in a four wheeler. However, the same principle cannot be imported to a rider for a motor cycle, who has caused the accident by his own act. Such a claim would be possible only if there is any particular personal accident cover available for a person, who is a driver of the vehicle. A personal accident cover again is personal contract between the insurer and the insured and it is not a transferable right. If the victim in this case was not himself a named person to whom the benefit of such personal cover was available, then he cannot treat himself as having stepped into the shoes of the owner, who may have had a personal accident cover against an insurer. Even the concept attempted to be imported that a driver, who borrows the vehicle will step into the shoes must be understood only in the context of right of indemnity from the insurance company. A right of indemnity is a right to obtain a full indemnity to a claim which that person was answerable to. In other words, if the owner was liable for a claim by a third party, a right of indemnity will provide the insurance company to make good loss which the owner suffers. The right of indemnity is not a right of enforcement of claim arising under a policy of any right of compensation against the insurance company itself for death or injury accruing to a person at whose instance the claim is made. In this case, therefore, there is no question of the victim leaving a trail of claim possible at the instance of the legal representatives.

(Para 6)

Further held, that the only benefit which the legal representatives could secure is the entitlement in the manner provided under Section 140 of the Motor Vehicles Act. It has been considered by the judgment of the Supreme Court in Eshwarappa @ Maheshwarappa and Anr. Vs. C. S. Gurushanthappa and Anr 2010(8) SCALE 263. It lays down principle of law that if there is any accident that results in death or injury arising out of use of motor cycle then the minimum that a person could obtain shall be what is statutorily provided and in that case provided for a compensation of ` 50,000/-. The same benefit shall be extended to the legal representatives of the deceased.

(Para 7)

Nitin Mittal, Advocate for Subhash Goyal, Advocate, *for the appellants.*

Ashwani Arora, Advocate for respondent Nos.1 and 2-cross objectors.

K.S. Banyana, Advocate, *for the appellants.*

R.C. Kapoor, Advocate for respondent No.2.

K. KANNAN J. (ORAL)

(1) The appeal in FAO No.172 of 2012 is at the instance of the insurance company challenging the award passed by the Tribunal assessing a compensation under Section 163-A of the Motor Vehicles Act as payable by the insurance company. The case was at the instance of the legal representatives of the deceased, who was riding a motor cycle, fell on the road and suffered fatal injuries. The Tribunal found that since the claim was made under Section 163-A, representatives of the deceased would be entitled to secure a compensation against the insurance company since the entitlement is statutorily recognized on a strict liability basis.

(2) Learned counsel appearing on behalf of the respondents has two substantive arguments to make. One, the judgment of the Supreme Court in ***Deepal Girishbhai Soni and others*** versus ***United India Insurance Co. Ltd. (1),*** where the Supreme Court in paragraph 66 has recognized an entitlement to recover damages even in cases where the deceased himself was negligent. The relevant portion in the judgment is reproduced below:-

> ".....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."

The argument, therefore, is that the statute recognized absolute liability for claiming compensation even in cases where the deceased himself was responsible for the accident. I would find this argument to be unacceptable,

(1) 2004 ACJ 934

for the Supreme Court was not laying down a liability relating to all possible claims under Section 163-A and in all types of situations. The import of Section 163-A shall be seen as different from how Section 140 of the Motor Vehicles Act itself is assessed. The strict liability under Section 163-A on the structured formula is not the same thing as in appeal under Section 140 of the Motor Vehicles Act.

