

**(2016) 07 J&K CK 0008**  
**In the Jammu And Kashmir High Court**  
**Case No : CIMA No. 562 of 2010**

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|-------------------------------------------------|------------|
| Bajaj Allianz General Insurance Company Limited | APPELLANT  |
| Vs                                              |            |
| Balwant Raj                                     | RESPONDENT |

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**Date of Decision :** 20-07-2016

**Acts Referred:**

Motor Vehicles Act, 1988 — Section 149, Section 163A, Section 163A

**Citation :** (2017) AAC 121

**Hon'ble Judges :** Mr. Ramalingam Sudhakar, J.

**Bench :** Single Bench

**Advocate :** Mr. Parvinder Singh, Advocate, for the Respondents; Mr. Vishnu Gupta, Advocate, for the Appellant

**Final Decision :** Allowed

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## Judgement

Mr. Ramalingam Sudhakar, J. - This appeal is of the year 2010. Insurance Company has filed this appeal challenging the award of the Tribunal.

The brief facts of the case are as follows:

2. Respondent Nos.1 to 3 have filed the petition under Section 163-A under Motor Vehicle Act (hereinafter to be referred to as the Act) before

the Tribunal on account of death of Sanjeev Kumar - 23 years old, who died in a road accident on 02.02.2008 at 9 PM near Khain, Udhampur

when the Motorcycle bearing No.JK02AB- 1931 was driven by said late Sanjeev Kumar along with Jaswinder Singh - pillion rider met with an

accident duly on account of rash and negligent driving on the part of the deceased Sanjeev Kumar. Sanjeev Kumar died in the accident and

Jaswinder Singh sustained injuries. It is also on record that the deceased and Jaswinder Singh had proceeded to Patnitop and on the way at Khain,

NHW Udhampur, the Motorcycle skidded and the accident was caused. The FIR

was lodged which is part of the record stating that the death was due to the rash and negligent driving on the part of Sanjeev Kumar.

3. The owner of the vehicle is one Ashish Podwal respondent No.2 before the Tribunal and he was set exparte as he did not appear. The

Insurance Company, however, resisted the claim vehemently both on the facts and also on the plea that Insurance policy does not cover the claim.

The Tribunal framed the following questions of law which reads as follows:

1. Whether an accident occurred on 2.2.2008 at Khain near Udhampur by the rash and negligent driving of offending vehicle No. JK02AB 1931

being driven rashly and negligently in the hands of erring driver in which deceased Sanjeev Kumar sustained fatal injuries. OPP

2. If issue No.1 is proved in affirmative whether petitioners are entitled to the compensation; if so to what amount and from whom? OPP

3. Whether driver of offending vehicle at the time of accident was not holding valid and effective driving license and plied the vehicle in violation of

insurance policy? OPR-1

4. Relief. O.P. Parties

4. Balwant Raj - father of the deceased was examined as PW, besides Pankaj Bagotra, the maternal uncle of the deceased, was also examined in

support of the claim petition. RW Deepak Gupta, Legal Executive was examined by the respondent-company. It is recorded by the Tribunal in

Issue No.1 that 23 years old Sanjeev Kumar died on account of the vehicle skidding while moving on the road. PW-Balwant Raj stated that the

deceased was working as Sales Man in Ashish's Agency owned by the 2nd respondent and the deceased was getting Rs. 3200/- per month as

pay. He also stated that the deceased had completed his Diploma in J&K Handloom in the year 2007 and he was getting Rs. 10,000/- per month.

A valid driving license was produced. It is pleaded that at the time of death, the deceased had gone for collection on behalf of the agency. His

maternal uncle also reiterated the fact that the deceased was working in Ashish's Agency and was getting salary of Rs. 3500/- per month and he

died during the course of employment.

5. On the contrary, the Insurance Company pleaded that the FIR and the evidence clearly establish the case of fault on the part of the deceased

Sanjeev Kumar, who was driving the vehicle in a rash and negligent manner and due to his carelessness, he suffered fatal injuries and died. The

Insurance Company is not liable, nevertheless, it is pleaded that the policy does not cover it. They denied the employment stating that document

like appointment order, salary slip etc. were not marked. The said plea is an afterthought.

6. Various decisions of the Courts including the Supreme Court was relied upon by the counsel for the appellant Insurance Company to plead that

in a claim under Section 163-A, on account of fault of the deceased who steps into the shoes of the owner, the Tribunal ought not have granted the

claim of compensation for own fault.

