

(2013) 11 AHC CK 0017
In the Allahabad High Court
Case No : F.A.F.O. No. 1067 of 2011 etc.

Oriental Insurance Co. Ltd.

APPELLANT

Vs

Mohd. Saleem and Others

RESPONDENT

Date of Decision : 11-11-2013

Acts Referred:

Citation : (2014) 1 AWC 941

Hon'ble Judges : Ritu Raj Awasthi, J

Bench : Single Bench

Judgement

Ritu Raj Awasthi, J.—Heard learned counsel for the appellant as well as Mr. M.P. Yadav, learned counsel appearing for respondents-claimants and Mr. Alok Saxena, learned counsel for respondents-vehicle owner of Mini Bus bearing registration No. U.P. 32 A.N./0621.

2. These are five first appeals from orders arising out of same accident, as such, they have been connected and heard together and are being decided by the common judgment:

(i) First Appeal From Order No. 1067 of 2011 arises out of the judgment and order dated 29.7.2011 passed in claim petition No. 526 of 2007 whereby the Tribunal has awarded a sum of Rs. 1.52,000 as compensation alongwith 6% simple interest from the date of institution of claim till actual payment is made.

(ii) First Appeal From Order No. 1068 of 2011 arises out of the Judgment and order dated 29.7.2011 passed in claim petition No. 525 of 2007 whereby the Tribunal has awarded a sum of Rs. 1,52,000 as compensation alongwith 6% simple interest from the date of institution of claim till actual payment is made.

(iii) First Appeal From Order No. 1069 of 2011 arises out of the judgment and order dated 30.7.2011 passed in claim petition No. 524 of 2007 whereby the Tribunal has awarded a sum of Rs. 1,52,000 as compensation alongwith 6% simple interest from the date of institution of claim till actual payment is made.

(iv) First Appeal From Order No. 1066 of 2011 arises out of the judgment and order dated 30.7.2011 passed in claim petition No. 522 of 2007 whereby the Tribunal has awarded a sum of Rs. 1,96,500 as compensation alongwith 6% simple interest from the date of institution of claim till actual payment is made.

(v) First Appeal From Order No. 1070 of 2011 arises out of the judgment and order dated 30.7.2011 passed in claim petition No. 523 of 2007 whereby the Tribunal has awarded a sum of Rs. 1,96,500 as compensation alongwith 6% simple interest from the date of institution of claim till actual payment is made.

3. The learned Tribunal has also directed that in case of failure to pay awarded amount within the prescribed period, the interest rate shall be enhanced to 9% per annum.

4. Learned counsel for the appellants-insurance company submitted that the learned Tribunal has grossly erred in awarding compensation against the insurance company and in favour of the claimants, as the said accident had not taken place due to fault on the part of driver of Mini Bus No. U.P. 32 A.N./0621. The learned Tribunal has failed to appreciate that in the motorcycle bearing Registration No. U.P. 32 B.R./5314, five persons were riding and they were coming from the opposite side and had dashed with the stationary Mini Bus which was on its side of the road. The said accident had taken place due to negligence on the part of driver of the motor-cycle and not due to any fault of driver of the Mini Bus.

5. It is further submitted by learned counsel for the appellant that even in case of claim petitions filed u/s 163A of M.V. Act the claimants have to prove the fault, wrongful act or neglect of the offending vehicle and the Tribunal is required to come to conclusion that the said accident had taken place due to the fault on the part of the offending vehicle. It is correct that u/s 163A the claimants are not required to prove rash and negligent driving of the offending vehicle, however it does not mean that even in case there is no fault on the part of the offending vehicle and accident has taken place only due to negligence on the part of the other vehicle in which the deceased were travelling even then the compensation is to be paid to the claimants.

6. The submission is that in the present case as per the site plan prepared by the police subsequent to the first information report lodged by the claimants, it has come that the accident had taken place on the road, at a place which indicates that the motor-cycle has deviated from its side and had moved towards its right due to which it had come in" front of the Mini Bus, as such, it cannot be said that the accident had taken place due to fault of the Mini Bus only. It is submitted that the Tribunal has wrongly decided issue No. 5 which relates to contributory negligence on the part of driver of motor-cycle. The finding of Tribunal in this regard are perverse.

7. In support of her submission learned counsel for appellant relies on the judgment of Apex Court in the case of National Insurance Company Ltd. Vs.

Sinitha and Others, , wherein the Apex Court has held that Section 163A is governed under "fault liability" principles. The liberty to defendants in such case shall be given to plead and establish "wrongful act" or "neglect" or "default" of the other side to defeat the claim raised u/s 163A of M.V. Act.

