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

FIRST APPEAL NO.545 OF 2009

The Branch Manager,
Oriental Insurance Co. Ltd.
Wardha Branch,
through its Divisional Manager,
Nagpur Divisional Office – II,
Kanoriya House, Civil Lines,
Nagpur.

...APPELLANT

VERSUS

1. Madhukar s/o Narayan Nakhale,
Aged 56 years,

2. Pramilabai w/o Madhukar Nakhale,
Aged 58 years,

Both R/o - 41, Ujwal Co-Op. Housing Society, Borle Layout, Jaitala Road, Nagpur

3. Tularam s/o Tukaram Gaikwad,
Age Major,
R/o. Jaurwada,
District Wardha

...RESPONDENTS

Shri D.N. Kukday, Advocate for the appellant.
Shri K.P. Mirache, Advocate for respondent Nos.1 and 2.

CORAM : URMILA JOSHI-PHALKE, J.
DATED : APRIL 20, 2023.

ORAL JUDGMENT :

Heard learned Counsel for the parties.

2. By this appeal, the appellant - Insurance Company challenges the judgment and award dated 13/11/2006 passed by the Motor Accident Claims Tribunal, Nagpur in Claim Petition No.1099/2000 whereby the Tribunal awarded the compensation of Rs.2,71,000 with interest at the rate 8% per annum from the date of filing of the petition till realisation of whole amount to the petitioners.

3. Brief facts in nutshell are as follows :

A] On 27/09/2000 at about 20:30 hours the deceased – Kamalakar Nakhale riding bike bearing No.MH-32-E-2518 at Mohagaon area, National Highway No.7, on Nagpur-Chandrapur Road and due to the mechanical fault in motorcycle the deceased had lost his control over his vehicle. The motorcycle slipped resulting into death of the deceased during medical treatment. Regarding the said accident, report was lodged to the Bori police station vide Crime No.245/2000. The offending vehicle Bajaj Caliber motorcycle bearing registration No.MH-32-E-2518 was owned by respondent No.1 and validly insured with respondent No.2.

4. As per the contention of the claimants, the age of the deceased was 31 years and he was serving in Patel and Patel Bidi Works

Pvt. Ltd. and getting Rs.4500/- per month. The petitioners are the parents and the dependents of the deceased. Due to the accidental death of the deceased, they have claimed compensation from the respondents. As per the contention of the claimants, as the death of the deceased is caused in a vehicular accident, therefore, they are entitled to receive compensation.

5. In response to the notice, respondent No.1 though duly served failed to file his written statement. Respondent No.2 – Insurance Company has resisted the petition by filing written statement vide Exhibit 21. The Insurance Company has denied its liability on the ground that the deceased was not a third party as he has borrowed the vehicle from the owner so he entered into the shoes of the owner, and therefore, the deceased is not entitled for any compensation.

6. Learned Member of the Tribunal having heard both the sides and evidence recorded by the judgment and award, allowed the claim petition of the claimants and granted the compensation to the claimants.

7. Being aggrieved and dissatisfied with the judgment and award, present appeal is preferred by the appellant - Insurance Company on the ground that the deceased is not a third party since he stepped

into the shoes of owner of the motorcycle i.e. respondent No.1. The deceased is not covered in the term of the "victim". In view of Section 147 of the Motor Vehicles Act, the deceased is not included under the definition of any person but he was a tortfeasor, and therefore, the claimants are not entitled for compensation.

8. Heard Shri D.N. Kukday, learned Counsel for the Insurance Company and Shri Mirache, learned Counsel for the claimants. None appears for the owner.

9. Shri D.N. Kukday, learned Counsel for the appellant submitted that the deceased died in a motorcycle accident as the motorcycle was slipped. The said motorcycle was owned by the original respondent No.1. The deceased sustained severe bodily injuries and died during treatment. Inasmuch as the alleged accident took place due to the negligent act of the deceased himself as the motorcycle was slipped and turn turtle, therefore, the appellant - Insurance Company is not liable to pay compensation to the claimants. The appellant - Insurance Company is to be exonerated from the liability. Since the deceased stepped into shoes of the owner of the motorcycle i.e. respondent No.3. As he was riding the motorcycle, he is not the third party, and therefore, the appellant - Insurance Company is not liable to pay compensation.

10. In support of his contention he placed reliance on ***HDFC Chubb General Insurance Co. Ltd. Vs. Shantidevi Rajbalsingh Thakur and anr., 2008 ACJ 1280***, wherein this Court held that contract of insurance covered the owner-driver, pillion rider and the mandatory third party risk but not 'other named person' or paid driver or a tortfeasor who because of his own negligence met with death cannot be equated with a victim of the accident. There is no insurance cover for the driver other than the owner. Whether insurance company is liable to indemnify the owner for the death of gratuitous driver of insured motorcycle as a victim held no.

