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HIGH COURT of CHHATTISGARH, BILASPUR
MAC No. 875 of 2016

Branch Manager, The Oriental Insurance Co. Limited Ambikapur, Through : Divisional Manager The Oriental Insurance Company Ltd. Opposite High Court, Bilaspur (Chhattisgarh)

---- Appellant

Versus

1. Mus Chandbiwi W/o Late Shahabuddin Aged About 45 Years
2. Mohammad Shahid S/o Late Shahabuddin Aged About 22 Years
3. Hamid Mohammad S/o Late Shahabuddin Aged About 14 Years
4. Sitara Bano D/o Late Shahabuddin Aged About 12 Years
   Respondents No.3&4 are minor through Guardian Mother Mus. Chandbiwi , w/o late Shahabuddin.
   All R/o South Jhagara Khand Kalari, Badi Dafai, Nayee Ledri, Manendragarh, District- Koria (Chhattisgarh), Present Address- Through- Khatri Rui Bhandar Kargiroad Kota, District- Bilaspur (Chhattisgarh).
5. Ramavatar S/o Maniram Banjare Aged About 23 Years R/o Badi Ledari, Thana- Manendragarh, District- Koria (Chhattisgarh), (Driver Of Scooter No. - C.G. 16 Z.E./3998)
6. Maniram Banjare S/o Hiraram Banjare Aged About 52 Years R/o Badi Ledri, Thana- Manendragarh, District- Koria (Chhattisgarh), (Owner Of Scooter No.- C.G. 16 Z.E./3998).

---- Respondents

For Appellant : Shri Sudhir Agrawal, Advocate.

SB: Hon'ble Shri Justice P. Sam Koshy

Order On Board

03/08/2017

1. This is insurer's appeal under Section 173 of the Motor Vehicles Act against the award dated 18.03.2016 passed by the First Motor Accident Claims Tribunal, Bilaspur (in short, the Tribunal) in Claim Case No.10 of 2013 (Old Case No.150 of 2005. Vide the said impugned award, the Tribunal on an application preferred by the claimants under Section 166 of the Motor Vehicles Act has awarded

a compensation of Rs.5,47,600/-.

2. The brief facts of the case is that, the son of respondent No.1 and brother of respondents No.2 to 4 Mohd. Nasim met with an accident while he was sitting as a pillion rider in the Scooter bearing registration No.CG-19-ZE-3998. As a result of the said accident, Nasim sustained grievous injuries and to which he later succumbed. The offending vehicle belonged to respondent No.6 and was being driven by son of respondent No.6 i.e. respondent No.5. The age of the deceased at the time of accident was 23 years.

3. The claimants preferred claim application under Section 166 of the MV Act seeking for compensation on the accidental death of the deceased. The respondents No.5&6 i.e. driver and owner of the Scooter involved in the accident admitted the accident and stated that the accident had occurred because of technical fault as the brake wire of the scooter got broken and because of failure of brake, the scooter went and dashed against a large stone beside the road resulting in the accident.

4. The insurance company filed its reply denying all the contentions put forth by the claimants including the insurance coverage. The insurance company further contended that the deceased did not fall within the ambit of a third party nor did the owner of the scooter pay any premium covering pillion rider. It had also contended that the respondent No.5 i.e. driver of the scooter at the relevant point of time did not have a valid licence and that the vehicle was being run in contravention to the policy conditions.

5. The Tribunal taking into consideration the evidence which have come on record has awarded a compensation of Rs.5,47,600/-payable to the claimants along with interest @ 6 percent per annum from the date of application. The liability of payment of compensation has been fastened upon the driver, owner and insurer of the vehicle jointly and severally and the insurance company was accordingly directed to make payment. While granting compensation, the Tribunal has not granted compensation to the claimant No.2 as he was not a minor and did not appear to be a dependent upon his deceased brother.
6. The present is an appeal by the insurance company challenging the liability part. According to insurance company, the insurance policy which was exhibited before the Tribunal did not cover the risk of pillion rider and further that the pillion rider does not fall within the ambit of third party. Thus, the insurance company cannot be held liable for payment of compensation. It was the contention of the insurance company that it had examined its witness and who had categorically deposed before the Tribunal of the policy not covering the risk of pillion rider and that the deceased could not also fall within the ambit of a third party, and therefore, the insurance company should be exonerated from payment of compensation part. He relied upon the decision of Supreme Court in case of AIR 2008 SCW 7786, General Manager, United India Insurance Co. & Others Vs. M. Laxmi and Others, where the Supreme Court in a case where the policy issued was 'Act Only' policy and the deceased being a pillion rider

and gratuitous passenger, the insurance company was discharged/exonerated of its liability of payment of compensation.