8. Learned counsel for the respondents-claimants on the other hand submitted that the learned Tribunal in its findings has come to conclusion that the said accident had taken place between the said Mini Bus and the motor-cycle on which two adults and three children were riding. All the five persons travelling on the motor-cycle had died on sustaining serious injuries due to the said accident.

9. It is further submitted that the Tribunal has rightly awarded compensation against the present appellant which happens to be the insurer of the Mini Bus as the said accident had taken place due to fault of the driver of Mini Bus. The appellant-insurance company, as such, is liable to pay the compensation awarded by the Tribunal.

10. It is also submitted that P.W. 2/eye-witness of the said accident has stated in its statement before the Tribunal that the said accident had taken place due to rash and negligent driving of the driver of said Mini Bus which had hit the motor-cycle from the front and due to the said accident the deceased had died. P.W. 2 in his statement has also stated that the police has not prepared the site plan correctly as per the information given by him and the accident had occurred on the road, at a place which was on the side on which the motor-cycle was coming. There was no fault of the driver of motor-cycle.

11. Mr. Alok Saxena, learned counsel appearing for respondent-owner of Mini Bus submitted that the driver of Mini Bus (D.W. 1) in his statement before the Tribunal had stated that no such accident had taken place from the said Mini Bus. In fact some Tempo Dala had hit the motor-cycle which in turn had dashed with the stationary bus which was standing on its side of the road due to puncture in one of its tyre. The learned Tribunal has failed to appreciate the said evidence in the right perspective.

12. I have considered the submissions made by the parties counsel and gone through the records.

13. It is the admitted position between the parties that all the aforesaid claim petitions were filed u/s 163A of Motor Vehicles Act, 1988.

14. As per the facts of the case the said accident had taken place on 19.10.2007 at about 12.30 p.m. near Rahmankhera Farm House, P.S. Kakori, District Lucknow. The deceased Wasi Ahmed with his sister Rukhsana and three children (nieces), Km. Saba, Km. Sana and Mohd. Mobeen aged about 12 years, 10 years and 5 years respectively was going on motor-cycle to Village Kurrana, P.S. Sandila. District Hardoi to meet Smt. Humaira who was said to be the sister of Wasi Ahmed. The said Mini Bus which was coming from the other side had hit the motor-cycle from the front due to which all the persons riding on the motor-cycle

had sustained serious injuries and had died.

15. In this regard, the brother of deceased Wasi Ahmed had lodged a first information report at P.S. Kakori which was registered as Case Crime No. 381 of 2007, under Sections 279, 304A and 427, I.P.C. The claim petitions were filed on behalf of all the deceased persons through their legal representatives. The learned Tribunal while deciding these claim petitions had come to conclusion that the said accident had taken place due to negligence of the driver of said Mini Bus which had hit the motor-cycle from the front. The Tribunal after coming to conclusion that the said accident had taken place due to negligence on the part of driver of Mini Bus has awarded compensation to the deceased on the basis of structured formula provided in Schedule II u/s 163A.

16. The point of consideration in these appeals which arise on the basis of pleadings raised in these appeals as well as the arguments raised before the Court is whether the appellants being defendants in the claim petitions was entitled to raise the pleadings of "fault of the driver of motor-cycle" in the said accident in order to defeat the claim petitions. It is also to be decided as to whether the learned Tribunal while deciding the claim petitions has rightly come to conclusion that there was no negligence on the part of driver of the motor-cycle in the said accident.

17. So far as the first point of consideration is concerned, u/s 163A Motor Vehicles Act there is no statutory requirement to plead or establish that the death or permanent disablement in respect of which claims were made was due to any "wrongful act" or "neglect" or "default" of the owner of the vehicle or vehicle concerned or of any other person. However, the defendants in order to defeat the claim petition can very well plead that the said accident had taken place due to the wrongful act" or "neglect" or "default" on the part of the driver of the vehicle on whose behalf the claim petitions have been filed.

18. This view find support from the judgment of the Apex Court in the case of National Insurance Company Ltd. v. Sinitha and others (supra) wherein the Apex Court has concluded that it is open to the owner or insurance company, as the case may be, to defeat the claim u/s 163A of the Act by pleading and establishing through cogent evidence a "fault" ground ("wrongful act" or "neglect" or "default"). It is, therefore, doubtless that Section 163A is found under "fault" liability principles.

