# Simon Laximon Gopi and Others Vs Paskin Fernandes and Others

**Court:** Bombay High Court (Goa Bench)

**Date of Decision:** April 28, 2014

**Acts Referred:** Motor Vehicles Act, 1988 - Section 140 140(3) 140(4) 163A 163-A
Penal Code, 1860 (IPC) - Section 279 304-A

**Citation:** (2015) 4 ABR 369

**Hon'ble Judges:** U.V. Bakre, J

**Bench:** Single Bench

**Advocate:** E. Afonso, Advocate for the Appellant; J.J. Mulgaonkar, Advocate for the Respondent;

**Final Decision:** Allowed

## Judgement

U.V. Bakre, J.

1. Heard Mr. Afonso, learned counsel appearing on behalf of the appellants and Mr. Mulgaonkar, learned counsel appearing on behalf of the

respondent No. 2. This appeal is directed against the judgment and award dated 16/01/2010 passed by the learned Presiding Officer of Motor

Accident Claims Tribunal at Mapusa (Tribunal, for short) in Claim Petition No. 37/2008.

2. The appeal was admitted on 25/06/2010 and hearing was ordered to be expedited. As per the report of the bailiff, on the notices issued to the

parties for the purpose of Lok Adalat, it is revealed that the respondent No. 1 has expired. Mr. Mulgaonkar, learned Counsel appearing on behalf

of the respondent No. 2 submits that the respondent No. 2 is the sole legal representative of deceased respondent No. 1 and he has no objection

if the amendment to the cause title of the appeal is made accordingly. Hence, leave as prayed for is granted to the appellants to amend the cause

title accordingly to show respondent No. 1 as deceased and being represented by the respondent No. 2 as the legal representative. Amendment

shall be carried out forthwith.

3. The appellants were the respondents No. 1 and 2 being the driver and owner of the offending vehicle whereas respondents Nos. 1 and 2 were

claimants, in the claim petition No. 37/2008. The respondent No. 3-the Insurance Company was also respondent No. 3 in that claim petition.

Parties shall hereinafter be referred to as per their status in the Petition. Respondent No. 3, though duly served in the present appeal, is absent.

4. The claimants had filed the said Claim Petition under Section 163-A of Motor Vehicles Act, 1988 (M.V. Act, for short) claiming compensation

of ` 5,00,000/- on account of death of Mr. Fermin Fernandes, the son of claimant No. 1 (since deceased) and the brother of claimant No. 2, in a

motor vehicular accident.

5. The case of the claimants, in short, was that: On 31/12/2007 at 00.20 hours at Madhla Maj, Mandrem, Pernem, Goa, the deceased was

returning home towards Madhla Maj, Mandrem, after completion of his overtime work, by Kinetic Honda scooter, bearing registration No. GA-

01/F-0262. Respondent No. 1 came from his behind in Maruti car bearing registration No. GA-02/A-7269 and gave dash to the scooter thereby

causing grievous injuries to the deceased who succumbed to the said injuries.

6. The respondent Nos. 1 and 2 had filed a short written statement thereby denying the contents of the Claim Petition. They specifically alleged that

the accident had occurred due to the fault of the deceased himself who came from opposite direction i.e. from Madhla Maj and suddenly tried to

cross without giving any signal to proceed towards Ashvem and that the amount of ` 5,00,000/- claimed by the claimants was excessive, exorbitant

and exaggerated.

7. Respondent No. 3-Insurance Company stated that the insurance policy No. 120503/31/06/02/00005294 was issued in favour of respondent

No. 2 covering the said vehicle No. GA-02/A-7269 for the period from 10/01/2007 to midnight of 09/01/2008 and its liability under the said

policy for the purported accident on 31/12/2007 was governed by the terms and conditions of the insurance policy and relevant provisions of the

M.V. Act. The respondent No. 3 also denied all the averments made in the Claim Petition and alleged that the amount of compensation claimed by

the claimant was excessive.

8. Issues were framed by the Tribunal as per the rival contentions of the parties. The claimants examined the claimant No. 2 Mr. Pedru Santan

Fernandes as AW1; Mr. Felix Fernandes as AW2 and P.S.I. Mr. Neenad G. Deulkar as AW3. The respondents did not lead any evidence in

defence.

