

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

FIRST APPEAL NO.1491 OF 2008

Oriental Insurance Co. Ltd.
through its Divisional Manager,
D.O. III, Sharda Complex,
Chhapru Nagar Chowk,
Central Avenue Road, Nagpur

...APPELLANT

VERSUS

- | | | | |
|----|---|---|--|
| 1. | Suresh s/o Sidheshwar Badwaik
Aged 47 years, Occupation - Nil | } | Deleted as per Court's
Order dated 24/01/2023 |
| 2. | Smt. Usha w/o Suresh Badwaik,
Aged about 42 years, Occupation – Household,
Both R/o Matatoli, Gondia,
Tahsil and District Gondia | | |
| 3. | Santosh s/o Laxmandas Ahuja,
Age Major, Occupation – Business,
R/o. Malviya Ward, Gondia,
Tah. and District Gondia | | |

...RESPONDENTS

Shri T.T. Mirza, Advocate for the appellant.
Shri R.M. Pande, Advocate for respondent No.2.

CORAM : URMILA JOSHI-PHALKE, J.
RESERVED ON : APRIL 13, 2023.
PRONOUNCED ON : JUNE 06, 2023

ORAL JUDGMENT :

Heard learned Counsel for the parties.

2. By this appeal, the appellant - Insurance Company challenges

the judgment and award dated 20/06/2008 passed by the Motor Accident Claims Tribunal, Gondia in Claim Petition No.115/2006 whereby the Tribunal awarded the compensation of Rs.3,69,500/- with interest @ 7.5% per annum from the date of filing of the claim petition till realization of whole amount to the petitioners.

3. Brief facts in nutshell are as follows :

A] On 13/07/2006 the deceased – Prashant Badwaik riding bike bearing No.MH-35-H-8091 near Marar Toli Railway Gate with due care and cautions. At the relevant time, while saving the bicycle rider, he applied sudden breaks, due to which the motorcycle of the deceased skidded and he sustained severe head injury. He was immediately admitted in KTS Hospital, Gondia and subsequently shifted to Orange City Hospital, Nagpur. During the course of treatment he succumbed to the death.

4. As per the contention of the claimants, the age of the deceased was 20 years and he was skilled Electronic Mechanic and was earning Rs.4000/- per month. As the death of the deceased is caused in an accident, the motorcycle was owned by respondent No.2 and validly insured with respondent No.1, the claimants who are the parents are claiming compensation.

5. In response to the notice, respondent No.1 – Insurance Company contested the claim on the ground that the alleged accident took place due to the rash and negligent act of the deceased himself. Deceased was not a third party. As per the contention of the Insurance Company as the deceased has borrowed the vehicle from the owner so he entered into the shoes of the owner, and therefore, the petitioners are not entitled for any compensation.

6. Respondent No.2 resisted the claim and denied the liability. Alternatively, it is contention of respondent No.2 that the vehicle is validly insured with the Insurance Company – opponent No.1 hence, he is not liable to pay compensation.

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

8. 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 should not be included in the term of the victim. In view of Section 147 of the Motor Vehicles Act, 1988 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. It is further the contention of the Insurance Company that in view of the policy the limited liability of owner is covered. Therefore, Insurance Company is only liable to pay Rs.1,00,000/-.

9. Heard Shri T.T. Mirza, learned Counsel for the Insurance Company and Shri R.M. Pande, learned Counsel for respondent No.2. None appears for respondent No.3.

10. Shri T.T. Mirza, 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.2. 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.2. As he was riding the motorcycle, he is not the third party, and therefore, the appellant - Insurance Company is not liable to pay compensation.

11. In support of his contention he placed reliance on the following judgments :

- (i) *New India Assurance Co. Vs. Sadanand Mukhi and ors., (2009) 2 SCC 417*
- (ii) *Oriental Insurance Co. Ltd. Vs. Rajni Devi and ors., (2008) 5 SCC 736,*
- (iii) *The New India Assurance Co. Ltd. Vs. Ranglal Punju Nikam and ors., 2007 (5) ALL MR 151,*
- (iv) *Ramkhiladi and anr. Vs. The United India Insurance Co. and anr. (2020) 2 SCC 550,*
- (v) *HDFC Chubb General Insurance Co. Ltd. Vs. Shanti Devi Rajbala Singh Thakur and anr., 2008 ACJ 1280,*

wherein the Hon'ble Apex Court and this Court held that contract of insurance covered the ownerdriver, pillion rider and the mandatory third party risk but not 'other named person' or paid driver. 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 the insurance company is liable to indemnity the owner for the death of gratuitous driver of insured motorcycle as a victim held - No.

