. Therefore, the Tribunal has to first decide whether there is any permanent disability and, if so, the extent of such permanent disability. This means that the Tribunal should consider and decide with reference to the evidence:

(i) whether the disablement is permanent or temporary;

(ii) if the disablement is permanent, whether it is permanent total disablement or permanent partial disablement,

(iii) if the disablement percentage is expressed with reference to any specific limb, then the effect of such disablement of the limb on the functioning of the entire body, that is, the permanent disability suffered by the person.

If the Tribunal concludes that there is no permanent disability then there is no question of proceeding further and determining the loss of future earning capacity. But, if the Tribunal concludes that there is permanent disability, then it will proceed to ascertain its extent. After the Tribunal ascertains the actual extent of permanent disability of the claimant based on the medical evidence, it has to determine whether such permanent disability has affected or will affect his earning capacity.”

(30) The petitioner states in his evidence that after the accident he was immediately taken to Dr. Chavhan Hospital situated at Sakardara area, Nagpur and was provided the necessary treatment for about 15 days. He was also given traction therapy for hip joint and was operated for his right hand. He was completely bed ridden for three months and could not move.

(31) It is his further evidence that because of various injuries suffered by him his right side body was paralyzed. His right hand and right leg were completely paralyzed i.e. both bones – fractures Acetum alongwith sciatic palsy. According to him, the Department of Social Justice and Welfare has also issued him disability certificate and found his disability to the extent of 80 %. His all physical activities are affected and he is completely dependent on others for his day-to-day activities. He is unable to sit, stand or even walk properly.

(32) It is his further evidence that recently he has undergone another surgery for treatment of his hip joint on 26.06.2017 and looking at the serious nature of the disability he was taken to Mumbai for surgery before Dr. Raj Mukhi at Mumbai.

(33) In support of his claim on the point of permanent disability, the petitioner has also examined doctors namely Dr. Maruti Raghoji Kohichade (PW-2), Dr Sanjiv Devidas Choudhary, (PW-3) and Dr. Shyamlal Ramkishan Mukhi (PW-4).

(34) PW-3 Dr. Sanjiv Devidas Choudhary in his examination in chief (Exh. 56) states that the petitioner was admitted in his Hospital on 18.03.2007 having fracture and dis-location of hip joint with sciatic nerve palsy with compound fracture both bones forearm with LW scalp with contusion and with chest injury. He charged Rs.39,000/- and issued discharge card on 04.03.2006, He then proved the bill at Exh. 57.

(35) It is his further evidence that in his opinion the petitioner had sustained more than 80 % permanent disability. He also came across disability certificate at Exh. 44 to 46. According to him, he operated the petitioner and suggested physiotherapy. But despite physiotherapy and the treatment, the mobility of the petitioner could not be recovered. He proved the discharge Card at Exh. 86 and Form Comp 'B' at Exh. 87.

(36) In the cross examination this witness he was given suggestion that petitioner had not sustained 80 % permanent disability which is denied out rightly by this witness. Except that general denial there is nothing in the cross examination of this material witness who not only examined the petitioner but also had occasion to operate him. There is no challenge to his version that despite physiotherapy and treatment, mobility of the petitioner was not recoverable.

(37) PW-2 Dr. Maruti Raghoji Kohichade (Exh 43) states in his evidence that at the relevant time he was professor and head of the Department of orthopedic in IGMCH Hospital in the year 2008. He was the Member of Handicap Board. On 24.11.2008 petitioner visited the Hospital in order to get disability certificate. He examined him. According to this witness, the petitioner was operated case of both bones right side with fracture femur with acetabulum (hip Joint socket) with nerve injuries (Palsy). According to him, the petitioner had suffered permanent disability to the extent of 80 %. His right leg became paralytic. He then proved the disability certificate at Exh. 44. In the cross examination his attention was also drawn to the handicap certificate at Exh. 45 and another certificate issued for the purposes of Railway concession at Exh. 46.