9. The learned Tribunal upon consideration of the entire evidence on record held that the deceased was involved in the vehicular accident and had

died in the same as a result of dash of motor vehicle No. GA-02/A-7269 which accident took place on 31/12/2007. It was held by the Tribunal

that the question of claimants proving that the accident was caused due to rash and negligent driving of vehicle No. GA-02/A-7269 by respondent

No. 1 did not arise. The Tribunal held that the deceased was born on 25/09/1970 and as such was 37 years old at the time of death. The Tribunal

relied upon the judgment in the case of National Insurance Co. Ltd. Vs. Smt. Gurumallamma and Amithabh Nahata, , in which the judgment of

Hon"ble Supreme Court in the case of Deepal Girishbhai Soni and Others Vs. United India Insurance Co. Ltd., Baroda, has been considered and

held that it was the age of the deceased which was to be taken into account while awarding compensation on the basis of structured formula under

Second Schedule. Therefore, in terms of the said structured formula under Section 163-A of the M.V. Act, given in the Second Schedule, the

multiplier of 16 was taken to be appropriate multiplier. The Tribunal held that the monthly income of the deceased was ` 3,000/-. In terms of the

said structured formula under Section 163-A of the M.V. Act, deduction of 1/3rd towards personal living expenses of the deceased was made

and the amount which the deceased would spend annually on his dependents (multiplicand) was calculated at ` 24,000/-. By using the multiplier of

16, the loss of dependency was found to be ` 3,84,000/-. An amount of ` 5000/- was awarded towards funeral expenses and further sum of `

3000/- was awarded towards loss of estate and other miscellaneous expenses. Resultantly, the total compensation of ` 3,92,000/- has been

awarded to the claimants along with interest @ 6% per annum on the said amount from the date of filing of the petition that is from 02/06/2008 till

the final payment. The respondent Nos. 2 and 3 have been held responsible to pay the same jointly and severally. The respondent Nos. 1 and 2

are aggrieved with the impugned judgment and award and have filed the present appeal.

10. Mr. Afonso, learned counsel appearing on behalf of the respondent Nos. 1 and 2 submitted that in a case filed under Section 163-A of the

M.V. Act, the respondents could prove that there was no rashness or negligence on the part of the respondent No. 1-driver and that the fault was

of the deceased and if that was proved then the claimants could not have been held to be entitled to any compensation. In this regard, he relied

upon National Insurance Company Ltd. Vs. Sinitha and Others, . He submitted that in the Claim Petition, though the respondents had specifically

pleaded that the accident had occurred due to the fault of the deceased, no such issue was framed by the Tribunal and, therefore, the respondent

Nos. 1 and 2 had no opportunity to prove then-case. He, therefore, submitted that the case requires to be remanded back to the Tribunal for

giving opportunity to the respondents to prove their defence. He further submitted that there was absolutely no evidence produced by the claimants

to prove the income of the deceased and therefore, notional income mentioned in the structured formula given in the Second Schedule could have

been taken as income of the deceased. He relied upon the case of Smt. Sarla Verma and Others Vs. Delhi Transport Corporation and Another,

and submitted that deduction towards personal expenses could not have been only of 1/3rd but ought to have been 50%. He also urged that the

claimant No. 1 was about 48 years old and, therefore, her age ought to have been considered for the purpose of multiplier and not the age of the

deceased. He, therefore, urged that impugned judgment and award is arbitrary and perverse and ought to be quashed and set aside.

11. On the other hand, Mr. Mulgaonkar, learned Counsel appearing on behalf of the respondent No. 2 submitted that it is clear from the judgment

of the Hon''ble Apex Court in the case of Smt. Sarla Verma and Others Vs. Delhi Transport Corporation and Another, , that is the age of the

deceased which is to be considered. He also relied upon the judgment of the Full Bench of the High Court of Karnataka in the case of Guruanna

Vadi and another Vs. The General Manager, Karnataka State Road Transport Corporation, Bangalore and another, . He pointed out from the

structured formula that the multiplier for the age group of 35 years to 40 years is 16. He submitted that the claimants have produced the birth

certificate of the deceased which proves that his age was 37 years. He further contended that the claimants had duly proved that the deceased was

working as a loader and his income was about ` 3,000/- per month. According to him, therefore, the Tribunal has rightly held that the annual

income of the deceased was ` 36,000/-. He, therefore, submitted that the judgment of the Tribunal is in accordance with the settled principles of

law and no interference with the same is called for.