7. Per contra, learned counsel for the respondents relied upon the decisions of the High Courts pleading that Sanjeev Kumar died during the

course of employment. The age of the deceased and other factors are not disputed. He also stated several decisions to contend that there is no

necessity to prove negligence. He relied upon judgment of the Karnataka High Court titled ""M/s. Oriental Insurance Company Limited v.

Smt. Salma and others"" : (AIR 2008 Kar 106 to plead that the claim under Section 163-A of the Motor Vehicles Act is maintainable even in

case where negligence is on the part of the victim. Para-8 of the judgment reads as follows:

8. The learned Counsel appearing for the appellant has relied upon the decision of this Court in the case of Appaji (Since Deceased) and

another v. M. Krishna and another, reported in 2004 ACJ 1289 : (2004 AIR-Kant HCR 945) wherein it is held that Section 163-A

provides awarding compensation on structure formula and if death is caused due to the negligence of the victim himself, the petition is not

maintainable, In subsequent judgment of Hon'ble Supreme Court in case of Deepal Girishbhai Soni and Ors. v. United India Insurance Co.

Ltd. reported in 2004 ACJ 934, (AIR 2004 Supreme Court 2107), the 3 judge bench of the supreme court has held in para 66 of the

Judgment as follows:

We may notice that Section 167 of the Act provides that where death of, or bodily injury to, any person gives rise to claim of compensation under

the Act and also under the Workmen's Compensation Act, 1923, he cannot claim

compensation under both the Acts, The Motor Vehicles Act

contains different expressions as, for example, under the provision of the Act', or 'any other law or otherwise'. In Section 163-A, the expression

notwithstanding anything contained in this Act or in any other law for the time being in force"" has been used, which goes to show that Parliament

intended to insert a non-obstante clause of wide nature which would mean that the provisions of Section 163-A would apply despite the contrary

provisions existing in the said Act or any other law for the time being in force. Section 163-A of the Act covers cases where even negligence is on

the part of the victim. It is by way of an exception to Section 166 and the concept of social justice has been duly taken care of.

In view of the abovesaid principle laid down by the Hon'ble Supreme Court, it is clear that a petition under Section 163-A of the Motor Vehicles

Act is maintainable even in case where negligence is on the part of the victim.

8. The question that arises for consideration is whether in an admitted fact of rash and negligent driving by the deceased Sanjeev Kumar on the

vehicle owned by said Ashish Podwal, whether the claim for compensation by the parents of the deceased is justified.

9. No doubt, in the decision of Karnataka High Court, there is an indication to that effect in relation to claim under Section 163-A of the Act.

However, the decision of the Supreme Court in ""National Insurance Company Limited v. Sinitha and others"", 2012 AAC 380 (SC), it has

been emphatically held that the claims under Section 163-A of the Act is founded on ""fault"" liability principle. Paras 13 & 15 of the judgment read

as follows:

13. In the second limb of the present consideration, it is necessary to carry out a comparison between Sections 140 and 163A of the Act. For this,

Section 163A of the Act is being extracted hereunder:

Section 163A. Special provisions as to payment of compensation on structured formula basis - (1) Notwithstanding anything contained in this Act

or in any other law for the time being in force or instrument having the force of law, the owner of the motor vehicle or the authorized insurer shall be

liable to pay in the case of death or permanent disablement due to accident arising out of the use of motor vehicle, compensation, as indicated in

the Second Schedule, to the legal heirs or the victim, as the case may be.

Explanation - For the purposes of this sub-section, "permanent disability shall have the same meaning and extent as in the Workmen's Compensation Act, 1923 (8 of 1923).

(2) In any claim for compensation under subsection (1), the claimant shall not be required to plead or establish that the death or permanent disablement in respect of which the claim has been made was due to any wrongful act or neglect or default of the owner of the vehicle or vehicles concerned or of any other person.

(3) The Central Government may, keeping in view the cost of living by notification in the Official Gazette, from time to time amend the Second Schedule.

A perusal of Section 163(A) reveals that subsection (2) thereof is in pari materia with subsection (3) of Section 140. In other words, just as in

Section 140 of the Act, so also under Section 163A of the Act, it is not essential for a claimant seeking compensation, to "plead or establish", that

the accident out of which the claim arises suffers from "wrongful act" or "neglect" or "default" of the offending vehicle. But then, there is no

equivalent of sub-section (4) of Section 140 in Section 163A of the Act. Whereas, under subsection (4) of Section 140, there is a specific bar,

whereby the concerned party (owner or insurance company) is precluded from defeating a claim raised under Section 140 of the Act, by "pleading

and establishing", "wrongful act", "neglect" or "default", there is no such or similar prohibiting clause in Section 163A of the Act. The additional

negative bar, precluding the defence from defeating a claim for reasons of a "fault" ("wrongful act", "neglect" or "default"), as has been expressly

incorporated in Section 140 of the Act (through sub-section (4) thereof), having not been embodied in Section 163A of the Act, has to have a

bearing on the interpretation of Section 163A of the Act. In our considered view the legislature designedly included the negative clause through

sub- section (4) in Section 140, yet consciously did not include the same in the scheme of Section 163A of the Act. The legislature must have

refrained from providing such a negative clause in Section 163A intentionally and purposefully. In fact, the presence of sub-section (4) in Section