19. The relevant paragraphs 16, 17, 18 and 19 of the judgment are reproduced hereinbelow:

16. At the instant juncture, it is also necessary to reiterate a conclusion already drawn above, namely, that Section 163A of the Act has an overriding effect on all other provisions of the Motor Vehicles Act, 1988. Stated in other words, none of the provisions of the Motor Vehicles Act, which is in conflict with Section 163A of the Act will negate the mandate contained therein (in Section 163A of the Act). Therefore, no matter what. Section 163A of the Act shall stand on its own,

without being diluted by any provision. Furthermore, in the course of our determination including the inferences and conclusions drawn by us from the judgment of this Court in *Oriental Insurance Company Limited v. Hansrajbhai V. Kodala* (supra), as also, the statutory provisions dealt with by this Court in its aforesaid determination, we are of the view, that there is no basis for inferring that Section 163A of the Act is founded under the "no-fault" liability principle. Additionally, we have concluded hereinabove, that on the conjoint reading of Sections 140 and 163A, the legislative intent is clear, namely, that a claim for compensation raised u/s 163A of the Act, need not be based on pleadings or proof at the hands of the claimants showing absence of "wrongful act", being "neglect" or "default". But that, is not sufficient to determine that the provision falls under the "fault" liability principle. To decide whether a provision is governed by the "fault" liability principle the converse has also to be established, i.e., whether a claim raised thereunder can be defeated by the concerned party (owner or insurance company) by pleading and proving "wrongful act", "neglect" or "default". From the preceding paragraphs (commencing from paragraph 12), we have no hesitation in concluding, that it is open to the owner or insurance company, as the case may be, to defeat a claim u/s 163A of the Act by pleading and establishing through cogent evidence a "fault" ground ("wrongful act" or "neglect" or "default"). It is, therefore, doubtless, that Section 163A of the Act is founded under the "fault" liability principle. To this effect, we accept the contention advanced at the hands of the learned counsel for the petitioner.

17. Having recorded our conclusions hereinabove, it is essential for us to determine whether or not the compensation awarded to the claimants/respondents in the present controversy, by the Tribunal, as also, by the High Court, is liable to be set aside on the plea of "negligence" raised at the hands of the petitioner. The award rendered by the Tribunal, as also, the decision of the High Court in favour of the claimants/respondents is, therefore, liable to be reappraised keeping in mind the conclusions recorded by us. In case, the petitioner can establish having pleaded and proved negligence at the hands of the rider Shijo, the petitioner would succeed. The pleadings filed before the Tribunal at the hands of the petitioner, are not before us. What is before us, is the award of the Tribunal dated 19th April, 2005. We shall endeavour to determine the plea of negligence advanced at the hands of the learned counsel for the petitioner from the award. The Tribunal framed the following issues for consideration:

- (1) Who are responsible for the accident?
- (2) What, if any is the compensation due and who are liable?
- (3) What is the annual income of the deceased?
- (4) Whether the OP (2280/00) is maintainable u/s 168A of the M.V. Act?

It is difficult to understand the true purport of the first issue framed by the Tribunal. A person may be "responsible" for an act, yet he may not be

"negligent". Illustratively, a child who suddenly runs on to a road may be "responsible" for an accident. But, was the child negligent? The answer to this question would emerge by unraveling the factual position. A child Incapable of fending for himself would certainly not be negligent, even if he suddenly runs on to a road. The person in whose care the child was, at the relevant juncture, would be negligent, in such an eventuality. The driver at the wheels at the time of the accident is responsible for the accident, just because he was driving the vehicle, which was involved in the accident. But, considering the limited facts disclosed in the illustration can it be said that he was negligent? Applying the limited facts depicted in the illustration, it would emerge that he may not have been negligent. Negligence is a factual issue and can only be established through cogent evidence. Now the case in hand. In the present case also, the negligence of Shijo shall have to be determined from the factual position emerging from the evidence on record. Issue No. (1) framed by the Tribunal therefore, may not provide an appropriate answer to the issue in hand. Besides there being no issue framed by the Tribunal for adjudicating "negligence" in the accident under reference, it is also clear that the petitioner-insurance company did not seek the Courts intervention on such a plea. It is also relevant to mention, that no witness was produced by the petitioner-insurance company before the Tribunal. During the course of hearing, learned counsel for the petitioner only replied upon the conclusions drawn by the Tribunal on issue No. (1). For this, our attention was drawn to paragraph 8 of the award rendered by the Tribunal which is being extracted hereunder:

8. Issue No. 1.--This issue arises now only in O.P. 2281/2000. P.W. 1 admitted that she has seen the accident. Exhibits A-1 to A-5 and Exhibit A-10 are records from the connected criminal case charge-sheeted under Sections 279, 337 and 304A, I.P.C. as against the deceased Shijo. They are the copies of the F.I.R., post-mortem certificate, scene mahazor, report of inspection of the vehicle, final report and the inquest report, respectively. In the absence of contra evidence I find that the deceased Shijo was responsible for the accident.

