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HIGH COURT OF CHHATTISGARH AT BILASPUR

MAC No.1570 of 2016

Rajesh Pandey S/o Shri Ramkrishna, Aged About 39 Years R/o Ashok Nagar Sarkanda, Tahsil And District Bilaspur, Chhattisgarh (Vehicle Owner)

---- Appellant

Versus

1. Smt. Parvati Shyam W/o Late Avatar Shyam, Aged About 28 Years
2. Kumari Satyavati Shyam D/o Late Avatar Shyam, Aged About 9 Years
3. Pravesh Kumar Shyam S/o Late Avatar Shyam, Aged About 5 Years
4. Mohit Ram Shyam S/o Late Avatar Shyam, Aged About 3 Years
5. Kumari Nirmala D/o Late Avatar Shyam, Aged About 1 Years

   Respondents No. 2 to 5 are Minor Through Legal Guardian Mother Smt. Parvati Shyam, Aged About 28 Years, Wife Of Late Avatar Shyam,

   All are R/o Village- Bindaval, Tahsil And Police Station- Kota, District- Bilaspur, Chhattisgarh
6. Lallu Yadav S/o Sarju, R/o Ashok Nagar, Sarkanda, Police Station- Sarkanda, Tahsil And District Bilaspur, Chhattisgarh (Vehicle Driver)
7. The Oriental Insurance Company Limited, Through The Divisional Manager, Divisional Office, In Front Of Rajeev Plaza, Bus-Stand, Bilaspur, Police Station- City Kotwali, Bilaspur, Tahsil And District- Bilaspur, Chhattisgarh (Insurer)

----Respondents

MAC No. 1571 of 2016

Rajesh Pandey S/o Shri Ramkrishna, Aged About 36 Years R/o Ashok Nagar Sarkanda, Tahsil And District Bilaspur, Chhattisgarh (Vehicle Owner)

---- Appellant

Versus

1. Smt. Jaymati Kol W/o Late Sarvan Kol, Aged About 26 Years
2. Kumari Versha Kol D/o Late Sarvan Kol, Aged About 12 Years
3. Omprakash Kol S/o Late Sarvan Kol, Aged About 10 Years
4. Sohanlal S/o Late Sarvan Kol, Aged About 4 Years
5. Amaru Kol S/o Lokai, Aged About 58 Years

6. Kusamvati Kol W/o Shri Amaruram Kol, Aged About 55 Years

   Respondent No. 2 to 4 are Minor Through Legal Guardian Mother Smt. Jaymati Kol Wife Of Late Sarvan Kol, Aged About 26 Years,

   All are R/o Village- Bindaval, Tahsil And Police Station- Kota, District-Bilaspur, Chhattisgarh

7. Lallu Yadav S/o Sarju, R/o Ashok Nagar, Sarkanda, Police Station-Sarkanda, Tahsil And District Bilaspur, Chhattisgarh (Vehicle Driver)

8. The Oriental Insurance Company Limited, Through The Divisional Manager, Divisional Office, In Front Of Rajeev Plaza, Bus-Stand, Bilaspur, Police Station- City Kotwali, Bilaspur, Tahsil And District-Bilaspur, Chhattisgarh (Insurer)

----Respondents

For Appellant/Owner	:	Mr. S.S. Rajput, Advocate
For Respondents/Claimants	:	Mr. Anand Kesharwani, Advocate
For Respondent/Driver	:	Mr. A.L. Singroul, Advocate
For Respondent/Insurance Company	:	Mr. H.P. Agrawal, Advocate

Hon'ble Shri Justice P. Sam Koshy

Order on Board

12/12/2017

1. These are two appeals arising out of the same accident preferred by the Owner. The challenge in the present two appeals are the common award dated 22.08.2016, passed by the 3rd Additional Motor Accident Claims Tribunal, Bilaspur, Chhattisgarh, in Claim Case No. 82/2010 and in Claim Case No.83/2010.

2. The matter pertains to the accident that took place on 24.04.2009 in which the two deceased persons Avatar Shyam Gond and Sarvan Kol while traveling on a motorcycle was hit by a Maruti Van bearing registration No. CG/10/BB/7312 owned by the appellant herein and driven by the Lallu

Yadav and the vehicle was duly insured with the Oriental Insurance Company Limited. The legal representatives of Avatar Shyam had filed a Claim Case No. 82/2010 and likewise the legal representatives of Sarvan Kol preferred a Claim Case No.83/2010.

