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

FIRST APPEAL NO.771 OF 2009

The Oriental Insurance Co.Ltd.,
Branch:Yavatmal, THROUGH:
The Divisional Manager,
D.O.No.2:8, Hindustan Colony,
Wardha Road, Nagpur. ..... Appellant.

:: V E R S U S ::

1. Shri Wasudeo Mukaji Sambhalkar,
Aged about 65 years, occupation:not known.

2. Sau.Shantabai w/o Wasudeo Sambhalkar,
Aged about 55 years, occupation:not Known.

Both r/o Bamarda, tahsil:Maregaon,
District : Yavatmal.

3. Shri Keshav G.Guradkar,
Age & occupation:not known.
R/o Moradi, tahsil Maregaon,
District:Yavatmal. ..... Respondents.

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Shri Lalit Limaye, Counsel for the Appellant.
Shri S.C.Bhalerao, Counsel for Respondent Nos.1 and 2.

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CORAM : URMILA JOSHI-PHALKE, J.
CLOSED ON : 11/01/2023
PRONOUNCED ON : 08/02/2023

JUDGMENT

1. By this appeal, the appellant - Insurance Company challenges judgment and award dated 3.8.2007 passed by learned Chairman, Motor Accident Claims Tribunal, Yavatmal in Claim Petition No.471/1999 whereby learned Chairman awarded compensation Rs.2,88,000/- with interest at the rate of 9% per

annum from the date of petition, till the amount is deposited to respondent Nos.1 and 2 (claimants).

2. Brief facts are as follows:

The claimants filed petition bearing Claim Petition No.471/1999 under Section 163-A of the Motor Vehicles Act, 1988 (for short, "**the said Act**") before the Motor Accident Claims Tribunal at Yavatmal for grant of compensation on account of accidental death of Ganesh (the deceased). The deceased was their son who died in a motor accident on 8.7.1999. On the relevant date, at about 3:00 p.m., when the deceased was riding Bajaj M-80 Moped No.MH-29/D-4587 on Wani-Yavatmal Road, near Sidana Ginning Factory Maregaon, the motorcycle was slipped and turned turtle due to which the deceased was thrown away from the motorcycle and sustained injuries and succumbed to injuries during treatment. On the basis of report, accidental death was registered and, therefore, claimants filed the claim petition under Section 163-A of the said Act. As per contentions of claimants, the deceased died in the motorcycle accident owned by respondent No.3 and the said motorcycle was validly insured with the appellant – Insurance Company. The deceased was earning Rs.3000/- per month and at the time of the accident he was 21-year-old and, therefore, claimants are entitled for compensation.

3. The appellant – Insurance Company, as well as respondent No.3 – owner of the motorcycle, resisted the claim of claimants.

As per contentions of the appellant – Insurance Company, the deceased sustained severe bodily injuries and died during treatment inasmuch as the alleged accident took place due to negligent act of the deceased himself as the motorcycle was slipped and turned turtle and, therefore, the appellant – Insurance Company is not liable to pay any compensation to claimants. Hence, the appellant – Insurance Company be exonerated from liability. It is further contention of the appellant – Insurance Company that since the deceased stepped into shoes of owner of the motorcycle, i.e. respondent No.3, as he was riding the motorcycle, he is not third party and, therefore, the appellant – Insurance Company is not liable to pay any compensation.

As per contentions of respondent No.3 – owner of the motorcycle, as the motorcycle was validly insured with the appellant – Insurance Company, the appellant – Insurance Company is liable to pay compensation.

4. Learned Chairman of the Tribunal, having heard both sides and evidence recorded, by the judgment and award allowed

the claim petition of claimants and granted compensation to claimants.

5. Being aggrieved and dissatisfied with the judgment and award, the present appeal is preferred by the appellant – Insurance Company on the ground that the deceased is not third party since he stepped into shoes of owner of the motorcycle, i.e. respondent No.3, as he was riding the motorcycle. The deceased should not be included in the term of the "victim". In view of Section 147 of the said Act, the deceased is not included under the definition of "any person", but he was a tortfeasor and, therefore, claimants are not entitled for compensation.

6. Heard learned counsel Shri Lalit Limaye for the appellant – Insurance Company and learned counsel Shri S.C.Bhalerao for respondent Nos.1 and 2. None appears for respondent No.3.