7. The claimants as well as the owner and the driver of the offending vehicle, in spite of notice being issued to them did not enter appearance and finally notice was also published in the daily newspaper and in spite of publishing notice, none of the respondents entered appearance before the court.

8. Relying upon the decision of Supreme Court in case of M. Laxmi (Supra), counsel for the insurance company tried to harp upon the fact that since the facts is not in dispute so far as the accident having arisen when the deceased was sitting as pillion rider, all that now is to be seen is whether the insurance policy which was taken by the respondent No.6, the owner of the vehicle did infact covering the risk of the pillion rider or not.

9. A perusal of the policy issued by the appellant insurance company, it would reveal that the premium which was paid by the respondent No.6 was the basic liability for which premium of Rs.160/- was charged. Further, for the personal accident, another Rs.50/- was charged. In addition, for any extra loading, Rs.48/- was also charged. Thus, from the aforesaid, it would reveal that apart from premium for the third party and the personal accident, it had also taken charge of extra loading.

10. In support of its contention, the Tribunal has also recorded deposition of one Sushil Kumar Ekka who has categorically deposed that the charge of extra loading which has been collected, cannot be treated

as premium for the risk covering the pillion rider. The said extra loading charge was for non renewal of insurance policy in the previous year.

11. What is also relevant to consider is that the insurance company had also examined, in addition to Sushil Kumar Ekka, one K. P. Sao, Administrative Officer of the insurance company, who in his deposition has categorically deposed that the policy issued against the Scooter involved in the accident was for covering the risk of third party and in addition, the owner of the vehicle was also covered in the risk for which extra premium of Rs.50/- was taken where the limit of compensation was up to Rs.1,00,000/-.

12. From the aforesaid deposition of the witnesses of the insurance company, it clearly reflects that admittedly at the time of accident the deceased was not riding Scooter. Likewise, it is also not in dispute that the vehicle was not being driven by the actual owner of the scooter, and therefore, the deceased in the given circumstances would not step into the shoes of the owner. What is also touching the conscious of this court is the fact that the accident in the instance case arose on 20.12.2004 i.e. almost about 13 years back, however till date except for the statutory deposit which has been made by the insurance company, the claimants have not been able to get the amount of compensation.

13. It is also pertinent to take note that on an earlier occasion also the Tribunal had passed an award in favour of the claimants on 15.12.2006 awarding Rs.3,25,500/- to be paid jointly and severally by

the owner, driver and the insurance company. The said award was subjected to challenge in an appeal vide MAC No.433 of 2007. The Division Bench of this court has remitted back the matter for decision afresh so that it could be explained and determined properly as to the purpose of collecting Rs.48/- towards extra loading by the insurance company as is reflected from the policy. It is then thereafter that the fresh award passed which is now under challenge.

14. Another aspect which cannot be lost sight is the fact that the owner and driver, in spite of best efforts being made, did not enter appearance before the Tribunal and avoiding the proceeding.

15. In the given factual matrix of the case, to meet the ends of justice, this court is of the opinion that, it would be appropriate if the appellant-insurance company is directed to pay the compensation awarded by the Tribunal with liberty of getting the same recovered from the owner and driver of the offending Scooter applying the principle of “Pay and Recover”.

16. The view of this court stands fortified from the decision of Supreme Court in the case of Ishwar Chandra and Others v. Oriental Insurance Co. Ltd. and others, 2007 ACJ-1067, wherein the appeal preferred by the owner and driver has been rejected upholding the order of the High Court in giving the liberty to the Insurance Company to pay the amount of compensation and then recover the same from the owner of the vehicle. This view has further been re-iterated by the Supreme Court in many more cases. Some of which are National Insurance Co.Ltd. Vs. Challa Bharathamma & Others, 2004 (8) SCC-517,

National Insurance Co.Ltd. Vs. Saju P. Paul, 2013 (2) SCC 41 and Manuara Khatun and Others Vs. Rajesh Kumar Singh and Others, 2017(4) SCC 796.

17. With the aforesaid reasons, the appeal of the insurance company is allowed in part to the extent that it is held that the liability of payment of compensation would be upon the owner and driver of the offending Scooter. However, in the peculiar facts and circumstances of the case, considering the enormous delay that has taken place for the claimants in getting the compensation, the amount awarded by the Tribunal be paid to the claimants by the insurance company and the insurance company in turn may recover the same from the owner and driver of the offending Scooter.

Sd/-
(P. Sam Koshy)
Judge

inder