11. *Per contra*, Shri Mirache, learned Counsel submitted that the claimants have claimed the compensation under Section 163-A of the Motor Vehicles Act wherein the factor of the negligence is not to be seen. The compensation under Section 163-A is based on the structured formula. In view of that the Tribunal has awarded the compensation. The findings recorded by the Tribunal cannot be faulted with as the claimants are awarded with the compensation on the basis of No Fault Liability, therefore, no interference is called for.

12. In support of his contention, he placed reliance on catena of decisions as follows:

(i) Kore Laxmi and ors. Vs. United India Insurance Co. Ltd. and ors., 2005 ACJ 543

(ii) National Insurance Co. Ltd. Vs. Sinitha and ors., 2012 (1) T.A.C. 234 (S.C.)

(iii) Riyana Ishaque Kazi and ors. Vs. Pushpa R. Sheva, 2014 AAC 2402 (BOM)

(iv) United India Insurance Co. Ltd. Hyderabad Vs. Katikala Indira, 2014 AAC 1114 (AP)

(v) National Insurance Co. Ltd. Vs. Seema Ramdas Telhande and ors. 2014 ACJ 1054

(vi) New India Assurance Co. Ltd. Vs. Manishaben Mahendra and ors. [2009 AC 585 (Guj)]

On the basis of catena of these decisions, the learned Counsel for the claimants submitted that the claimants are entitled for the compensation and hence insurance company is rightly held to be liable to pay compensation, therefore, no interference is called for.

13. 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 as he lost control and turn turtle and in the said accident, he had sustained injures and succumbed to the injuries. The Tribunal held that the deceased succumbed to the injuries sustained by

him in an accident. The Tribunal also held that as the application under Section 163-A of the Motor Vehicles Act is filed, the question of negligence is not required to be gone into. It is further held that there being a negligence or not but involvement of the vehicle makes respondents liable in view of amended provisions of Section 163-A of the Motor Vehicles Act and held that the appellant - insurance company is liable to pay compensation.

14. In order to prove the claim under Section 163-A of the Motor Vehicles Act, the 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, neglect or default of the owner or owners of the vehicle or vehicles concerned. In the decision of the Hon’ble Apex Court in the case of ***Ningamma and anr. and United India Insurance Co. Ltd., 2009 ACJ 2020*** wherein a claim was filed under Section 163-A of the said Act and the deceased had borrowed the motorcycle from the owner which met with an accident. The dependents of the deceased filed a petition. The Hon’ble 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."

15. In Ramkhiladi and anr. Vs. ***United India Insurance Company and anr., 2020 ACJ 627*** wherein also the Hon'ble Apex Court held that the compensation claimed only against owner and insurer of motor cycle which was borrowed. As deceased has stepped into shoes of owner of vehicle and not being a third party, claim is not maintainable. There is no error in the finding of the High Court. In paragraph No.5.4, the Hon'ble Apex Court considered the case of *Ningamma* (supra) and observed that the deceased was driving a motorcycle which was borrowed from its real owner and met with an accident by dashing against the bullock cart i.e. without involving any other vehicle. The claim petition was filed under Section 163-A of the said Act by the legal representatives of the deceased against the real owner of the motorcycle which was being driven by the deceased. To that, this Court has observed and held that since the deceased has stepped into the shoes of the owner of the vehicle. Section 163A of the said Act cannot apply wherein the owner of the vehicle himself is involved. Consequently, it was held that the legal heirs for the deceased could not have claimed the compensation under Section 163-A of the said Act. Therefore, as such, in the present case, the claimants could have even claimed the compensation and/or filed the claim petition under Section 163-A of the said Act against driver, owner and insurance company of offending vehicle i.e. motorcycle bearing registration No. RJ-29/2M-9223 being a

third party with respect to the offending vehicle. However, no claim under Section 163A of the Act was filed against the driver, owner and/or insurer of motorcycle bearing No.RJ-29/2M-9223. It is an admitted position that the claim under Section 163A of the said Act was only against the owner and the insurer of motorcycle bearing No.RJ-02/SA-7811 which was borrowed by the deceased from the opponent – owner – Bhagwan Sahay. Therefore, applying the law laid down in the case of Ningamma, and as the deceased has stepped into the shoes of the owner of vehicle as rightly held by the High Court, the claim petition under Section 163A of the Act against the owner and insurance company of the vehicle shall not be maintainable. It is further held by the Hon'ble Apex Court in paragraph No.5.5 of that judgment that in a claim under Section 163-A of the Act, here is no need for the claimants to plead or establish the negligence and/or that the death in respect of which the claim 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 163A 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 163A of the Act against the owner and insurer of the vehicle bearing No.RJ-02/SA-7811. In the present case, the parties are governed by the contract of insurance and under the contract of insurance the liability of the insurance company would be qua third party only. In the present case, the deceased cannot be said to be a third party with respect to the insured vehicle bearing No.RJ-02/SA-7811.

