HIGH COURT OF CHHATTISGARH, BILASPUR

MAC No. 20 of 2014

Jeevrakhan Sahu, Aged About 65 years, S/o Nohar Singh R/o village Saragaon, P.S. Kharora, Tah. And Distt. Raipur C.G.

---- Appellant

Versus

1. Manharan Dhivar, S/o Mohanlal Dhivar Aged About 30 Years R/o Saragaon, P.S. Kharora, Tah. And Distt. Raipur C.G.
2. Smt. Hirodhi Dhivar W/o Manharan Dhivar Aged About 28 Years R/o Saragaon, P.S. Kharora, Tah. And Distt. Raipur C.G.
3. Ravi Nirmalkar S/o Sarju Nirmalkar Aged About 35 Years R/o Saragaon, P.S. Kharora, Tah. And Distt. Raipur C.G.
4. The New India Insurance Company Ltd. - Through Divisional Manager, Divisional Office, Raipur, Tah. And Distt. Raipur C.G.

---- Respondent

For Appellant – Shri Amiyakant Tiwari, Advocate.
For Respondent No.4- Shri Ajad Siddiqui, Advocate.

Hon'ble Shri Justice Goutam Bhaduri

Order

30/07/2015

1. Instant appeal is against the award dated 21/10/2013 passed in Claim Case No.12/2013 by the court of 2nd Additional Motor Accident Claims Tribunal, Raipur. A claim petition was filed by mother and father of the deceased minor boy aged 5 years namely

Himanshu with the averments that on 29/06/2012 Ravi Nirmalkar who was driving the tractor and working in the agricultural field while was tilling the field with tractor dashed deceased Himanshu who was sitting in the boundary of said field. A claim petition was filed under Section 163-A of the Motor Vehicles Act claiming compensation of Rs.2,85,000/-. The respondents denied the averment including the insurance company and insurance company contended that at the time of the accident driver of the vehicle i.e. tractor C.G. 04 DA/7311 was not holding a valid licence, therefore it will amount to breach of the condition of the insurance policy. It was further contended that the tractor was being driven without valid permit therefore it amount to breach of condition of the insurance.

2. The case file would show that though the petition was filed under section 163-A of the Motor Vehicles Act but instead of treating the same under section 163-A of the Motor Vehicles Act, the parties there to proceeded with the claim petition in the manner under section 166 of the Motor Vehicles Act and adduced necessary evidences with respect to the negligence. The tribunal while adjudicating the case framed issues as to whether on 29/06/2012 because of the use of tractor bearing No.C.G. 04 DA/7311 Himanshu sustained injuries and died ? In reply to it was held in affirmative and also the issue was framed that whether on the date of accident there was breach of condition of the policy. Issue was held in affirmative and after court held but the accident happened due to the use of the

said vehicle and passed an award of Rs.1,80,000/- whereas at the same time exonerated the insurance company by holding that there was breach of the policy condition. Consequently, insurance company cannot be directed to pay the compensation.

3. Instant appeal is by the owner of the vehicle namely Jeevrakhan Sahu on whom liability is fastened.

4. Learned counsel for the appellant would submit that pleading by the insurance company was only to the effect that on the date of accident driver of the offending vehicle was not having any valid licence and he was not holding valid permit, therefore there was a breach of policy. On those pleadings the court has framed the issue as to whether there was a breach of policy. However over reaching the pleading during evidence it was stated that before the court below by the insurance company that deceased was traveling in tractor, therefore the accident had happened. He would submit that such finding is completely perverse since defence was not raised by the insurance company in its pleading that the deceased was a third party. He would submit that such finding would amount to complete miscarriage of justice in absence of pleading and if any submission is considered without evidence and pleading and the judgment is delivered on that issue it will lead to perversity. He therefore submits that eye witness in this case has contended that deceased was sitting on the border of the field therefore necessarily it would be a third party and consequently the insurance company cannot be

exonerated of its liability.

5. Per contra, learned counsel for the insurance company submits that award is well merited. The deceased was traveling in the vehicle and therefore would not be within the ambit of third party.

6. I have gone through the award and evidence and the pleading of the parties. Claim petition though was captioned under section 163-A of the Motor Vehicles Act but the entire proceeding was carried out treating the application under section 166 of the Motor Vehicles Act. Respective parties also participated in such proceeding and adduced evidence, therefore for purpose of this appeal, claim petition is considered under section 166 of the Motor Vehicles Act.