12. *Per contra*, Shri Pande, learned Counsel submitted that the claimants have claimed the compensation on account of accidental death of the deceased on the ground that the vehicle was involved in the said accident. In view of that the tribunal has awarded the compensation. The findings recorded by the Tribunal cannot be faulted with.

13. It is not in dispute that the alleged accident took place when the deceased was riding the motorcycle owned by respondent No.2. 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 attempted to save the bicycle rider and turn turtle and in the said accident, he had sustained injuries and succumbed to the injuries. The Tribunal held that the deceased died in a vehicular accident owned by opponent No.2 and validly insured with opponent No.1 and awarded the compensation.

14. In order to prove the claim, claimant No.1 stepped into the witness box and narrated about the alleged incident. PW-2 - Ramkisan Nandlal Choudhary is also examined vide Exhibit-32 to show that due to the bad road conditions the alleged accident took place. PW-3 – Bharat Chandrapal Kollhare examined to prove the income of the deceased. Besides oral evidence, claimants placed reliance on police papers i.e. accident form (Exhibit 21), Merg report (Exhibit 22 and 23), Post mortem Report (Exhibit 25), Inquest Panchnama (Exhibit 26), Spot panchnama (Exhibit 27), Insurance Policy (Exhibit 28).

15. Learned Counsel Shri Mirza vehemently submitted that the deceased had borrowed the motorcycle from the owner which met with an accident. In view of the policy, limited liability of owner is

accepted. He placed on record the policy terms and conditions which shows that the compensation shall be payable under only one of the items (I) to (iv) in respect of the owner-driver arising out of any one occurrence and the total liability of the insurer shall not in the aggregate exceed the sum of Rs.1,00,000/- during any one period of insurance. 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.”

16. In Ramkhiladi and anr. (supra) 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, there 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.

17. 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.

18. 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.

19. The learned Counsel further placed reliance on New India Assurance Co. Ltd. Vs. Sadanand (supra) wherein also the Hon'ble Apex Court held that contract of insurance of a motor vehicle is governed by the provisions of the Insurance Act. The terms of the policy as also the quantum of the premium payable for insuring the vehicle in question depends not only upon the carrying capacity of the vehicle but also on the purpose for which the same was being used and the extent of the risk covered thereby. By taking an 'act policy', the owner of a vehicle fulfils his statutory obligation as contained in Section 147 of the Act. The liability of the insurer is either statutory or contractual. The same ratio is laid down in Oriental Insurance Co. Ltd. Vs. Rajni Devi and ors.(supra) and held that it is now a well settled principle of law that in a case

where third party is involved, the liability of the insurance company would be unlimited. Where, however, compensation is claimed for the death of the owner or another passenger of the vehicle, the contract of insurance being governed by the contract qua contract, the claim of the insurance company would depend upon the terms thereof.

20. In view of the observation of the Hon'ble Apex Court in catena of decisions, the deceased stepped into the shoes of the owner. 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.2 - 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 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 the claimants are entitled for compensation. Admittedly, entitlement of compensation depends upon nature of contract and terms and conditions enumerated therein.

23. In the present case, as per the contract of insurance, in case of personal accident the owner-driver is entitled to a sum of Rs.1,00,000/-. Therefore, the deceased, as observed earlier entered into the shoes of the owner shall be entitled to a sum of Rs.1,00,000/-, even as per the contract of insurance from the appellant – insurance company. The limited liability of the insurance company is of Rs.1,00,000/-. The respondent No.3 (original respondent No.2) owner is liable to pay rest of the amount of compensation.

24. It is well settled position of law that deceased borrowing

motorcycle from the owner of the motorcycle is not a third party. The contract of insurance is based on the terms and conditions of the policy. Thus, taking into consideration provisions contained in Section 147 of the Act, the insurance policy covers the liability in view of the contract. After applying the abovesaid principle, insurance company has accepted the limited liability, and therefore, the insurance company is liable to pay compensation only to the extent of Rs.1,00,000/-, therefore, the appeal deserves to be allowed.

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

- (i) The first appeal is allowed.
- (ii) The judgment and award dated 20/06/2008 passed by Member, Motor Accident Claims Tribunal, Gondia in Claim Petition No.115/2006 is modified.
- (iii) The appellant – insurance company is liable to pay Rs.1,00,000/- along with interest @ 7.5% per annum to the claimants in view of the terms and conditions of the policy. The respondent No.3 – owner is liable to pay rest of the compensation amount along with interest @ 7.5% per annum from the date of application till realisation of the amount.
- (iv) The first appeal is disposed of.

(URMILA JOSHI-PHALKE, J.)