The Tribunal in holding, that the rider Shijo was responsible for the accident, had placed reliance on copies of the first information report, post-mortem certificate, scene mahazor, report of inspection of vehicle, Inquest report and final report. Neither of these in our considered view, can constitute proof of "negligence" at the hands of Shijo. Even if he was responsible for the accident, because the motor-cycle being ridden by Shijo had admittedly struck against a large laterite stone lying on the tar road. But then, it cannot be overlooked that the solitary witness who had appeared before the Tribunal had deposed, that this has happened because the rider of the motorcycle had given way to a bus coming from the opposite side. Had he not done so there may have been a head-on collision or it may well be, that the bus coming from the opposite side was being driven on the wrong side. This or such other similar considerations would fall in the realm of conjectural determination. In the absence of concrete evidence this factual jumble will remain an unresolved tangle. It has already been concluded

hereinabove, that in a claim raised u/s 163A of the Act, the claimants have neither to plead nor to establish negligence. We have also held, that negligence (as also, "wrongful act" and "default") can be established by the owner or the insurance company (as the case may be) to defeat a claim u/s 163A of the Act. It was, therefore, imperative for the petitioner-insurance company to have pleaded negligence, and to have established the same through cogent evidence. This procedure would have afforded an opportunity to the claimants to repudiate the same. Has the petitioner discharged this onus? In the present case, only one witness was produced before the Tribunal. The aforesaid witness appeared for the claimants. The witness asserted, that while giving way to a bus coming from opposite side, the motor-cycle being ridden by Shijo, hit a large laterite stone lying on the tar road, whereupon, the motor-cycle overturned, and the rider and the pillion-rider suffered injuries. The petitioner insurance company herein did not produce any witness before the Tribunal. In the absence of evidence to contradict the aforesaid factual position, it is not possible for us to conclude, that Shijo was "negligent" at the time when the accident occurred. Since, no pleading or evidence has been brought to our notice (at the hands of the learned counsel for the petitioner), it is not possible for us to conclude, that the inverse onus which has been placed on the shoulders of the petitioner u/s 163A of the Act to establish negligence, has been discharged by it. We, therefore, find no merit in the first contention advanced at the hands of the learned counsel for the appellant.

18. The second contention advanced at the hands of the learned counsel for the petitioner was, that Shijo being the rider of the motor-cycle, cannot be treated as a third party. It was pointed out, that the claim u/s 163A can only be raised at the behest of a third party. It seems, that the instant determination raised at the hands of the learned counsel for the petitioner, is based on the determination rendered by this Court in *Oriental Insurance Co. Ltd. Vs. Smt. Jhuma Saha and Others*, wherein, this Court held as under:

10. The deceased was the owner of the vehicle. For the reasons stated in the claim petition or otherwise, he himself was to be blamed for the accident. The accident did not involve motor vehicle other than the one which he was driving. The question which arises for consideration is that the deceased himself being negligent, the claim petition u/s 166 of the Motor Vehicles Act, 1988 would be maintainable. According to the learned counsel for the petitioner, since, the rider of the vehicle involved in the accident was Shijo himself, he would stand in the shoes of the owner, and as such, no claim for compensation can be raised in an accident caused by him, u/s 163A of the Act.

19. To substantiate his second contention, it would be essential for the petitioner to establish, that Shijo having occupied the shoes of the owner, cannot be treated as the third party. Only factual details brought on record through reliable evidence, can discharge the aforesaid onus. During the course of hearing, despite our queries, learned counsel for the petitioner could not point out the

relationship between Shijo and the owner of the motor-cycle involved in the accident. Shijo is not shown to be the employee of the owner. He was not even shown as the representative of the owner. In order to establish the relationship between the Shijo and the owner, the petitioner-insurance company could have easily produced either the owner himself as a witness, or even the claimants themselves as witnesses. These or other witnesses, who could have brought out the relationship between the owner and Shijo, were not produced by the petitioner herein, before the Tribunal. The petitioner has, therefore, not discharged the onus which rested on its shoulders. Since, the relationship between the Shijo and the owner has not been established, nor the capacity in which he was riding the vehicle has been brought out, it is not possible for us to conclude, that Shijo while riding the motor-cycle on the fateful day, was an agent, employee or representative of the owner. It was open to the petitioner to defeat the claim for compensation raised by the respondents by establishing, that the rider Shijo represented the owner, and as such, was not a third party, in terms of the judgment rendered by this Court in Oriental Insurance Company Limited case (supra). The petitioner failed to discharge the said onus. In view of the above, it is not possible for us to accede to the second contention advanced at the hands of the learned counsel for the petitioner.