7. Learned counsel Shri Lalit Limaye for the appellant – Insurance Company submitted that the deceased died in the motorcycle accident as the motorcycle was slipped. The said motorcycle was owned by respondent No.3. The deceased sustained severe bodily injuries and died during treatment inasmuch as the alleged accident took place due to negligent act of

the deceased himself as the motorcycle was slipped and turned turtle and, therefore, the appellant – Insurance Company is not liable to pay any compensation to claimants. The appellant – Insurance Company be exonerated from liability. Since the deceased stepped into shoes of owner of the motorcycle, i.e. respondent No.3, as he was riding the motorcycle, he is not third party and, therefore, the appellant – Insurance Company is not liable to pay any compensation.

8. In support of contentions, learned counsel Shri Lalit Limaye for the appellant – Insurance Company placed reliance on the decisions of this Court in First Appeal No.803/2013 with connected appeals (Iffco Tokio General Insurance Co.Ltd., Nagpur vs. Smt.Aarti w/o Mohanrao Tabhane and ors) decided on 14.3.2016; First Appeal No.1390/2009 (The Divisional Manager, United India Insurance Co.Ltd., Nagpur vs. Smt.Shilabai wd/o Bholu Kalkhor and anr) decided on 30.7.2021; First Appeal No.526/2005 (The Divisional Manager, New India Assurance Company Limited, Nagpur vs. Sangeeta wd/o Balwantrao Wandile and ors) decided on 15.6.2017, First Appeal No.885/2005 (United India Insurance C.Ltd., thr.its Divisional Manager vs. Satyabhamabai w/o Balaji Rawendale and ors) decided on 5.9.2018, and the decision of the Honourable Apex Court in the case of **Ningamma and another vs.**

<u>United India Insurance Co.Ltd.,</u> reported in **<u>2009 ACJ 2020</u>**. He submitted that the Honourable Apex Court in the case of <u>Ningamma and another vs. United India Insurance Co.Ltd.,</u> has held that death of borrower of motorcycle was caused as motorcycle dashed against a bullock cart proceeding ahead resulting in death of motorcyclist. Deceased had borrowed motorcycle from its owner. Legal representatives of a person driving a vehicle after borrowing it from the owner meets with accident without involving any other vehicle are not entitled for compensation as borrowers stepped into shoes of the owner and owner cannot himself be a recipient of compensation as liability to pay the same is on him.

9. It is not in dispute that the alleged accident took place when the deceased was riding the motorcycle owned by respondent No.3. It is also not in dispute that another vehicle is not involved in the accident. The deceased met with an accident when the motorcycle being driven by him was slipped and turned turtle and in the accident he had sustained injuries and succumbed to injuries. The Tribunal held that the deceased succumbed to injuries sustained by him in the accident. The Tribunal also held that as the application under Section 163-A of the said Act is filed, question of negligence is not required to be gone into. It is further held that there being negligence or not but involvement of vehicles makes

respondents liable in view of amended provisions of Section 163-A of the said Act and held the appellant – Insurance Company liable to pay compensation.

10. In order to prove the claim under Section 163-A of the said Act, claimants are not required to plead and prove that the death in respect of which the claim has been made, occurred due to any wrongful act or neglect or default of the owner of the vehicle concerned. In the decision of the Honourable Apex Court in the case of Ningamma & another vs. United India Insurance Co. Ltd. cited *supra*, it was a claim under Section 163-A of the said Act and the deceased had borrowed motorcycle from owner, which met with an accident. The dependents of deceased filed a petition. The Honourable Apex Court has held in paragraph Nos.18 and 19 as under:

> "18. In the case of Oriental Insurance Company Ltd. Rajni Devi and Others (supra), wherein one of us, namely, Hon'ble Justice S.B. Sinha is a party, it has been categorically held that in a case where third party is involved, the liability of the Insurance Company would be unlimited. It was also held in the said decision that where, however, compensation is claimed for the death of the owner or another passenger of the vehicle, the contract of insurance being

governed by the contract qua contract, the claim of the claimant against the Insurance Company would depend upon the terms thereof. It was held in the said decision that Section 163A 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 163A 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 163A of the MVA. In our considered opinion, the ratio of the aforesaid decision 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 employee of the owner of the motorbike although he was authorized to drive the said vehicle by its owner, and therefore, he would step into the shoes of the owner of the motorbike."

"19. We have already extracted Section 163A of the MVA hereinbefore. A bare perusal of the said provision would make it explicitly clear that

> persons like the deceased in the present case would step into the shoes of the owner of the vehicle. In a case wherein the victim died or where he was permanently disabled due to an accident arising out of the aforesaid motor vehicle in that event the liability to make payment of the compensation is on the Insurance Company or the owner, as the case may be as provided under Section 163A. 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 163A 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 163A of the MVA."