(38) First of all it may be noted that the version of PW-3 is consistent with the version of PW-2 as far as the injuries and the percentage of disability are concerned. His cross examination also shows that after clinical examination and considering the X-ray the percentage of disability of the petitioner was ascertained by him. Although that record was not produced by him, but there is no reason to doubt the testimony of this witness, particularly when there is nothing to show that he did not carry out any clinical examination or examine the X-ray of the petitioner in order to determine the percentage of disability.

(39) The petitioner then lastly examined PW-4 Dr. Shyamlal Ramkisan Mukhi. It is his evidence that he is an orthopedic surgeon. As the petitioner consulted him and complained of sever pain in his hip joint and right hand, on examination he found that the petitioner has dis-figured hip-joint caused due to old acetabulam right dis-figuration of hip joint and also had sever restriction in mobility. In further examination he found that he had still not recovered from his injuries. He was having symptoms such as he was unable to walk, stand and sit properly and had severe pain in his hip joint.

(40) According to this witness, he prescribed petitioner right total hip replacement (THR) surgery immediately. The petitioner was admitted in his hospital on 25.06.2017 and was discharged on 05.07.2017. The petitioner underwent right total hip replacement surgery. It is his further evidence that the petitioner may never recover completely since the petitioner has foot drop in his right leg caused by accident. There is no treatment available to cure or correct foot drop. The percentage of the disability of petitioner can be said to be more than 80 %. He then proved the various bills issued by him amounting to Rs.4,05,270/-.

(41) The cross examination of this witness remained intact and evidence of this witness as regards the nature of injury, surgery i.e. right total hip replacement perform over petitioner, percentage of disability and the medical bills issued by him are not effectively dislodged in the cross examination.

(42) Having regard to the nature of evidence adduced by the petitioner and in the light of the testimonies of various medical officers who not only examined and treated petitioner but also opined the percentage of permanent disability to the extent of 80%, I have no

manner of doubt that the petitioner indeed has permanent disability to the extent of 80%.

MAINTAINABILITY OF PETITION AND FIXATION OF LIABILITY

(43) Two most contentious issues between the parties are also required to be settled. They are maintainability of the present petition under Section 166 of the Act and liability to pay the compensation to the claimant.

(44) According to the respondent No.2-Insurance Company the present petition is not maintainable against it as it is the insurer of the fateful vehicle involved in the accident and the petitioner himself being a gratuitous driver, who borrowed vehicle from his friend i.e. respondent No.1, is now stepped into the shoes of the owner, cannot be both claimant and receiver at the same time.

(45) It is no more *res integra* that the principal of “claimant stepping into the shoes of owner” is applicable only in respect of Section 163-A of the Act, wherein this special provision is meant for special class of claimants based on no fault liability basis which provides it is the owner or the authorized insurer who has to be

the indemnifier as per the scheme of Section 163-A of the Act, which is not the case in respect of Section 166 of the Act. Section 163-A fixes liability on the owner of the vehicle and provides for grant of compensation as per the Schedule. On the other hand, the scheme of Section 166 provides ample scope of determination of compensation for the claimant on the satisfaction of the primary condition of involvement of Motor vehicle on no fault liability basis. The learned member in his judgment has not spared thought on this contentious issue which goes into the root of the matter. I am of the view that the principle of “Driver stepping into the shoes of the owner” is applicable only in respect of claims filed under Section 163-A of the Act and having regard to the circumstances of the present case the said ground was already corrected when the claim was allowed to be converted to Section 166 of the Act by this Court.

(46) Now the question is who is responsible or who is liable to pay compensation to the claimant. This issue will have to be essentially answered keeping in mind the terms of the policy and thus it has to be examined whether the insurance company is liable to pay compensation to a gratuitous driver as per the terms of the policy.