12. I have minutely gone through the original records and proceedings and considered the submissions made by the learned Counsel for the parties

and also the judgments relied upon by them.

13. In the case of National Insurance Company Ltd. Vs. Sinitha and Others, , the issue was whether the claim for compensation made under

Section 163-A of the M.V. Act can be defeated either by the owner or Insurance Company by pleading and by establishing that the accident in

question was based on the contributory negligence of the offending vehicle. This question has been answered in the affirmative by the Hon''ble

Supreme Court. It has been observed that if a claim for compensation under a provision is not sustainable for reason of a ""fault"" on account of any

one or more of the following i.e. ""wrongful act"", ""neglect, or ""default"", the provision in question would be governed by the fault liability principle. It

has been observed thus :

For determining, whether Section 163-A of the M.V. Act, 1988 is governed by the fault or the no-fault liability principle, Sections 140(3) and (4)

are relevant. A perusal of Section 140(3) reveals that the burden of pleading and establishing whether or not wrongful act, neglect or default was

committed by the person (for or on whose behalf) compensation is claimed under Section 140, would not rest on the shoulders of the claimant. In

other words the onus of proof of wrongful act, neglect or default is not on the claimant.

A perusal of Section 140(4) of the M.V. Act, 1988 further reveals that a claim of compensation under Section 140 of the Act cannot be defeated

because of any of the fault grounds (wrongful act, neglect or default). This additional negative bar, precluding the defence from defeating a claim for

reasons of a fault, is of extreme significance for the consideration of the issue in hand. It is apparent, that both sides are precluded in a claim raised

under Section 140 of the Act from entering into the arena of fault (wrongful act or neglect or default). There can be no doubt, therefore, that the

compensation claimed under Section 140 is governed by the no-fault liability principle.

A perusal of Section 163-A(2) of M.V. Act, 1988 reveals that it is in pari materia with Section 140(3). Just as in Section 140 of the Act, so also

under Section 163-A 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 Section 140(4) in Section 163A of

the Act. Whereas under Section 140(4), there is a specific bar whereby the party concerned (the owner or the insurance company) is precluded

from defeating a claim raised under Section 140 of the M.V. Act, 1988 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 163-Aof the Act, has to have a bearing on the interpretation of Section 163-A of the Act.

The legislature designedly included the negative clause through Section 140(4) of the M.V. Act, 1988, yet consciously did not include the same in

the scheme of Section 163-A of the Act. The legislature must have refrained from providing such a negative clause in Section 163-A intentionally

and purposefully. In fact, the presence of Section 140(4) and the absence of a similar provision in Section 163-A, 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 163-A of the Act, by pleading and establishing wrongful act, neglect or default.

Thus, it is open to a party concerned (the owner or the insurer) to defeat a claim raised under Section 163-A of the Act, by pleading and

establishing any one of the three faults, namely, wrongful act, neglect or default. The object for incorporating Section 163-A(2) 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 Section 140(4) of the Act from Section 163-A of the Act is for shifting the onus of proof on the grounds of wrongful act,

neglect or default on to the shoulders of the defence (the 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. Therefore, there is no hesitation to conclude that Section 163-A of the Act

is founded on the fault liability principle.

14. From the above, it is clear that under Section 163-A 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. However, there is liberty to the

defence to defeat a claim for compensation raised under Section 163-A of the Act, by pleading and establishing wrongful act, neglect or default.

Thus, it is open to a party concerned (the owner or the insurer) to defeat a claim raised under Section 163-A of the Act, by pleading and

establishing any one of the three faults, namely, wrongful act, neglect or default. Therefore, in the present case it can be said though the claimants

were not required to plead and establish fault of the respondent No. 1, however, the respondent Nos. 1 and 2 could defeat the claim of

compensation made by the claimants by establishing that the accident in question had occurred due to wrongful act, neglect or default of the

deceased himself.