140, and the absence of a similar provision in Section 163A, in our view, leaves no room for any doubt, that the only object of the Legislature in

doing so was, that the legislature desired to afford liberty to the defence to defeat a claim for compensation raised under Section 163A of the Act,

by pleading and establishing ""wrongful act"", ""neglect"" or ""default"". Thus, in our view, it is open to a concerned party (owner or insurer) to defeat a

claim raised under Section 163A of the Act, by pleading and establishing anyone of the three ""faults"", namely, ""wrongful act"", ""neglect"" or ""default"".

But for the above reason, we find no plausible logic in the wisdom of the legislature, for providing an additional negative bar precluding the defence

from defeating a claim for compensation in Section 140 of the Act, and in avoiding to include a similar negative bar in Section 163A of the Act.

The object for incorporating sub-section (2) in Section 163A of the Act is, that the burden of pleading and establishing proof of ""wrongful act",

neglect"" or ""default"" would not rest on the shoulders of the claimant. The absence of a provision similar to sub-section (4) of Section 140 of the

Act from Section 163A of the Act, is for shifting the onus of proof on the grounds of ""wrongful act", ""neglect"" or ""default"" onto the shoulders of the

defence (owner or the insurance company). A claim which can be defeated on the basis of any of the aforesaid considerations, regulated under the

fault"" liability principle. We have no hesitation therefore to conclude, that Section 163A of the Act is founded on the ""fault"" liability principle.

15. The heading of Section 163A also needs a special mention. It reads, ""Special Provisions as to Payment of Compensation on Structured

Formula Basis"". It is abundantly clear that Section 163A, introduced a different scheme for expeditious determination of accident claims.

Expeditious determination would have reference to a provision wherein litigation was hitherto before (before the insertion of Section 163A of the

Act) being long drawn. The only such situation (before the insertion of Section 163A of the Act) wherein the litigation was long drawn was under

Chapter XII of the Act. Since the provisions under Chapter XII are structured under the ""fault"" liability principle, its alternative would also

inferentially be founded under the same principle. Section 163A of the Act, catered to shortening the length of litigation, by introducing a scheme

regulated by a prestructured formula to evaluate compensation. It provided for some short-cuts, as for instance, only proof of age and income,

need to be established by the claimant to determine the compensation in case of death. There is also not much discretion in the determination of

other damages, the limits whereof are also provided for. All in all, one cannot lose sight of the fact, that claims made under Section 163A can result

in substantial compensation. When taken together the liability may be huge. It is difficult to accept, that the legislature would fasten such a

prodigious liability under the "no-fault" liability principle, without reference to the "fault" grounds. When compensation is high, it is legitimate that the

insurance company is not fastened with liability when the offending vehicle suffered a "fault" ("wrongful act", "neglect", or "defect") under a valid Act

only policy. Even the instant process of reasoning, leads to the inference, that Section 163A of the Act is founded under the "fault" liability

principle.

10. In light of the above legal principle and in light of the evidence on the record which clearly establishes that the deceased was careless and

negligent, the plea of the Insurance Company has relevance. Deceased was responsible for the accident and he died due to his carelessness and

not otherwise. The Clause 2 of the Section 163-A of the Act would not cover such a plea of this nature which reads as follows:

(2) In any claim for compensation under sub-Section (1), the claimant shall not be required to plead or establish that the death or permanent

disablement in respect of which the claim has been made was due to any wrongful act or neglect or default of the owner of the vehicle or vehicles

concerned or of any other person.

11. This is so because the deceased has stepped into the shoes of the owner. He being responsible for the accident cannot claim compensation.