(47) Primary requirement of Section 166 read with Section 165 of the Act is that there must be use of Motor Vehicle in respect of accident involving death or bodily injury in order to entitle the claimant to claim compensation under Section 166 of the Act. The remaining conditions required for grant of compensation may follow and it is not disputed that the claimant has satisfied this primary condition of requiring involvement of motor vehicle in order to maintain the petition under Section 166 of the Act and once the Tribunal is satisfied with this condition, it is duty bound to grant just compensation. This is well settled in the case of ***Ningamma and Anr. .v/s. United India Insurance Company Ltd., reported in (2009) 13 SCC 710*** wherein the Hon'ble Apex Court has categorically held that in case of claim under Section 163-A the liability is upon the owner of the vehicle to pay compensation and a person cannot be both recipient as well as the claimant. In such case the application can be made under Section 166 of the Act and the Tribunal is required to hold an inquiry into claim and then proceed to make an award by determining just compensation. The relevant paras are reproduced below:

“20. It was held in 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.

21. 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.

22. 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.

23. When we apply the said principle into the facts of the present case we are of the view that the claimants were not entitled to claim compensation under Section 163-A of the MVA and to that extent the High Court was justified in coming to the conclusion that the said provision is not applicable to the facts and circumstances of the present case.

24. However, the question remains as to whether an application for demand of compensation could have been made by the legal representatives of the deceased as

provided in Section 166 of the MVA. The said provision specifically provides that an application for compensation arising out of an accident of the nature specified in subsection (1) of Section 165 may be made by the person who has sustained the injury; or by the owner of the property; or where death has resulted from the accident, by all or any of the legal representatives of the deceased; or by any agent duly authorised by the person injured or all or any of the legal representatives of the deceased, as the case may be.

25. When an application of the aforesaid nature claiming compensation under the provisions of Section 166 is received, the Tribunal is required to hold an enquiry into the claim and then proceed to make an award which, however, would be subject to the provisions of Section 162, by determining the amount of compensation, which is found to be just. Person or persons who made claim for compensation would thereafter be paid such amount. When such a claim is made by the legal representatives of the deceased, it has to be proved that the deceased was not himself responsible for the accident by his rash and negligent driving. It would also be necessary to prove that the deceased would be covered under the policy so as to make the insurance company liable to make the payment to the heirs.”

(48) The record shows that the above case was relied by petitioner as well as Insurance Company also. The learned Tribunal or learned Member has not given any findings as to why the ratio of the said case was not applicable to the case in hand. The learned Member ought to have given cogent and convincing reason for discarding the ratio so laid down in the said judgment. This approach and practice of learned Member of not giving reason must be deprecated.

NATURE OF INSURANCE POLICY

(49) Now is the time to examine the terms of the insurance policy which is filed on record at Exh. 63, 64, 65 and also it is required to be ascertained whether the petitioner has been successful to make out a case of grant of compensation in view of the terms of the policy. According to learned counsel for the petitioner the policy in question is a comprehensive package policy covering all contingencies and includes insurance cover for the appellant or any other driver for that matter. As regards this, the learned counsel for respondent- insurance company stated that there is no extra premium paid for gratuitous driver and further in absence of any contractual relationship between the petitioner and the insurance company, the insurance company is not liable to compensate the petitioner. It is the further contention of the learned counsel for the petitioner that the petitioner is covered under Section 2, clause 3 of the insurance policy (Exh. 65) and falls in the category “third Party”. Since, the petitioner is not the registered owner of the vehicle and therefore, must be treated as a third party. The relevant clause of the insurance policy is reproduced here under:

“3. In terms of and subject to the limitations of the

indemnity granted by this section to the insured, the Company will indemnify any driver who is driving the vehicle on the insured's order or with insured's permission provided that such driver shall as though he/she was the insured observe fulfill and be subject to the terms exceptions and conditions of this Policy in so far as they apply."

(50) Learned counsel for the appellant in order to buttress his submission further relied upon "Driver clause" of the said policy, which is reproduced here:

"Driver Clause: Any person including the insured provided that a person holds an effective driving license at the time of the accident and is not disqualified from holding or obtaining such a license;

Provided also that the person driving holds an effective learner's licence may also drive the vehicle and that such a person satisfied the requirements of Rule 3 of the Central Motor Vehicles Rules, 1989."

