

HIGH COURT OF CHHATTISGARH, BILASPUR

MAC No. 39 of 2008

1. Pradeep Kumar Chandravanshi, aged 20 years, S/o Maniram Chandravanshi, R/o village Dhobghatti, Out-post Pandatarai, Tahsil Pandaria, District Kabirdham CG

Driver/Appellant

2. Ganeshram, aged about 40 years, S/o Kedarnath, R/o village Dhobghatti, Out-post Pandatarai, Tahsil Pandaria, District Kabirdham, CG

Owner/Appellant

Versus

1. Smt. Kundiabai, aged 37 years, W/o Sirotan Nishad
2. Sirotan Nishad, aged 39 years, S/o Dashru Nishad
3. Mannu Nishad, aged 13 years, S/o Sirotan Nishad
4. Ramu Nishad, aged 10 years, S/o Sirotan Nishad
- S.No. 3 & 4 are minor through their mother Kundiabai W/o Sirotan Nishad
(All R/o village Dhobghatti, Out-post Pandatarai, Tahsil Pandaria, District Kabirdham, CG)

---- Respondents/claimants

5. The United India Insurance Company Limited through Branch Manager, Branch office near Rajendra Nagar Chowk, Bilaspur, CG

For Appellants	:	Shri Sanjay Agrawal, Adv.
For Respondents 1 to 4	:	Shri Goutam Khetrpal, Adv.
For Respondent No.5	:	Shri Dashrath Gupta, Adv.

AND

MAC No. 324 of 2008

1. Smt. Kundiabai, aged 37 years, W/o Sirotan Nishad
2. Sirotan Nishad, aged 39 years, S/o Dashru Nishad
3. Mannu Nishad, aged 13 years, S/o Sirotan Nishad
4. Ramu Nishad, aged 10 years, S/o Sirotan Nishad
- S.No. 3 & 4 are minor through natural guardian - mother Kundiabai W/o Sirotan Nishad(All R/o village Dhobghatti, Out-post Pandatarai, Tahsil Pandaria, District Kabirdham, CG)

----Appellants/claimants

Versus

1. Pradeep Kumar Chandravanshi, aged 20 years, S/o Maniram Chandravanshi, R/o village Dhobghatti, Out-post Pandatarai, Tahsil Pandaria, District Kabirdham CG
2. Ganeshram, aged about 40 years, S/o Kedarnath, R/o village Dhobghatti, Out-post Pandatarai, Tahsil Pandaria, District Kabirdham, CG
3. The United India Insurance Company Limited through Branch Manager, Branch office near Rajendra Nagar Chowk, Bilaspur, CG

---- Respondents

For Appellants	:	Shri Goutam Khetrapal, Adv.
For Respondents 1&2	:	Shri Sanjay Agrawal, Adv.
For respondent No.3	:	Shri Dashrath Gupta, Adv.

SB:Hon'ble Shri Justice Pritinker Diwaker
Order on Board

12/08/2016

As these two appeals arise out of the same award dated 09.10.2007 passed by MACT Kawardha in Claim Case No. 09/2007, they are disposed of by this common order.

2. Facts of the case in brief are that on 3.1.2007 when deceased Binnu Nishad was travelling in tractor bearing registration No. CG-10A 5092 attached with trolley bearing registration No. CG-10A 5093, he fell down, came under the wheels and met an instantaneous death.

3. Claimants filed a claim petition under Section 166 of the Motor Vehicle Act claiming compensation of Rs. 11,12,200/- impleading the owner, driver and insurer of the tractor-trolley in question as non-applicants. In the claim petition it is *inter alia* pleaded that the accident occurred on account of the vehicle being driven rashly and negligently by Pradeep Kumar Chandravanshi which was owned by Ganesh Ram and duly insured with the United India Insurance Company. It is further pleaded in the claim petition that at the time of accident

the deceased was aged about 19 years and was earning Rs. 110/- per day.

4. In support of their claim, the claimants examined two witnesses namely Sirotan Nishad – the mother of the deceased as AW-1 and Sukhnandan as AW-2. Insurance Company has pleaded that there was breach of the terms and conditions of the insurance policy and the deceased himself was responsible for the accident. It however has not examined anyone in support of its case.

5. Owner and driver of the vehicle have pleaded that the vehicle in question was being used for transporting the sand for construction of a tubewell house in the agriculture land and as the same was duly insured, it is the Insurance Company which has to satisfy the award.