20. The appellants being defendants in claim petition can raise the pleadings of "fault" liability of driver of motor-cycle in a claim petition filed u/s 163A Motor Vehicles Act.

21. So far as the second point of consideration as to whether the learned Tribunal has rightly held that there was no contributory negligence on the part of the driver of motor-cycle No. U.P. 32 B.R./5314 is concerned, it is to be noted that the learned Tribunal while deciding claim petition No. 522 of 2007 had framed issue No. 5 in this regard which on reproduction read as under:

Issue No. 5.--Kya Durghatna Motor-cycle Chalak mritak Wasi Ahmed ki Anshdai upechaa ke karan Ghatit Hui, jaisa ki vipakshlgan ne apne prativad-patra me kathan kiya hai?

Similar issue was framed in other claim petition also.

While deciding the said issue the learned Tribunal had relied on the documents such as first information report filed in Case Crime No. 381 of 2007, charge-sheet submitted by the police and the site plan of the said accident.

22. Considering these documents, the Tribunal has come to conclusion that there was no fault of the driver of motor-cycle in the said accident. It is to be noted that from the site plan, copy of which, was placed on record before the Tribunal as a piece of evidence by the claimants themselves indicates that the motor-cycle was deviated from its side and had travelled to the side of the Mini Bus and the accident had taken place at the place which was on the side of the Mini Bus, i.e., the motor-cycle has travelled to the right side and had come in front of Mini Bus. From the site plan it appears that the accident had taken place because the

motorcycle had come in front of the Mini Bus while the Mini Bus was moving on its side of the road.

23. There was no evidence, neither placed nor considered by the Tribunal, there was also no pleading that the Mini Bus was driven in a zigzag manner and the driver of motorcycle in order to save themselves had travelled to the right side of the road. The statement of eye-witness P.W. 2 only indicates that driver of the Mini Bus due to rash and negligent driving had hit the motor-cycle from the front. The learned Tribunal has failed to properly consider this piece of evidence which is very relevant in order to establish that the said accident had taken place due to the fault of the driver of Mini Bus only. The learned Tribunal in its finding has not recorded that the said site plan was not properly prepared or incorrectly made, as such, I am of the view that it cannot be said that the accident had taken place due to the sole fault of the driver of Mini Bus only. There was contributory negligence on the part of the driver of motor-cycle as well and the accident had taken place due to the fault of the driver of Mini Bus as well as driver of motor-cycle.

24. At this stage, it is also to be kept in mind that on the said motorcycle five persons which include two adults and three children were riding and there is a possibility that due to some reason the driver of the motorcycle was not able to control his balance and had deviated to the right side of the road and had come in front of the Mini Bus. However, there is no denying the fact that the driver of the Mini Bus had also not taken care to avoid the accident and had not tried to stop the Mini Bus as such. I am of the view that the said accident had taken place due to the negligence on the part of both the drivers of the vehicles involved in the accident.

25. It is also to be observed that even in cases filed u/s 163A the competent court is fully empowered to see whether the said accident had taken place due to the fault on the part of one vehicle or due to the fault of both the vehicles.

26. Since, the vehicles involved in the accident are Mini Bus and motorcycle and the persons died were all sitting on the motor-cycle the negligence on the part of the driver of the Mini Bus shall be 75% whereas the negligence on the part of the driver of the motor-cycle shall be 25%.

27. As such, considering the aforesaid position the impugned judgments of the Tribunal are modified to the extent that the liability to pay compensation of the awarded amount shall be in the ratio of 75% and 25% on the said Mini Bus and Motorcycle respectively. Accordingly, the appellant-insurance company is liable to pay 75% of the amount of compensation fixed by the Tribunal alongwith interest @ 6% per annum from the date of institution of the claim petitions till actual payment is made.

28. Before parting with the judgment. It is necessary to observe that under the statute there is no provision to fix penal interest and the direction of the Tribunal in the judgment impugned that in case the appellants will not pay the awarded

amount within time, then in that case the interest would be enhanced to 9% is not correct.

29. Learned counsel for the appellant at this stage informed that appellant has already complied with the direction of the Tribunal and has deposited the awarded amount within time, as such, the direction of the Tribunal so far as it relates to the penal interest is not attracted.

30. The appeals are partly allowed.

31. The statutory amount deposited at the time of filing of the appeals shall be remitted back to the Tribunal. The excess amount, if any, deposited by the appellants shall be refunded back.