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HIGH COURT OF CHHATTISGARH, BILASPUR

MAC No. 1212 Of 2015

- The Oriental Insurance Co. Ltd. Through Branch Manager, Branch Office, Sadar Bazar Road, Jagdalpur (Chhattisgarh).....(Insurer)

---- Appellant

Insurer

Vs

1. Smt. Radhika Nag W/o Late Ghanshyam Nag, Aged About 35 Years
2. Mukesh Kumar Nag S/o Late Nathuram Nag, Aged About 22 Years
3. Rakesh Kumar Nag S/o Late Nathuram Nag, Aged About 20 Years
4. Ku Reena Nag, D/o Late Nathuram Nag, Aged About 18 Years

All R/o Village Neerachindli (Kachharpara), Post Adenga, P. S. & Tahsil - Keshkal, District Kondagaon (Chhattisgarh).....(Claimants)

5. Lalan Raut S/o Shankar Raut, Aged About 35 Years R/o Village Babuchhapar, P. S. Mufseel, District - Bethiya (Bihar).....(Driver)
6. Kamaldev Jha S/o Sadanand Jha, R/o Village Rajendra Nagar Ward Jagaldalpur (Chhattisgarh).....(Owner)

---- Respondent

Present:

For Appellants	: Shri Raj Awasthi, Advocate.
For Respondent No. 1 to 4	: Shri Anil Gulati, Advocate
For Respondent No.5	: None
For Respondent No.6	: Shri J.K. Gupta, Advocate.

And

MAC No. 1253 Of 2015

1. Smt. Radhika Nag Wd/o Late Ghanshyam Nag, Aged About 35 Years
2. Mukesh Kumar Nag S/o Late Nathuram Nag, Aged About 22 Years
3. Rakesh Kumar Nag S/o Late Nathuram Nag, Aged About 20 Years
4. Ku. Reena Nag D/o Late Nathuram Nag, Aged About 18 Years

All R/o Village Neerachhindli (Kachharpara), Post Adega, Police

Station And Tahsil Keshkal, District Kondagaon (Chhattisgarh).....
(Claimants)

---- Appellants

Claimants

Vs

1. Lalan Raut S/o Shanker Raut, Aged About 35 Years R/o Village Babuchhapar, Police Station Mufsil, District Betiya (Bihar).....
(Driver Of Alleged Truck Bearing Registrarion C G 17 H 1663)
2. Kamaldev Jha S/o Sadanand Jha, R/o Village Rajendra Nagar Ward Jagdalpur (Chhattisgarh).....(Owner Of Alleged Truck Bearing Registration C G 17 H 1663)
3. The Oriental Insurance Company Limited Through Branch Manager - Branch Office, Sadar Bazar Road, Jagdalpur (Chhattisgarh).....
(Insurer Of Alleged Truck Bearing Registration C G 17 H 1663)

---- Respondent

Present:

For Appellants	: Shri Anil Gulati, Advocate.
For Respondent No. 1	: None
For Respondent No.2	: Shri J.K. Gupta, Advocate.
For Respondent No.3	: Shri Raj Awasthi, Advocate.

Hon'ble Shri Justice Pritinker Diwaker

Order On Board

19/08/2016

With the consent of the parties, the appeals are heard finally.

02. As these two appeals arise out of common award dated 13.7.2015 passed by Additional Motor Accident Claims Tribunal, Kondagaon, in Claim Case No.77/2012, they are being disposed of by this common order.

03. Brief facts of the case are that on 8.3.2011 when deceased Vijay Kumar Nag was riding his motorcycle and other deceased Ghanshyam Nag was sitting as pillion rider in the same motorcycle, the said vehicle was dashed by the offending vehicle truck bearing registration No. CG

17-H-1663 as a result of which both the rider and pillion rider suffered grievous injuries, they were taken to Keskal hospital from where were shifted to Kanker hospital, however, during treatment they succumbed to their injuries on the date of accident itself. At the relevant time, the offending vehicle truck was being driven by Lalan Raut, owned by Kamaldev Jha and insured with Oriental Insurance Co. Ltd.

04. A claim case No.77/2012 was filed by the claimants i.e. widow and three minor children of the deceased Ghanshyam Nag respectively, claiming compensation of Rs.26 lacs under various heads, inter alia, pleading that at the relevant time the deceased was working as mason (Raj Mishtri), was earning Rs.250/- per day, he was aged about 38 years and the claimants were dependent upon him and therefore, they are entitled for compensation as claimed.

It is pertinent to mention here that though in the claim application, the claimants have correctly stated themselves to be widow and minor children of deceased Ghanshyam, however, in the award impugned as well as in the appeal memo, the minor claimants have wrongly been mentioned to be the children of deceased Nathuram, who, in fact, is the father of the deceased in another claim case arising out of the same accident.

05. Driver and owner of the offending vehicle were proceeded ex-parte.

06. Denying the claim of the claimants, it has been pleaded by the insurance company that driver of the offending vehicle was not having valid and effective driving licence and therefore, liability cannot be fastened upon the insurance company. In support of its contention, the

insurance company examined one Abhay Kumar Sinha, Branch Manager, Jagdalpur, who has stated that as per record of Regional Transport Office (RTO), licence was not issued from the authority allegedly shown in the driving licence and that the driver was driving the offending vehicle after consuming liquor. However, no witness from RTO has been examined by the insurance company to substantiate their case.