7. Claim petition would reveal that at para 3 it was stated that on 29/06/2012 the vehicle tractor bearing C.G. 04 DA/7311 was driven by original non-applicant Ravi Nirmalkar and while it was tilling the field it caused the injury to Himanshu Dhivar who was sitting at the border of the field. The non-applicant No.2, the owner, who contested the claim denied the averment of the claim petition. However, in additional plea it was stated that at the time of the accident Ravi Nirmalkar driver of the vehicle was holding valid licence and after verification of the licence he was allowed to drive the vehicle. It was further contended that at the time of the accident while vehicle was being used for agriculture and after tilling one field when it was moving to other field at that time deceased all of a sudden ran behind the tractor to climb on it and had sustained

injuries. Subsequently, he died.

8. The insurance company in its reply denied the averment of the claim petition and in additional plea it was contended that at the time of the accident driver of the tractor was not holding a valid licence and therefore insurance company is not liable to pay the compensation. It was further stated that at the time of the accident the subject vehicle was being driven without permit which amounts to breach of condition of insurance. Reading of the issue would reveal that issue no.2 was framed on the pleading of the insurance company that since dual submission was made that driver of the vehicle was not holding valid licence which amounts to breach and further vehicle was not having permit, therefore breach of the condition of the insurance. Consequently on the basis of pleading the issue no.2 was framed that whether at the time of accident vehicle was being driven in breach of the condition of the policy or not?

9. The claimants on their behalf had examined Manharan Dhivar, claimant No.1. He stated that his son Himanshu had went to field along with his mother namely Hirondi Dhivar and driver of the tractor trolley has caused injury to the deceased who was sitting at the border of the field. Witness has further proved document FIR Ex. A-3 and in the cross examination it has come that he has not seen the incident and he was not present at the time of the accident.

10. The other witness was Hirondi Bai AW-2, claimant/mother.

She has stated that on the date of incident tractor was being driven by Ravi Nirmalkar. While driving tractor her son namely Himanshu who was sitting at the boundary near field was dashed whereby he sustained injuries. In the cross examination of this witness she further reiterated the fact that at the time of accident tractor was crossing one field to other and his son was sitting at the border of the field. When she was confronted with the report i.e. FIR she denied the suggestion that the deceased her son, was sitting in the tractor and stated that if such facts are written in FIR that would be wrong. The tribunal has exonerated the insurance company on the ground that in the FIR it is written that deceased was traveling in the tractor and according to the document form of certificate of registration Ex.D-2(C) only one person was allowed to travel in the tractor. Person who has proved Ex. A-3 is not author of the document. Ex.A-3 was lodged by Dukit Ram Dhivar. Insurance company on their behalf have not adduced any evidence. In the cross examination of AW-1, has stated that he has not lodged report though it has been exhibited by him. Eye witness of the incident is Hirondi Dhivar. She affirms the fact that at the time of accident she has seen and is eye witness to the incident. In the cross examination of this eye witness this fact has not been negated and nothing has come out in the cross examination. Therefore, taking in to contents of Ex.A-3, the finding of the learned tribunal that at the time of accident the boy was traveling in the tractor appears to be wrong and cannot be sustained. Insurance company if was sanguine of the fact about the way the accident took place should have been pleaded this fact categorically in their written statement and issue framed on other pleading can not be made omnibus and the claimant can be taken by surprise. Further more in order to prove contents of Ex. A-3 FIR author of the document i.e. Dukhit Ram Dhivar could have been summoned by the insurance company to prove document on their behalf. Therefore, on due consideration of facts, statement made by mother of the deceased appears to be more correct and trust worthy.

11. Tribunal has further held that at the time of accident vehicle was being driven other than from agriculture purpose and was being used for commercial purpose. Though suggestion given by the insurance company in evidence was negated by the owner of the tractor/appellant that tractor was sent on rent yet tribunal has held without any evidence on record that tractor was being plied for the commercial purpose, therefore it would be deemed to be breach of policy as the policy was for agriculture purpose is a finding of facts without any evidence. It is also relevant to note that policy though have been exhibited marked as Ex.D-3(C) but the terms of policy has not been produced, therefore in absence of any evidence adduced by the insurance company about terms of the policy and the way the incident happened, the finding which has been arrived by the tribunal that at the time of accident deceased was traveling in

the tractor and therefore it would come within breach cannot be sustained.

12. In a result, appeal preferred by the appellant/owner is allowed. The finding of the learned tribunal whereby insurance company has been exonerated to pay amount is set aside. It is held that original non-applicants i.e. driver Ravi Nirmalkar, the owner Jeevrakhan Sahu and the New India Insurance Company Limited shall also be jointly liable to make good the amount of compensation. The appeal is allowed to the above extent. In facts of the case no order as to cost.

Sd/-
(Goutam Bhaduri)
JUDGE

Gouri