(51) The insurance company in this regard has examined RW-1 Amol Bidwaik (Exh. 62), who states that the policy in question is a comprehensive package policy and admits that it has wider benefit of risk that Act policy. Similarly, RW-2 Mr Deepak Ramchandra Fadnavis (Exh. 107) supplemented the version of RW-1 by stating that no premium was received to cover the risk of such gratuitous driver and risk of such driver is not covered under the policy. He further stated that the claimant cannot be treated as third party since he steps

into the shoes of owner and hence his claim should be dismissed. However, in the cross examination he admits that he has not placed on record any material in respect of his claim and further admits that it is not pleaded in the written statement as well that there is any breach of policy by the appellant. It is his further admission that the insurance company has received additional premium of Rs.25/- in respect of coverage of driver of the Car. Although it is submitted by the insurance company that additional premium of Rs.25/- is in respect of IMT-28, but again it is admitted that there is no mention of the word IMT-28 before the driver clause, in insurance policy.

(52) For the aforesaid purpose the appellant has placed reliance on *Narcinva V. Kamat and Anr. .v/s Alfredo Antonio Doe Martins and ors.* reported in *(1985) 2 SCC 574*. Wherein, the Hon'ble Apex Court has held that if the insurance company denies liability on ground of breach of of any terms of insurance contract the same must be pleaded and established by adducing evidence. In absence of it the liability to indemnify cannot be absolved.

(53) It is also disturbing to note from the impugned award that the learned Member has not given any findings in respect

of terms of the policy and has not even touched those issues which required adjudication nor addressed issues involved in the present case. As per the terms of the policy the risk of gratuitous driver is also covered in the policy and conjoint reading of both terms of the policy lead to only inference that “any person” including the insurer (owner) if drives the vehicle with an effective driving licence, will be covered under the risk of the policy. The learned member did not bother to analyse and advert to the terms of the policy.

(54) The learned counsel for the appellant for the said purpose has also placed relied on *New Asiatic Insurance Company Limited .v/s. Pessumal Dhanamal Aswani and ors.* reported in *AIR 1964 SC 1736*, wherein the Hon’ble Apex Court has held that once the company has undertaken liability to third parties incurred by the persons specified in the policy, the third party right to recover any amount under or by virtue of provision of the act is not affected by any condition in the policy. The learned counsel for the insurance Company has also placed reliance in *The Divisional Manager, United India Insurance Company Ltd. .v/s. Subhash Pitamberlal Jaiswal and ors.*, reported in *(2017) 6 AIR Bom R. 681*, wherein the claim was filed

by the owner of the vehicle himself who was the insurer and thus cannot be treated as third party. This case therefore will have no application to the case in the hand. This position is noted in the case of *United India Insurance Co. Ltd. and Anr. .v/s. Sudha Singh and ors.* reported in *2014 (2) TN MAC 735 (Pat.)* and also in *New India Assurance Co. Ltd. .v/s. Shanti Bopanna.* reported in *AIR 2017 SC 2857*. Wherein the Hon'ble Apex Court has held that a person not being the insurer or the insured is a "third party". Paragraph 8 which is relevant for our purpose is reproduced herein:

"8. We thus find that the claim of the widow and the adopted son is fully covered by the clause in the insurance contract, i.e., the policy and there is no scope for acceding to the submission made on behalf of the appellant-company that the claim is excepted by virtue of the provisions of Section 147 (1) of the Act in this case. We, therefore, reject the contention made on behalf of the appellant that the deceased was not a third party because he was an employee sitting in the car. It is obvious from the circumstances that the deceased was indeed a third party being neither the insurer nor the insured."

(55) If what is canvassed before me by the learned counsel for the insurance company is taken to be true, the same will lead to an absurd interpretation where a large class of driver driving vehicle will be excluded from the insurance coverage, which will not only be against spirit of the provisions but also contrary to benevolent Scheme of the Act.