15. The first question, therefore, which arises for determination is whether the respondent Nos. 1 and 2 proved that the accident had occurred due

to the fault of the deceased himself.

16. The respondent Nos. 1 and 2, in their written statement, had pleaded that the respondent No. 1 was proceeding from Chopdem to Madhla

Maj and the deceased was coming from the opposite direction that is from Madhla Maj and suddenly tried to cross without giving any signal to

proceed towards Ashvem and that the accident occurred due to the fault of the deceased himself. In his affidavit-in-evidence, AW1, the claimant

No. 2, stated that on 31/12/2007 his brother Fermin Santan Fernandes was returning home towards Madhla Maj, Mandrem, after completion of

his overtime work by scooter bearing No. GA-01/F-0262 and that as soon as he crossed the cross road, respondent No. 1 came from his behind

not only in a very fast speed but also in a very rash and negligent manner and directly gave a dash on the scooter from its behind and that the dash

of the Maruti car bearing No. GA-02/A-7269 driven by respondent No. 1, due to its speed, was so powerful that the scooter skidded almost at a

distance of 15.40 metres from the point of impact and that the respondent No. 1 managed to stop his car at a distance from 16.00 metres from the

point of impact. AW1 specifically stated that his brother died due to the rash and negligent driving of respondent No. 1. A suggestion was put to

AW1 that at the time of accident the deceased was proceeding towards Madhla Maj towards Ashvem and that at the time of accident the

deceased was taking a right turn to proceed to Ashvem and in the process dashed against the Maruti car which was going from Chopdem to

Madhla Maj. However, except mere suggestions put to AW1, which were denied by him, nothing more has been done by the respondents. The

respondent No. 1 though was driver of the offending vehicle, did not step into the witness box to prove the defence taken in the written statement.

Several opportunities were given by the Tribunal to the respondents to lead defence evidence, if any. In fact, the learned Advocate for the

respondents specifically made a statement that the respondents do not wish to lead any evidence. First Information Report was lodged for offence

under Sections 279 and 304-A of Indian Penal Code against the respondent No. 1. No one alleged before the Tribunal that the F.I.R. against the

respondent No. 1 was wrongly registered. The panchanama and the sketch of the scene of accident reveal that the Maruti car after the dash went

further to a distance of about 16 metres. There are brake marks of 10 metres length showing that the Maruti car was at fast speed. The

respondents have totally failed to prove that the accident had occurred due to the fault of the deceased or even that there was contributory

negligence on the part of the deceased.

17. The next question for determination is whether the compensation awarded to the claimants is improper and excessive.

18. It was contended by Mr. Afonso, learned Counsel appearing on behalf of the respondent Nos. 1 and 2 that it is the age of the deceased or the

claimant (whichever is higher) which is relevant. He therefore urged that since the age of the claimant No. 1 was higher man that of me deceased,

the age of the claimant was relevant. He further submitted that in the case of General Manager, Kerala State Road Transport Corporation,

Trivandrum Vs. Mrs. Susamma Thomas and others, , the Hon''ble Supreme Court has held that the choice of multiplier is determined by the age of

me deceased or that of the claimants whichever is higher. He pointed out that the learned Tribunal has chosen the multiplier of 16 as per the age of

the deceased which was 37 years and not as per the age of the claimant No. 1. He submitted that since age of the claimant No. 1 was 48 years,

the appropriate multiplier ought to have been 13. I am not inclined to agree with the above submissions of the learned Counsel for the respondent

Nos. 1 and 2. In the case of Smt. Sarla Verma and Others Vs. Delhi Transport Corporation and Another, , it has been clearly held that it is the

age of the deceased which is to be taken into account for choosing the multiplier. Be that as it may, in the present case, structured compensation

under 163-A of the M.V. Act was claimed and not under Section 166. In the case of Guruanna Vadi and another Vs. The General Manager,

Karnataka State Road Transport Corporation, Bangalore and another, , the Full Bench of Karnataka High Court has held that any claims under