(3) Again when in the case of ***Deepal Girishbhai Soni's case*** (supra), the Supreme Court was considering a reference made by two member Bench of the Supreme Court where persons, who were made claimants under Section 163-A were barred from making a case under Section 166 of the Motor Vehicles Act. The issue, therefore, was whether the relief under Section 163 is supplementary to the relief under Section 163-A or not. If the claim is made under Section 163-A, it shall not be possible for a person to duplicate a clam under Section 166 as well. The point of reference was, therefore, only with reference to the interplay of Section 166 and 163-A and whether a claim made independently under Section 166 could be made after a consideration of claim under Section 163-A. In such a context, the Court held that even situations where the victim was himself responsible, there was still a scope for claiming compensation. A person being contributory to the accident is not the same as one who is a principal tort feasor. I am not examining a situation of whether negligence is to be established or not. I am considering the situation of whether a person, who suffers a fatal injury by his own conduct, leaves a trail of claim for a representative to pursue. It all depends on the nature of claim and the person against whom the claim is sought. In this case, if the motor cycle had been borrowed by a person and he suffers an accident, he will have rightful claim if there is any principle of compensation available for a workman against his master. The owner of vehicle does not become a master of the person only by the fact that the person, who borrows the vehicle for his use comes by fatal injury. Again the concept of vicarious liability is seen only as an issue of liability and not an issue of entitlement.

(4) The other circumstance where Section 163-A could be invoked could be a case where there is a requirement to prove the negligence of another person, which requirement is discharged by the language employed under Section 163-A. In other words, if only there is yet another agency,

who was responsible for the accident, the liability would relieve him of his duty to show that such an agency was responsible for the accident. It has to be inevitably a human agency and cannot be a case of inanimate body like a tree against which a person drives against and meets with a fatal accident. The statutory basis for strict liability cannot be used in a situation where the victim had come by fatal injuries without a reference to any other human agency against whom a negligence could have been shown. The observations made by the Supreme Court in ***Deepal Girishbhai Soni's case*** must, therefore, be confined to the specific situations which the Supreme Court was considering and the observation that a victim could even also negligent is not wide enough to allow for an interpretation in the manner proposed in the present case.

(5) The other argument, which is mounted by the learned counsel appearing on behalf of the claimant is that when the Insurance Company has issued a Package Policy, the insurance company would become liable for all claims arising at the instance of a person, who is using the vehicle. The Package Policy allows for a claim for 3rd party as well as the own damage to the vehicle. The argument is, if under the instructions of the Tariff Committee a Package Policy would allow for covering the risk of a pillion rider, there is no justification for excluding the liability for the rider himself. The learned counsel argued that the Package Policy does not provide for express cover to a pillion rider but still the instructions have been given by the Tariff Committee to cover risk and by extension of logic, it must be also for covering the risk to a rider. This argument again in my view is wholly untenable. The Tariff Committee recommendations came after the judgment of the Supreme Court in ***Pushpabai Parshottam Udesh*** versus ***Ranjit Ginning and Pressing Co. Pvt. Ltd. (2).*** The case was being considered interpreting Section 95 of the Old Motor Vehicles Act, 1939. In the absence of a policy specifically providing for coverage of risk to gratuitous passengers in a private vehicle, the Supreme Court held that there was no liability for insurance company for risk to the occupants of the private car. At that time, a third party cover under a Comprehensive Policy issued before 25.03.1977, that is the day when the judgment was pronounced, provided for a clause that the insurance company will indemnify the insured in the event of accident

(2) AIR 1977 SC 1735

caused or arising out of use of the motor vehicle against all sums including claimant's costs and expenses which the insured shall become legally liable to pay in respect of :-

> "death of or bodily injury to any person but except so far as is necessary to meet the requirements of Section 95 of the Motor Vehicles Act, 1939, 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."