(56) The insurance company has also placed reliance in case of *New India Assurance Company Limited .v/s. Sadanand Mukhi and ors.* reported in (2209) 2 SCC 417. However, the difference between the above noted case and the case in hand lies in the kind of insurance policy. The policy involved in the above case was an “Act policy” and not a comprehensive one, like in the present case. Similarly, in *Oriental Insurance Company Ltd. .v/s. Jhuma Saha (Smt.) and ors.* reported in (2007) 9 SCC 263 the registered owner himself was driving the vehicle and did not have a comprehensive insurance policy. Similarly in *M/s. HDFC Chubb General Insurance Co. Ltd. .v/s. Smt. Shantidevi Rajbalsingh Thakur and Anr.* reported in 2008 (3) AIR Bom. R.607 the claim was filed under Section 163-A of the Act. Thus all these decisions have no bearing to the case in hand.

(57) In view of above discussion, I hold that the insurance policy in question being a comprehensive policy coupled with the fact that the insurer has not been able to prove the breach of insurance policy, the appellant is entitled to compensation.

(58) An idea was flashed in my mind, having regard to the debilitating infirmities appearing in the award, to remand back the

matter to the learned Member for determining the compensation afresh, however, that idea was done away in as much as the same would have been unreasonable as the claimant by now has become a senior citizen. Also the parties knowing fully well their respective cases have adduced ample evidence on record and all that is required was to appreciate and marshal available evidence and grant just compensation to the appellant. Therefore, the idea of remand was nipped in the bud so that the appellant need not undergo rigors of litigation.

QUANTUM

(59) I am on last legs – Quantum. The appellant has claimed Rs.8,00,000/- and Rs.500,000/- for his medical expenses. However, after going through the record it appears that the total medical expenses in the light of bills filed on record are to the extent of Rs.7,00,000/-. Further, the appellant has also claimed Rs.25,000/- per month as loss of his present and future income having regard to the extent of disability (80%) and multiplier as '13' as the age of the appellant on the date of accident was 45 years. In addition to this, the appellant has also claimed damages for travelling expenses, maid

charges and special diet. As far as non pecuniary damages are concerned, the appellant has claimed damages of Rs.1,00,000/- each for mental and physical sufferings, loss of amenities, loss of expectation of life and damages for inconvenience and hardship.

(60) Having regard to the detailed discussion made so far I do not have any iota of doubt that the because of the said accident, the life of the appellant must have adversely and severely affected and he must have suffered loss in his business because of his restricted mobility and ill-health. Considering the nature of business of the appellant where he was running liquor shop and pharmaceutical shop, loss of present and future income can be conveniently taken to be @ of Rs.25,000/- per month, which is quite just and reasonable.

(61) I am also not oblivious of the fact of the mental trauma undergone by the appellant. Thus, I have no hesitation in allowing the non-pecuniary damages as claimed by the appellant. The claim allowed in favour of the appellant is summarized as below:

1	Medical expenses	Rs.7,00,000/-
2.	Loss of earnings Rs.3,00,000/- X 80/100 = Rs.2,40,000/- Rs.2,40,000/- X 13 = Rs.31,20,000/-	Rs.31,20,000/-

3.	Incidental expenses including transportation, attendant charges and special diet	Rs.25,000/-
4.	Pain and sufferings	Rs.2,00,000/-
5.	Loss of amenities of life	Rs.1,00,000/-
6.	Loss of expectation of life	Rs.1,00,000/-
	TOTAL	Rs.42,45,000/-

(62) In view of above, I pass the following order:

ORDER

i] The Judgment and Order dated 30/03/2019 passed in M.A.C.P. No. 54 of 2008 is modified and respondents are directed to pay jointly and severally compensation of Rs.42,45,000/- (Rs. Forty Two Lacs Forty Five Thousand only) alongwith simple interest of 8% p.a. from the date of filing of claim petition i.e. 18.08.2008 till the payment of entire amount.

ii] The entire amount shall be paid to the appellant within 30 days from the date of this order.

iii] No order as to costs.

iv] The appeal is disposed of in the aforesaid terms.

[V.G. BISHT, J.]

Namrata