07. By the impugned award, the Tribunal after holding the deceased negligent to the extent of 50% awarded a total compensation of Rs. 4.91 lacs in favour of the claimants under various heads with simple interest @ 7% from the date of application till realization.

It is this award which has been assailed by the insurance company in MAC No.1212/2015 and by the claimants in MAC No.1253/2015.

08. **MAC No.1212/2015:** Counsel for the appellant/insurance company submits that as the driver of the offending vehicle was not having valid and effective driving licence on the date of accident to drive the vehicle, on account of there being breach of terms and conditions of the insurance policy, no liability can be fastened upon the insurance company for payment of compensation.

09. In reply to the above contention, it has been argued on behalf of the claimants as well as owner of the offending vehicle that mere pleading by the insurance company that the driver was not having valid and effective driving licence itself is not sufficient and therefore, in absence of any evidence by the insurance company adduced on the said point, no such ground is available to it for questioning its liability.

10. **MAC No.1253/2015**: Counsel for the claimants submits as under:

(i) that the Tribunal has erred in law while assessing monthly and yearly income of the deceased.

(ii) that the deceased was working as mason and even if his notional income, at the relevant time, is taken into consideration, it comes to Rs.4500/- per month and considering his age, after adding 50% of the same towards future prospects, the Tribunal ought to have calculated the compensation.

(iii) that even under the conventional heads, just compensation has not been awarded, which needs to be enhanced suitably.

11. Replying to this argument, it has been submitted on behalf of the insurance company and owner of the vehicle, that after considering the entire material on record, the Tribunal has rightly awarded compensation to the claimants, and therefore, the same needs no enhancement by this Court.

12. Heard learned counsel for the parties and perused the material on record.

13. So far as appeal (MAC No.1212/2015) preferred by the insurance company is concerned, though in the written statement the insurance company has taken a plea that driver of the offending vehicle was not having valid and effective driving licence to drive the vehicle and certificate to this effect has also been filed, but indisputably, no evidence whatsoever has been adduced by it to substantiate its contention nor any person from the RTO has been examined.

14. It is a settled position of law 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 legal position that in absence of a pleading, the evidence, if any, adduced by the parties cannot be considered. Unless factual foundation has been laid down in the pleading and evidence to that effect has been adduced, no argument is permissible to be advanced on that particular point.

15. In this case, though there is pleading by the insurance company that the driver was not having valid licence but the same is not supported by any legally admissible and cogent evidence. Thus, it has utterly failed to discharge its onus of pleading and proving the breach of terms and conditions of the insurance policy. Therefore, merely on the basis of its pleading it cannot be held that driver of the offending vehicle was not having valid and effective driving licence on the date of incident amounting to breach of terms and conditions of the insurance policy and ultimately leading to exoneration of the insurance company of its liability to pay compensation to the claimants. Being so, the appeal preferred by the insurance company (MAC No.1212/2015) is liable to be dismissed and is, accordingly, dismissed.

16. So far as appeal (MAC No.1253/2015) filed by the claimants is concerned, the Tribunal has erred in law while calculating the yearly income of the deceased. Even if the notional income of the deceased in the year 2011 is taken into consideration, it comes to Rs.4,500/- per month i.e. 54,000/- per annum. Since the deceased was 40 years of

age at the relevant time, after adding 50% of the annual income towards future prospects, it comes to Rs.81,000/- per annum. Since the deceased was survived by his wife and three minor children, after deducting 1/4th from the annual income towards his personal and living expenses, the annual loss of dependency comes to Rs.60,750/-. In this case, multiplier of 15 would be applicable and thus, after applying this multiplier, the total loss of dependency is worked out to Rs.9,11,250/-.

As regards the amount awarded under the conventional heads i.e. Rs.1 lac towards loss of consortium; Rs.1 lac towards love and affection; Rs.50,000/- towards loss of estate; and Rs.25,000/- towards funeral expenses, the same appear to be just and proper and therefore, need no interference by this Court.

17. So far as contributory negligence is concerned, it is a settled principle of law that the onus of proof regarding contributory negligence is on the party who alleges the same. The insurance company taking a plea of contributory negligence on the part of the victim/deceased must lead evidence with regard thereto and in absence thereof, such plea cannot be accepted. The insurer of the offending vehicle must state specifically that there was some casual connection of the deceased with the damage suffered by him to hold that the conduct of the deceased amounted to contributory negligence. Similarly, there had to be some evidence showing absence of reasonable care on the part of the deceased/victim for his own safety which contributed to the damage. However, no such evidence has been adduced by the insurance company to show that there was contributory negligence on the part of the deceased and as such, the finding of contributory

negligence recorded by the Tribunal is not sustainable and the same is hereby set aside.

18. In the result:

- MAC No.1212/2015 preferred by the insurance company being without substance is hereby dismissed.
- MAC No.1253/2015 preferred by the claimants is allowed. The claimants are held entitled for a total compensation of Rs. 11,86,250/-. Since the Tribunal has already awarded Rs.4.91 lacs, after deducting the same the claimants are held entitled for enhancement of Rs.6,95,250/-. This additional amount of compensation shall carry interest @ 6% per annum from the date of application till realization. The impugned award stands modified to the above extent.

Sd/

(Pritinker Diwaker)

Judge