3. The present is a third round of litigation before the High Court. Initially an award was passed on 18.11.2010, wherein that application was allowed and the Insurance Company was directed to indemnify the Owner. Aggrieved by the award dated 18.11.2010, the Insurance Company had preferred two appeals i.e. MAC Nos. 214/2011 and 215/2011. The High Court vide its order dated 01.08.2011 partly allowed the appeals and remitted back the matter to the trial Court for a fresh adjudication including the issue regarding contributory negligence and breach of the insurance policy.

4. Again subsequently, the Tribunal passed a common award on 13.02.2013. This time exonerating the Insurance Company fastened the liability upon the Owner. The Owner subsequently challenged the two awards vide MAC Nos. 436/2013 and 437/2013 and the High Court again vide its common judgment dated 09.12.2013 allowed the appeals preferred by the Owner setting aside the award passed by the Tribunal on 13.02.2013 and remitted back the matter to the Tribunal for considering of the case again on merits after granting an opportunity of hearing to all the parties. It is thereafter that the impugned awards have since been passed by the Tribunal by a common award passed in two Claim Cases on 22.08.2016 and again the Tribunal has exonerated the Insurance Company of its liability and

fastened the liability of payment of compensation upon the present appellant-Owner and the Driver Lallu Yadav.

5. It is this award which is under challenge in both the appeals whereby the Insurance Company has been exonerated of its liability and the payment part has been fastened upon the present appellant.

6. The admitted facts which would be relevant for consideration of both the appeals are the date of accident i.e. 24.04.2009, the resultant death of Avatar Gond and Sarvan Kol, the vehicle i.e. Maruti Van bearing registration No. CG 10 BB 7312 owned by the present appellant being involved in the accident and the said vehicle being duly insured with respondent no.7 in MAC 1570/16 i.e. the Oriental Insurance Company Limited.

7. If we peruse the impugned award, the sole ground on which the Insurance Company has been exonerated of its liability is that the vehicle i.e. Maruti Van belonging to the appellant which was otherwise registered and insured for private use was being used for commercial purpose. The reason to reach such a conclusion was the statement of Chhoti Das, one of the witnesses of the Insurance Company who is said to have hired the vehicle for transportation of the dead body of his son Shyam Das on payment of Rs.4,500/- from Apollo hospital, Bilaspur to Semri.

8. Now, the only point of issue which needs to be adjudicated is whether the finding of the Tribunal in holding that the vehicle being used for commercial purpose has been sufficiently proved or not.

9. The first witness whose evidence is required to be considered in this regard is Chhoti Das. For convenience sake, we are referring to the evidence which has been recorded in Claim Case No.83/10 filed by the legal representatives of deceased Sarvan Kol. In his evidence Chhoti Das has categorically accepted the fact that the affidavit-Exhibit-D/2 that he has furnished is in fact a stamp paper which was purchased by the officer of the Insurance Company, the contents of the said affidavit was also prepared by the said officer and he had only put his signature on the said affidavit. He further accepts the fact that he does not have any record whatsoever in respect of the payment of Rs.4,500/- paid for engaging the vehicle. He even did not know as to who was the owner of the said vehicle and had never met with him. He pleads total ignorance as to how he took the dead body of his son after accident of the Maruti Van. He also pleads total ignorance on the fact from where he had purchased the stamp paper Exhibit-D/2 which he has furnished before the Court. Further, in his cross-examination he has stated that when he came to know about the death of his son, he was at Bhilai hospital and he immediately on receipt of information had left for village Fulkona. This creates a doubt as to whether he had gone to Fulkona from Bhilai or he had come to Apollo hospital, Bilaspur from Bhilai. In his deposition, he also pleads ignorance so far as the details of the vehicle in which the dead body of his son was being taken form Apollo hospital, Bilaspur to Fulkona.

10. So far as the evidence of Security Guard G. Srinivasan examined on behalf of the Insurance Company is concerned, there is not much which has

been extracted from his deposition with which it could be assumed that the vehicle belonging to the appellant was used for commercial purpose in any manner neither does the said witness even remember such an incident to have occurred and as such, the evidence of the said witness is of no consequence.