11. The only vehicle involved in the present case is the motorcycle, which the deceased was riding, and it was owned by respondent No.3 and validly insured with the appellant - Insurance Company. The deceased cannot, therefore, be called as a 'third party'. The deceased was not the employee of the owner of the motorcycle in question.

12. In view of above observations of the Honourable Apex Court, the deceased stepped into the shoes of the owner, still the claim under Section 163-A of the said Act would not be maintainable at the instance of the dependents of the deceased.

13. First and foremost fact that the death of the deceased is caused due to the motorcycle accident which was insured with the appellant – Insurance Company at the relevant time, has been clearly established by claimants. The death of the deceased in the accident is also not disputed either by respondent No.3 - owner of the motorcycle or by the appellant - Insurance Company.

14. Only question arises in this appeal is with regard to entitlement of claimants for compensation under provisions of the said Act.

15. It is a well settled position of law that deceased borrowing motorcycle from owner of the motorcycle is not a “third party”. It is also not in dispute that the accident occurred as the motorcycle was slipped and the deceased sustained injuries. It is also a well settled position of law that the contract of insurance is based on the terms and conditions between the insurer and the insured and from the third party liability of the Insurance Company as per the mandatory provisions of the Act, the liability of the owner

or occupier of the vehicle can also be covered by paying extra premium. In this context, the Honourable Apex Court in the decision in the case of Ningamma & another vs. United India Insurance Co. Ltd. cited *supra* observed that where 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 insurance company would depend upon the terms thereof.

16. Having regard to the aforesaid, what is relevant is whether claimants are entitled for compensation.

17. Admittedly, entitlement of compensation depends upon nature of contract and terms and conditions enumerated therein.

18. In the instant case, basis for grant of compensation under Section 163-A of the said Act appears to be "No Fault Liability" arising on account of rash and negligent driving of the motorcycle rider. The claim for compensation is not based upon any fault liability. Under Section 163-A of the said Act, a relief is provided to those who suffered road accidents not because of negligence of another person making use of motor vehicle, but only on account of their own rash and negligent or imprudent act resulting in their deaths or personal injuries to them. In view of the

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said Section, word "victim" appearing therein does not include a person who himself is a wrongdoer or a perpetrator of crime or a victimizer. The right to receive compensation under the said Section presupposes that the person who makes a claim is a victim or a legal heir of a victim and not a tortfeasor or a wrongdoer. Section 163-A along with requirements of Section 147 of the said Act which *inter alia* envisages existence of liability of the owner of the driver to a third party arising out of the use of the vehicle in a public place. The reason being that what is insured in the policy is the risk of the owner against any liability that arises against him on account of any death or injury resulting from use of motor vehicle in a public place.

19. Thus, taking into consideration provisions contained in Section 147 of the said Act, the 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. Section 147 of the said Act, does not require an insurance company to assume risk for death or bodily injury to the owner of the vehicle.

20. In case of a contractual policy covering the risk of personal accident, the terms of the policy will have to be looked

into. Perusal of the policy at Exhibit-39 shows that it is an Act Policy and basic premium was paid to cover third party liability.

21. Thus, there is no dispute about the fact that the deceased has borrowed the motorcycle from respondent No.3 and met with an accident.

22. The Honourable Apex Court in the case of Ningamma & another vs. United India Insurance Co. Ltd. cited *supra* held that a bare perusal of provisions of Section 163-A of the said Act would make it explicitly clear that persons like the deceased in the present case would step into the shoes of the owner of the vehicle. In a case wherein the victim died or where he was permanently disabled due to an accident arising out of the 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 of the said Act. 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. Accordingly, 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 said Act.

23. After applying the above said principle to the present case in hand, I am also of view that claimants are not entitled to claim compensation under Section 163-A of the said Act as the deceased borrowed the motorcycle involved in the accident in question. As the claim is made by 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 legal heirs.

24. In view of the above and in view of the said well settled position of law, the claim made by claimants is not maintainable against the appellant – Insurance Company and the appellant – Insurance Company is not liable to pay compensation to claimants and, therefore, the appeal deserves to be allowed. Hence, I pass following order:

ORDER

(1) The first appeal is **allowed**.

(2) The judgment and award dated 3.8.2007 passed by learned Chairman, Motor Accident Claims Tribunal, Yavatmal in Claim Petition No.471/1999 is quashed and set aside.

(3) The appellant – Insurance Company is permitted to withdraw amount deposited by it in this Court, if any, since the appellant – Insurance Company is exonerated from paying compensation to claimants.

With this, the first appeal stands **disposed** of.

(URMILA JOSHI-PHALKE, J.)

!! BrWankhede !!