16. This Court in *HDFC Chubb General Insurance Co. Ltd.* (supra) had also considered and held that the contract of insurance covered the owner-driver, the pillion passenger and the mandatory-third party risk. It was to indemnify for any liability to any third party. This indemnity was towards any act of the driver. Such indemnity means and includes a contract or promise to save the insured from the loss caused to him by the act of the driver. Hence, if the driver was liable to any third party and consequently the owner incurred vicarious liability, the insurance company would indemnify the owner of the vehicle, provided the driver fell within the terms, exceptions and conditions of the policy. This necessarily implies that the driver was at fault. He would, therefore, incur liability. That would be tortious liability. The insurance company would, therefore, indemnify the owner against any third party liability. This indemnity is the statutory liability of the insurance company in case of contracts of such insurance. The purpose of the indemnity is to pay compensation to a third party, i.e., a party who is an outsider--other than

the two parties to the contract of insurance--the insurance company and the insured or any other person capable of being insured under the contract of insurance. Since the 'others'--the world at large, viz., the pedestrians, passers-by, etc., who can never be one of the contracting parties, but who may be involved in an accident, the insurance company owes a statutory liability to indemnify the owner/driver due to whose act some other innocent party has suffered death or injury. Such a third party, therefore, can never be the person who could have been one of the contracting parties or who could have been covered under the contract of insurance/policy, by way of payment of additional premium.

17. It is further held by this Court that a tortfeasor, who, because of his own negligence, met with death, cannot be equated with a victim of the accident. There is no insurance cover for the driver other than the owner. In that circumstances, the Insurance company is not liable to pay any compensation.

18. In the light of the above principles laid down by the Hon’ble Apex Court as well as this Court, if the facts and circumstances of the present case are considered, the only vehicle involved in the present case is motorcycle which the deceased was riding and it was owned by respondent No.3 and validly insured with 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.

19. In view of the observation of the Hon'ble Apex Court, the deceased stepped into the shoes of the owner, still the claim under Section 163A of the said Act would not be maintainable at the instance of the dependent of the deceased.

20. 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 the claimants. The death of the deceased due to the accidental injuries is also not disputed either by respondent No.3 - owner of the motorcycle or by the appellant – Insurance Company. Only question arises in this appeal is with regard to entitlement of claimants for compensation under the provisions of the said Act.

21. It is well settled position of law that the deceased borrowing motorcycle from owner of the motorcycle is not a third party. It is not in dispute that the accident occurred as the motorcycle was slipped and the deceased sustained injuries. It is also 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 observation of the Hon'ble Apex Court in the decision in the case of ***Ningamma*** (supra) wherein it is 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.

22. Having regard to the aforesaid, what is relevant is whether claimants are entitled for compensation. Admittedly, entitlement of compensation depends upon nature of contract and terms and conditions enumerated therein.

23. 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 death or personal injuries to them. In view of the said Section word “victim” appearing therein does not include a person who himself is a wrongdoer or a perpetrator of a 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 or 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.

24. 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.

25. 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 shows that it is covering only the risk of the third party liability.

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

27. The Hon'ble Apex Court in the case of *Ningamma* (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.

28. 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. Though Shri Mirache, learned Counsel placed reliance on catena of decisions but these decisions can be differentiated on the facts of the case. The facts of the relevant cases are not identical with the present case and therefore, these decisions are not helpful to the claimants to claim the compensation. 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 said accident by 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.

29. In view of the above and in view of the said well settled position of law, the claim made by the 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.

30. In view of that I proceed to pass the following order :

(i) The first appeal is allowed.

(ii) The judgment and award dated 13/11/2006 passed by the Member, Motor Accident Claims Tribunal, Nagpur in Claim Petition No.1099/2000 is quashed and set aside.

(iii) The appellant – insurance company is permitted to withdraw the amount deposited by him in this Court, if any, since the appellant- insurance company is exonerated from paying compensation to the claimants.

(iv) The first appeal is disposed of.

(URMILA JOSHI-PHALKE, J.)

**Divya*