11. So far as the evidence of the Administrative Officer of the Insurance Company namely Sushil Kumar Ekka is concerned, except for the fact that the vehicle was duly insured for the relevant period from 20.03.2009 to 19.03.2010 for private use and that there is some information available on record showing that the vehicle was being used for commercial purpose as per Exhibit-D/2, nothing else could be extracted from the evidence of this witness.

12. What is also proved and established from the evidence which have come on record is that, the two persons who had died from the said accident which took place on 24/04/2009 were admittedly the third party who were not travelling in the Maruti Van belonging to the appellant, but were travelling on a Motorcycle to which the Maruti Van belonging to the appellant had dashed.

13. Another aspect which cannot be ignored is the fact that, though the Insurance Company had filed its reply on 12/03/2010, even then, the Insurance Company was totally silent in respect of the affidavit-Exhibit-D/2 which they had got prepared from Chhoti Das (the father of the person whose dead body was being transported in the Maruti Van). This by itself leads us to draw an adverse inference of Exhibit-D/2 to have been got

prepared by the Insurance Company for their own use so as to avoid the liability of payment of compensation. In addition, there is this evidence of Chhoti Das who was examined on behalf of the Insurance Company and who has in a very categorical terms stated before the Tribunal and which goes unrebutted that the affidavit-Exhibit-D/2 was got prepared by the officers of the Insurance Company and that he was also not aware of the contents of the affidavit which too was got prepared by the officers of the Insurance Company.

14. Another important thing which is reflected from the cross-examination of the witness of Insurance Company-Sushil Kumar Ekka is that, though Chhoti Das before the Tribunal has stated himself to be an employee of SECL, but so far as the execution of Exhibit-D/2-affidavit is concerned, he has shown his status to be of an agriculturist and has not presented himself as an employee of SECL. This again forces this Court to draw an adverse inference so far as Exhibit-D/2 is concerned and it also gives an impression of having being prepared with ulterior motive of protecting the interest of the Insurance Company.

15. Now coming to the facts of the case there can be no doubt that on the date of accident i.e. on 24/04/2009, the Maruti Van belonging to the appellant met with an accident while carrying a dead body in it, which resulted in the death of two of the riders of a Motorcycle namely Avatar Shyam and Sarvan kol. However, the aspect that the vehicle being used for commercial purpose cannot be accepted as the evidence of Chhoti Das gives rise to a great element of doubt, contradiction and doubtful statement

and except for the statement of Chhoti Das and his affidavit-Exhibit-D/2, there is no other evidence or proof available with the Insurance Company to support the contention that the vehicle was being used for a purpose other than the private use.

16. What also requires consideration is that on the fateful day, the Maruti Van is said to have been permitted to be used for transporting the dead body of the son of Chhoti Das. The possibility of the vehicle being given to Chhoti Das on humanitarian grounds cannot be ruled out. In the process if some amount of money is charged for meeting the fuel expenses, the same by itself cannot be construed of the vehicle being used for commercial purpose. Many a times it happens that the private cars are given to friends and relatives during marriage functions so also in times of need like an accident in the neighborhood or a demise in the neighborhood or of some relatives or a close friends and under such circumstances, if some amount is charged towards fuel, it would not bring the vehicle under the umbrella of it being used for a commercial purpose.

17. From the plain reading of the evidence of NAW/3-G.Srinivasan, the security guard also it can be presumed or inferred that the vehicle belonging to the appellant was given for transportation of the body of the son of Chhoti Das at the behest of NAW/3 and in the process, Chhoti Das might have paid some amount towards fuel expense. Beyond this, there does not appear to be any element of commercial activity established by the respondent, more particularly, the Insurance Company so as to absolve them of their liability.

18. In the given facts and circumstances of the case, this Court is of the opinion that, the finding of the Tribunal in exonerating the Insurance Company of its liability is not proper, legal and justified and the same deserves to be and is accordingly set aside and it is ordered that the liability of payment of compensation shall jointly and severally be upon the owner, driver and the Insurance Company and the responsibility of payment of compensation shall be fully that upon the Insurance Company indemnifying the appellant/owner.

19. The two appeals i.e. MAC No.1570/2016 and 1571/2016 stands allowed and disposed off. Whatever amount which have been deposited by the owner shall be refunded by the Insurance Company and the balance amount shall be deposited by the Insurance Company before the Tribunal.

Sd/-
(P. Sam Koshy)
JUDGE

Sumit