6. By the impugned award, learned Tribunal has awarded a compensation of Rs. 1,70,000/- in favour of the claimants but exonerated the Insurance Company of its liability on the ground that there was breach of the terms and conditions of the insurance policy as the vehicle in question was being used for the commercial purpose and not for agriculture purpose.

7. Being aggrieved by the award the driver and owner of the vehicle have preferred MAC No. 39/2008 challenging the exoneration of the Insurance Company of its liability whereas the claimants have preferred MAC No. 324/2008 for enhancement of the compensation awarded by the Tribunal.

8. In MAC No. 39/2008 counsel for the appellants submits as under:

- (i) that vague pleading in respect of breach of terms and conditions of the insurance policy has been made by the Insurance Company and no evidence whatsoever has been adduced by it to substantiate the same;
- (ii) that the insurance company has not even bothered to prove the insurance policy and only the xerox of the same is on record that too filed by the owner and driver of the vehicle in question; and
- (iii) that as per the requirement of the judgment of the Apex Court in the matter of **Ramchandra v. Regional Manager, United India Insurance Co. Ltd.** reported in **2013 AIR SC 2561** the Insurance Company is not

only required to plead but is also required to prove the same by leading reliable and cogent evidence. In addition to this, reliance is also placed on the decision of this Court rendered in MAC 1143/2007 (The Oriental Insurance Company Limited v. Ramashankar Soni and others) on 14.3.2014;

- (iv) that the finding recorded by the Tribunal that the vehicle in question was being used for commercial purpose is not correct as the same was being used for transporting the sand to be used for construction of tubewell house meant for agriculture purposes;
- (v) that the Tribunal has assumed number of things of its own and has not correctly interpreted the evidence adduced by the claimants and even there is no evidence in rebuttal.

9. In **MAC No. 324/2008** preferred by the claimants for enhancement of the compensation counsel for the appellants submits as under:

- (i) that the Tribunal has erred in law in taking notional income of the deceased as Rs. 15,000/- per annum which in fact should have been Rs. 36,000/- per annum;
- (ii) that the Tribunal has not taken into consideration the future prospects of the deceased and that considering the fact that at the time of accident deceased was just 19 years of age, 50% of his yearly income has to be considered for future prospects;
- (iii) that the Tribunal has erred in law in applying the multiplier of 15 which ought to have been 17; and
- (iv) that under the general heads also the Tribunal has awarded just Rs. 20,000/- whereas the amount under these heads should have been at least 75,000/-.

10. On the other hand supporting the order impugned it has been submitted on behalf of the Insurance Company as under:

- (i) that even in the absence of any evidence adduced by the Insurance Company regarding use of vehicle, the Tribunal has been fully justified in holding that the vehicle was being used for commercial purposes and not for agriculture purposes; and
- (ii) that the income of the deceased has been correctly assessed by the Tribunal and so also the compensation awarded by it is quite justified.

11. Heard counsel for the parties and perused the documents on record.

12. **MAC 39/2008:** Admittedly no evidence has been adduced by the Insurance Company regarding use of the vehicle in question and only a vague pleading has been made in paragraph No.3 of its written statement that there was breach of terms and conditions of the insurance policy and liability of the Insurance Company is limited to the conditions mentioned therein. There is absolutely no evidence on record adduced by the Insurance Company as to in what manner there was breach of terms and conditions of the insurance policy. Further, there is no evidence that the vehicle in question was being used for commercial purposes. The Tribunal has erred in law in arriving at the conclusion that as the quantity of sand being transported in the said vehicle was on the higher side, it can not be said that it was being used for commercial purpose. In the absence of any cogent and reliable evidence, such finding is not supposed to be recorded by the Tribunal. In the case of **Ramchandra v. Regional Manager, United India Insurance Co. Ltd.** (supra) it has been held by the Apex Court as under:

