NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

MAC No. 1484 of 2007

1. Maheshwari Diwar W/o late Yamuna Dhiwar, aged 23 years,
2. Ku. Yamini Dhiwar D/o late Yamuna Dhiwar, aged 7 years,
3. Harish Dhiwar S/o late Yamuna Dhiwar, aged 2 ½ years,
4. Yashswaraj S/o late Yamuna Dhiwar, aged 9 months,
5. Ganesh Dhiwar S/o Dhusu Dhiwar, aged 58 years,
6. Ganesiya Dhiwar W/o Ganesh Dhiwar, aged 50 years

Appellants 2 to 4 are minor, hence impleaded through their natural guardian Appellant No.1

All R/o village Godhi, PS Mandir Hasaud, District, Raipur

---- Appellants/Claimants

Versus

1. Ramesh Nishad S/o Mohan lal, age 29 years, R/o Village Baghmara, PS Gundardehi, Tahsil Gundardehi, District Durg, **(Driver)**

2. Smt. Gauri Jain W/o Rajendar Jain, aged 45 years, R/o Vasudhara Nagar, Bhilai – 3, District Durg **(Owner)**

3. National Insurance Co. Ltd. Through Divisional Manager, GE Road, Raipur, District Raipur **(Insurer)**

---- Respondents

For Appellants - Shri Amiyakant Tiwari, Advocate.
For Respondent 2 - Ku. Pragya Pandey, Advocate.
For Respondent No.3 - Shri Gautam Khetrapal, Advocate

Hon'ble Shri Justice Pritinker Diwaker and Hon'ble Justice R.P. Sharma

Order on Board

17 /07/2017

This appeal arises out of the award dated 22.9.2007 passed by Additional Motor Accident Claims Tribunal (for short the "Tribunal") Raipur in Claim Case No. 101/2007 awarding a compensation of Rs. 2,48,000/- in favour of the appellants/claimants for the death of Yamuna Lal Dhiwar.

2. Facts of the case in brief are that on 17.4.2007 at about 7.30 PM when the deceased was parking his motorcycle bearing registration No. CG-04CS 5668 for answering the call of nature, truck bearing registration No. CG-07-ZC-1757 driven by respondent No.1 herein in a rash and negligent manner came from Raipur side and hit him as a result of which he died on the spot. A claim petition was filed by the appellants/claimants who happen to be the legal heirs of the deceased claiming a compensation of Rs. 9,70,144/- *inter alia* pleading that the deceased at the relevant time was aged about 26 years, he was running a hotel in the village and earning about Rs. 5000/- per month.

3. Pleadings of the claimants have, however, been denied by the respondent/insurance company.

4. After evaluating the evidence available on record, the Tribunal has though assessed the compensation at Rs. 4,96,000/- but after holding the deceased having contributory negligence, awarded Rs.2,48,000/- to the appellants/claimants as compensation

along with interest at the rate of 7.5% from the date of application. Hence this appeal for enhancement.

5. Counsel for the appellants/claimants submits that the finding recorded by the Tribunal holding the deceased to have contributory negligence is not in accordance with law as no evidence has been adduced in this regard by the Insurance Company or even by the owner and the driver. He submits that the Tribunal has committed an error in taking the monthly income of the deceased as Rs. 3,500/- because even if the notional income is taken into consideration, his monthly income comes to Rs. 5,000/-. He further submits that future prospects have not been considered by the Tribunal and the amount awarded under the conventional heads is also quite inadequate.

6. On the other hand, counsel for the respondents support the award impugned and submit that the accident occurred on account of the negligence of the deceased himself and therefore the claimants are not entitled for any enhancement in the awarded sum. According to the counsel for the Insurance Company even the multiplier of 17 applied by the Tribunal is erroneous which in fact should have been 16.

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

8. From the pleadings of the respective parties and the overall evidence on record it is clear that the accident occurred with the offending vehicle which was insured with respondent No.3 and was being driven by respondent No. 1. Evidence further goes to show that after being hit by the offending vehicle Yamuna Lal Dhiwar

died on the spot. Thus keeping all these factors in mind though the Tribunal assessed the compensation as Rs. 4,96,000/- but at the same time holding the deceased to have contributory negligence for the accident awarded only 50% of the same which comes to Rs. 2,48,000/-. The finding recorded by the Tribunal holding the deceased to have contributory negligence for the accident is quite erroneous as it has neither been proved by the insurance company nor even by the driver or the owner by leading cogent and reliable evidence. In respect of contributory negligence on the part of the victim the law holding the field is that the burden of proof regarding breach of policy conditions or contributory negligence lies on the insurance company as has been held by the Apex Court in the case of ***Usha Rajkhowa v. Paramount Industries (2009) 14 SCC 71*** and also in the case of ***Minu Rout v. Satya Pradyumna Mohapatra (2013) 10 SCC 695***. In this case though the insurance company has pleaded that the accident took place due to negligence on the part of the deceased but no evidence in support of such pleading has been adduced by it and in these circumstances and the law laid down by the Apex Court referred to above, it cannot be said that the victim was having contributory negligence leading to the accident and resultant death. Furthermore, the inference drawn by the Tribunal on the basis of spot map to hold the contributory negligence of the deceased is also imaginary and in the absence of any evidence the same cannot be sustained. Therefore, such finding being against the settled legal position is not sustainable in the eye of law and accordingly it is hereby set aside. The Tribunal has further erred in law in assessing the monthly income of the deceased as Rs. 3,500/-

because even if the notional income is taken into consideration the monthly income of the deceased comes to Rs. 5000/-. In addition to this, the amount awarded under the conventional heads also appears to be inadequate and requires suitable enhancement in this appeal.

9. Accordingly, the monthly income of the deceased is taken to be Rs. 5,000/- which makes the annual income as Rs. 60,000/- and likewise, looking to the age of the deceased at the time of accident, loss of future income can be assessed to be 50% of the total income which comes to Rs. 30,000/- per annum and after deducting 1/4th towards his personal expenses the annual loss of dependency comes to Rs. 67,500/-. After applying the multiplier of 16, the total loss of dependency is assessed at Rs. 10,80,000/- (67,500x16) on the basis of guidelines/principles adopted in the case of ***Sarla Verma v. Delhi Transport Corporation and another– (2009) 6 SCC 121***. At the same time, the amount awarded under the conventional heads also appears to be insufficient and being so is required to be enhanced suitably. The amount awarded by the Tribunal and the one enhanced by this Court are clear from the following table:

Head	Amount awarded	Amount enhanced
Loss of consortium	5,000/-	1,00,000/-
Funeral expenses	5,000/-	25,000/-
Love and affection	5,000/-	50,000/-
Loss of estate	5,000/-	25,000/-
	Total	**2,00,000/-**

10. Thus, the total compensation including the amount awarded on conventional heads comes to Rs. 12,80,000/-

(10,80,000+200,000/-) which the claimants are entitled to receive with interest @ 7.5% per annum. The amount already received by the claimants, if any, shall be adjustable in the enhanced sum.

11. Appeal is thus allowed in part with the modification in the award impugned as indicated above.

Sd/- Sd/-

(Pritinker Diwaker) (R.P. Sharma)
Judge Judge

Jyotishi