12. This was considered by the Division Bench of the Karnataka High Court in case titled "Appa Ji and Another v. M. Krishna and another

reported in 2004 ACJ 1289. Paras 16, 19 and 21 of the judgment reads as follows:

16. It is evident from the above that Section 163-A was never intended to provide relief to those who suffered in a road accident not because of

the negligence of another person making use of a motor vehicle, but only on account of their own rash, negligent or imprudent act resulting in death

or personal injury to them. The recommendations of the Law Commission were concerned more with the victims of hit-and-run accident cases

where the particulars of offenders could not be ascertained. It also expressed

concern about the security of victims, of road accidents and recommended dispensing with proof of fault on the part of the owner or driver of the vehicle. The recommendations, it is clear, were made from the point of view of victims of accidents on the roads more than those who were responsible for the same. The Review Committee too had viewed the situation from the point of view of such victims and expressed concern about the time it took for disposal of ordinary cases before the Tribunals. The objects and reasons underlying the introduction of the provision also envisaged adequate compensation to victims of road accidents without going into what was described as long-drawn procedure. The decision of the Apex Court in Kodala's case, 2001 ACJ 827 (SC), elucidated the purpose underlying the introduction of Section 163-A in the light of recommendations of the Law Commission and the Review Committee. There is nothing in any one of the above to suggest that Section 163-A was intended to be available even in a situation where the accident in question had caused death or physical injury to none except the person who was rash and negligent in using the motor vehicle. The universal concern was for the safety and the social security of an innocent user of the road and not for a person who had because of his own imprudence, rashness or negligence met with an accident and suffered an injury or death.

19. The right to receive compensation under Section 163-A presupposes that the person who makes a claim is a victim or the legal heirs of a victim. The provision on the plain language employed in the same does not entitle a person who is neither a victim nor his/her legal heir to claim any compensation. In other words, one who is the victim of his own actions of rash or negligent driving cannot invoke Section 163-A for making a claim. The concern of the legislature and the jurists is understandably for the victim in contradistinction to the victimiser or one who falls a victim to his own action. While road accidents generally affect innocent third parties or those making use of public transport, cases where the owner or driver of the vehicle alone suffers on account of his rash and negligent driving are not uncommon. Drunken driving, speeding in what are high performance new generation of automobiles including two-wheelers are accounting for a large number of accidents every day. Quite often these

accidents kill or wound even the person who is driving the vehicle. Parliament did not in our opinion intend to provide for compensation to the person responsible for the accident on structured formula basis in such cases. Neither the provisions of Section 163-A nor the background in which the same were introduced disclose any such intention. The argument that Section 163-A is a panacea for all ills concerning the accidents regardless of whether the person who is killed or injured is or is not a victim must therefore be rejected.

21. We need not dilate on the rights and liabilities of the parties in such a case for that aspect even though raised before us does not strictly

speaking fall for a detailed examination. Suffice it to say that in a case where no liability arises against the driver or owner of the vehicle on account

of the accident no such liability will arise even against the insurance company with whom the vehicle involved in the accident is insured. Section

163-A of the Act does not in our opinion alter that legal position. It does not alter the legal basis on which a liability arises under Section 147 of the

Act nor does it provide a different or modified basis for the same. That being so, in the case of an accident where the person killed or injured is

himself responsible for the accident, no liability would arise against the insured nor can any such liability be enforced under Section 163-A of the

Act. For a liability under Section 163-A to arise against insurance company, it is essential that such a liability must first arise against the insured and

the insurance company under Section 147 of Motor Vehicles Act.

13. Therefore, the decision of the Karnataka High Court in the case of ""M/s. Oriental Insurance Company Limited v. Smt. Salma and

others"", AIR 2008 Kar 106 relied upon by the respondents will not aid the respondent claimants.

14. Another aspect of the matter which has been pointed out by appellant and on which this Court finds justification is that the policy in this case

may not cover the claim because for two reasons. ""Section II- Liability to Third Parties"" in the Insurance Policy says that the Company shall not be

liable where such death or injury arises out of and in the course of the employment of such person by the insured, assuming that the deceased was

the employee of 2nd respondent, which fact is also not clear. The insurance Policy therefore does not cover such a claim.

15. The other plea is that the policy covers owner-driver and, therefore, since the deceased has stepped into the shoes of the owner, the claim is

maintainable. That plea also cannot be justified. "Section III - Personal Accident Cover for Owner Driver" of Insurance Policy reads as follows:

1. This cover is subject to

(a) the owner-driver is the registered owner of the vehicle insured herein;

(b) the owner driver is the insured named in this policy.

(c) the owner-driver holds an effective driving license, in accordance with the provision of Rule 3 of the Central Motor Vehicles Rules, 1989, at

the time of the accident.

16. It only means the registered owner of the vehicle, not the user. It can by no stretch of the imagination be extended to a person who is using the

vehicle gratis or otherwise. Therefore, the policy does not cover the claim at all. Ground raised by the appellant is justified. Accordingly the appeal

is allowed. The order of the Tribunal stands set aside.