“At this stage, we deem it appropriate to take note of an important step which the insurance Company generally fail to take and that is related to non appearance of the owner of the vehicle in spite of service of notice. The insurance companies although contend before the Motor Accident Claims Tribunal and even at the appeal stage that it is the owner of the vehicle which is liable to bear a part or the entire liability of making the payment of compensation to the claimant in view of the nature of policy, or even due to invalid licence by the driver of the owner of the vehicle, the insurance company fails to lead any evidence to establish as to how the owner and not the insurance

company is liable to pay the compensation and even submits to non appearance of the owner of the vehicle whose appearance is vital in view of inter se contest between the owner of the vehicle and the insurance company. In absence of the owner of the vehicle, when the Motor Accident Claims Tribunal or the High Court leaves it open to the insurance company subsequently to realise the amount from the owner of the vehicle by instituting a fresh proceeding in view of the ratio of the case of General Manager, Kerala State Road Transport Corporation, Trivandrum Vs. Sussama Thomas, 1994 2 SCC 176, it gives rise to a fresh proceeding between the owner and the insurance company putting unnecessary burden on the Motor Accident Claims Tribunal to try the issue all over again. In fact, if the insurance company were to succeed in establishing by leading cogent evidence at the initial stage itself before the Tribunal that it is the owner of the vehicle which is liable to pay even if the evidence is ex parte in nature, it would at least facilitate the issue in the subsequent proceeding when the insurer initiates proceeding for realising the amount from the owner/insurer. But in absence of such evidence, insurer/companies are a loser and inures advantage to the owner who happens to gain by choosing not to appear. The Insurance Companies would fair better if they were to address this issue before the Tribunal itself instead of becoming wiser at the stage of appeal. What is wished to be emphasised is that if the owner chooses not to appear before the Tribunal although his appearance is necessary in a given case, the insurance company would do well instead of acquiescing with their absence to their detriment giving an upper edge to the owner at their own peril.”

13. It is a settled legal position that the Insurance Company cannot shirk its liability merely by filing insurance policy. It is necessary for the insurance company not only to make specific pleading in its written statement but it is also required to prove the same by leading cogent and legally admissible evidence. It is also a settled position of law that in the absence of a pleading, the evidence if any, adduced by the parties cannot be considered. Unless factual foundation has been laid in the pleading and evidence to that effect has been adduced, no argument is permissible to be advanced on that particular point. In this case the Insurance Company has utterly failed to discharge its onus of pleading and proving the breach of terms and conditions of the insurance policy. Insurance

company has not even filed the insurance policy, rather xerox of the same was filed that too by the driver and owner of the vehicle in question. Thus taking into consideration the facts and circumstances of the case this Court is of the opinion that the Tribunal has erred in law in exonerating the Insurance Company from its liability and fastening the liability to pay compensation on the owner and driver of the vehicle in question. Accordingly, **MAC 39/2008** is hereby allowed and the award impugned so far as it relates to exoneration of the Insurance Company from paying compensation to the claimants is hereby set aside and it is held liable to pay compensation to the claimants.

14. **MAC 324/2008:** As per the evidence on record, at the time of accident age of the deceased was hardly 19 years and as has been pleaded by the claimants, his daily income was Rs. 110/-. Even if notional income is taken into consideration, it comes to Rs. 36,000/- per annum. Secondly, the future prospects of the deceased has also not been considered which looking to his age should have been taken to be 50% of the annual income which comes to Rs. 18,000/- per annum and thus the total income of the deceased is assessed at Rs. 54,000/- per annum. Since the deceased was unmarried, after deducting 50% of the annual income towards his personal and living expenses, the annual loss of dependency comes to Rs. 27,000/-. Similarly, the multiplier of 15 applied by the Tribunal is also incorrect which looking to the age of the deceased should have been 17. Thus applying the multiplier of 17 the total loss of dependency is worked out at Rs. 4,59,000/- In addition to this, the claimants would also get a sum of Rs. 41,000/- for loss of estate, love and affection, funeral expenses etc. The total compensation which the claimants are entitled to receive comes to Rs. 5,00,000/- which shall carry interest at the rate of 6% per annum from the date of application till realisation.

15. Insurance Company is directed to deposit this amount of Rs. 5,00,000/- with interest as noted above before the Tribunal within two months from today. In the event of deposit of such amount by the Insurance Company, the statutory amount deposited by the appellants in MA No. 39/2008, shall be refunded to

them.

16. It is further directed that out of total compensation amount including interest, Rs. 2,00,000 each (total Rs. 4,00,000) shall be kept in fixed deposit in favour of minor claimaints (Mannu Nishad and Ramu Nishad) and remainder shall be paid in cash.

17. Appeals thus suceed with the observations and modifications in the impugned award noted above.

Sd/-

(Pritinker Diwaker)

Judge

Jyotishi