(6) The Comprehensive Policy before 25.03.1977 did not expressly cover occupants carried in a vehicle. The circular was later issued by Circular MV No.1 of 1978 that directed all insurance companies to also cover the risk of gratuitous passengers carried in private car under a Comprehensive Policy. The insurance company had at all times, therefore, provided and led policy holders to believe that in a Comprehensive Policy, a passenger was also entitled to full cover. The contract of insurance is invariably a contract that enforces what is agreed between the parties and where a statutory body made an intervention to allow for claims to be enforceable at the instance of the gratuitous passengers as well as for claims under Comprehensive Policy, it became possible for enforcement of the claim at the instance of gratuitous passengers as though they were third parties against the insurance company. A pillion rider in a motor cycle, who comes by death or injury on account of negligent driving of the rider of motor cycle cannot in any way be said to have contributed to accident and to that extent a Comprehensive Policy will obtain the benefit to secure an enforceable claim against the insurance company, the same way as gratuitous passenger in a four wheeler. However, the same principle cannot be imported to a rider for a motor cycle, who has caused the accident by his own act. Such a claim would be possible only if there is any particular personal accident cover available for a person, who is a driver of the vehicle. A personal accident cover again is personal contract between the insurer and the insured and it is not a transferable right. If the victim in this case was not himself a named person to whom the benefit of such personal cover was available, then he cannot treat himself as having stepped into the shoes of the owner, who may have had a personal accident cover against an insurer. Even the concept attempted to be imported that a driver, who borrows the vehicle will step into the shoes must be understood only in the context of

right of indemnity from the insurance company. A right of indemnity is a right to obtain a full indemnity to a claim which that person was answerable to. In other words, if the owner was liable for a claim by a third party, a right of indemnity will provide the insurance company to make good loss which the owner suffers. The right of indemnity is not a right of enforcement of claim arising under a policy of any right of compensation against the insurance company itself for death or injury accruing to a person at whose instance the claim is made. In this case, therefore, there is no question of the victim leaving a trail of claim possible at the instance of the legal representatives.

(7) The only benefit which the legal representatives could secure is the entitlement in the manner provided under Section 140 of the Motor Vehicles Act. It has been considered by the judgment of the Supreme Court in ***Eshwarappa @ Maheshwarappa and Anr.*** versus ***C.S. Gurushanthappa and Anr. (3).*** It lays down principle of law that if there is any accident that results in death or injury arising out of use of motor cycle then the minimum that a person could obtain shall be what is statutorily provided and in that case provided for a compensation of Rs. 50,000/-. The same benefit shall be extended to the legal representatives of the deceased.

(8) The award passed already shall stand set aside and the appeal is allowed to the above extent, however, restricting the liability of the insurance company to ' 50,000/- with interest in the manner provided for. The cross objection filed by the claimants is dismissed.

(9) The appeal in FAO No.5994 of 2010 is against the award of compensation awarded at Rs. 1 lac granted under personal accident cover for the legal representatives of the deceased, who while riding the motor cycle fell down from the motor cycle while passing through a speed breaker and suffered fatal injuries. The Tribunal had assessed the compensation at ' 1 lac on the basis of a personal accident cover available under the policy of insurance with the insured. He was not himself the insured but however, the Tribunal applied the principle that the borrower of the vehicle will step into the shoes of the insured and whatever entitlement the insured himself could have had, was possible of being claimed by the borrower also. It appears that the insurance company had preferred an appeal against the

(3) 2010(8) SCALE 263

liability caused on the insurer in FAO No.1862 of 2010 but the same was dismissed. The claimants are in appeal seeking for enhancement of compensation.

(10) In my view, the claim under Section 163-A of the Motor Vehicles Act itself is not tenable. The compensation that the claimants could have obtained was only to secure what was statutorily permissible under a no fault claim under Section 140 of the Motor Vehicles Act. Even the principle of stepping into shoes of the insured by the borrower must be understood only in the context of liability suffered by the owner shall stand indemnified by the insurance company and that principle cannot be extended to a right of enforcement by a person other than the insured against the insurer for his own injuries or by representatives for death. The benefit of compensation for ' 1 lac for personal accident cover is available only to the insured for the injuries suffered by him personally. This entitlement is not available to a third party by borrowing the vehicle. However, compensation of Rs. 1 lac has already been awarded and since the appeal filed by the insurance company has been dismissed, it will operate as res judicata against the insured. I will not, therefore, make any modification but I will find that there is no scope for consideration of enhancement of compensation claimed at the instance of the legal representatives.

(11) The appeal in FAO No.5994 of 2010 is, therefore, dismissed.

P.S. Bajwa