Section 163-A, the Tribunal cannot apply a multiplier lower man the one permitted in Second Schedule on the basis of age of the claimant. In the

present case, the claimants had produced the birth certificate of the deceased as Exhibit 37 which showed that the deceased was 37 years old, as

on the date of accident. As per the Second Schedule in terms of Section 163-A of the M.V. Act, the multiplier for the age group of 35 years to 40

years is 16. Therefore, the Tribunal has correctly taken the multiplier of 16. The claimants in the Claim Petition had stated that the deceased was

working as a loader-cum-delivery boy with Golden Wine Store and was earning ` 3,000/- per month besides day to day bhatta charges. In his

affidavit-in-evidence, AW 1 had stated that his brother was working as loader-cum-delivery boy with Mr. Felix Fernandes, proprietor of ''Golden

Wine Store'' situated at Madhla Maj, Mandrem and was paid a monthly salary of ` 3,000/-. In the cross-examination of AW1, he again stated that

the deceased was working as loader-cum-delivery boy at Madhla Maj, Mandrem. The fact that the deceased was earning ` 3,000/-per month has

not been denied in the cross-examination of AW1.

19. Mr. Felix Fernandes (AW2), deposed that the deceased was working with him and that he was dealing in the business of wholesale I.F.L.

beers, wines etc. run under the name and style of ''Golden Wine Store'', situated at Madhla Maj, Mandrem. He stated that the deceased was

employed by him about 3 months prior to the accident and he used to pay ` 3000/-per month to him. A salary certificate issued by Mr. Felix

Fernandes in this regard is at Exhibit 26. A mere denial has been put to AW2-Felix Fernandes. In the circumstances above, I do not find anything

wrong in the finding of the Tribunal to the effect that the monthly income of the deceased was ` 3,000/-. Thus, the yearly income of the deceased

was proved to be ` 36,000/-.

20. It was contended by Mr. Afonso learned Counsel appearing on behalf of the respondent Nos. 1 and 2 that as decided by the Hon''ble

Supreme Court in the case of Smt. Sarla Verma and Others Vs. Delhi Transport Corporation and Another, , since the deceased was bachelor,

50% had to be deducted towards his personal living expenses but, in the present case, the learned Tribunal has deducted only 1/3rd. In the case of

Sarla Verma"" (supra), the question of compensation under Section 166 of the M.V. Act was involved and it was held that Section 163-A and

Schedule II of the M.V. Act in terms do not apply to determination of compensation for the applicants under Sections 166 of M.V. Act. It is

observed that the practice of deducting 1/3rd of the income if the deceased was married and one-half (50%) if the deceased was a bachelor was

evolved out of experience, logic and convenience. It is further observed that in fact 1/3rd deduction got statutory recognition under the Second

Schedule to the M.V. Act, in respect of the claims under Section 163-A of the said Act. It is observed that such percentage of deduction is not an

inflexible rule and offers merely a guidance. Thus, besides the fact that rule of deduction offers merely a guidance, insofar as the deduction in case

of compensation under Section 163-A of M.V. Act, is concerned, there is statutory recognition to deduct one-third only towards the personal

expenses. In this Schedule II under Section 163-A of the M.V. Act, it has been mentioned that the amount of compensation arrived at as per the

chart mentioned therein in the case of fatal accident claim shall be reduced by 1/3rd in consideration of the expenses which the victim would have

incurred towards maintaining himself had he been alive. The Tribunal has not committed any error by making deduction of only 1/3rd. By deducting

1/3rd from the annual income of the deceased the multiplicand came to ` 24,000/-. By using the multiplier of 16, the loss of dependency became `

3,84,000/-. The Tribunal has awarded a sum of ` 5,000/- towards funeral expenses and ` 3,000/- towards loss of estate and other miscellaneous

expenses. In my view, the above is reasonable and not at all to be termed as exorbitant. The total compensation, therefore, came to ` 3,92,000/-

which the respondent Nos. 2 and 3 have been directed to pay jointly and severally along with interest @ 6% per annum. Thus, the impugned

judgment and award is in accordance with the settled principles of law based on correct appreciation of evidence on record. No interference with

the same is warranted. In the result, the appeal is dismissed.