NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

MAC No. 995 of 2012

- Cholamandlam MS General Insurance Company Ltd. Through Branch Manager Office, Near HDFC Bank, Devendra Nagar Raipur, P.O. & P.S. Pandri, Tahsil & Dist. Raigarh (C.G.) Pin 492004

---- Petitioner

Versus

1. Smt. Mela Bai Kenwat W/o Rewaram Kenwat Aged 40 Years
2. Rewaram Kenwat S/o Dallu Ram Kenwat Aged 43 Years
3. Ku. Brihaspati Kenwat, Aged 17 Years
4. Dhani Ram Kenwat, Aged 15 Years
5. Krishna Kumar Kenwat, Aged 13 Years
6. Gulshan Kenwat, Aged 8 Years
7. Kishan Kenwat, Aged 7 Years

   Respondent No.3 to 7 Father of Rewram Kenwat and all are minor. They are through there guardian Mother Smt. Mela Bai Kenwat (Respondent No.1)

   Respondent 1 to 7 are R/o Sethi Nagar, Presently R/o Kenwant Para, Juna Bilaspur P.S. City Kotwali, Tahsil & Dist. Bilaspur (C.G.) Pin 495001

8. Rama Kundu @ Nirendra S/o Teejram Surywanshi, Aged 28 Years
9. Vijay Kumar Sidar S/o Gurwa Ram Sidar, Aged 23 years,

   Respondent No.8 and 9 are R/o Khorshi, Tehsil & PO Pamgarh, P.S. Shivrinarayan, Dist. Janjgir-Champa C.G. Pin 495554

10. Shyam Lal Kenwat S/o Mansharam Kenwat Aged 50 Years R/o Village Mekri & P.O. & P.S. Pamgarh, Dist. Janjgir Champa C.G. Pin 495554

---- Respondent

For Appellant Mr. Ghanshyam Patel, Advocate
For Respondent 1 to 7 Mr. Nitansh Jaiswal, Advocate
None for respondents 8, 9 & 10, though served.

Hon'ble Shri Justice P. Sam Koshy
Order On Board

11/7/2017

1. Heard.

2. The present is an insurer's appeal filed under Section 173 of the Motor Vehicles Act against the award dated 30.01.2012 passed by the Motor Accident Claims Tribunal, Bilaspur in Claim Case No.76/2011. Vide the said impugned award, the Tribunal in a proceeding under Section 163A of the Motor Vehicles Act, has allowed the claimants' application and ordered for payment of compensation of Rs.2,17,800/- to them with interest @ 7.5% per annum from the date of application till the date of realization.

3. It is this award which is under challenge by the Insurance Company at this juncture. The claimants/respondents 1 to 7 have also filed a cross-objection seeking enhancement of the compensation awarded under Order 41 Rule 22 of CPC.

4. The challenge by the Insurance Company to the impugned award is on the ground that the deceased was traveling in the offending vehicle as a gratuitous passenger and the accident policy which was covering the vehicle does not cover the risk of the gratuitous passenger.

5. It was the contention of Mr. Ghansham Patel, learned counsel

for the appellant/insurance company, that the offending vehicle was being used as a commercial transport vehicle and was not permitted for any passengers and therefore, the Insurance Company is not liable to pay compensation in the event of any accident or accidental injury. It was also the contention of learned counsel for the Insurance Company that on the date of the accident, the vehicle did not have a valid permit nor the driver had a valid driving license. The Insurance Company further took the plea that in spite of taking efforts for calling upon the owner and the driver to produce valid documents pertaining to the permit of the vehicle and driving license of the driver at the time of the accident, the owner and the driver have deliberately avoided appearance and as a result, an adverse inference has been drawn against them. According to the appellant/Insurance Company, in spite of service of summons, they chose not to appear before the Court to disprove the contentions raised by the Insurance Company. Thus, the learned counsel has prayed for allowing the appeal to the extent that the insurance company may be discharged from the liability of payment of compensation.

6. Mr. Nitesh Jaiswal, learned counsel for respondents 1 to 7, on the contrary, would submit that it is a case where the impugned award so far as liability of the Insurance Company is concerned, does not require any interference as the finding has been arrived at based upon the evidence which has come on record particularly that of the claimants as well as that of the employer. He further contended that if we look into the policy

which had covered the vehicle, the findings arrived at by the Tribunal cannot be said to be bad in law. It was further contended by learned counsel that the claimants have also filed a cross-objection seeking for enhancement of the compensation awarded, as the wages/income of the deceased has not been properly calculated by the Tribunal and thus, prayed for rejection of the appeal of the Insurance Company and for modifying the impugned award by enhancing the compensation awarded in accordance with the claim raised by the claimants.

7. Having considered the rival contentions on either side and on perusal of the record, what clearly reflects is that the date of accident; the accidental death of deceased Malti Bai, the age of the deceased being 50 years and that the deceased was working as a labourer, are all undisputed facts.

8. Now, so far as the allegations whether the deceased was traveling in the ill-fated vehicle as a gratuitous passenger is concerned, if we look into the evidence, it clearly reflects that one appellant's witness was Nutan Kumar Lunia, who had admitted before the Tribunal that it was he who had hired the vehicle as well as had engaged the deceased for traveling in the said vehicle for transportation of lights, which were used for marriage procession. It has further come in the evidence of the Insurance Company itself that the policy issued against the said offending vehicle i.e. CG-11/AB/0820, which is a pickup van, covered the risk of the driver + 2 Coolis. This admitted position of the Insurance Company further strengthens the claim of the

claimants that the deceased at the time of the accident was not a gratuitous passenger. The fact that it was the contention of the claimants which has been admitted by Nutan Kumar Lunia and also the fact that the policy covered the risk of driver + 2 coolis and that the deceased was traveling in the said pickup van as a Coolie for lifting of the lights used for marriage procession, are undisputed.

9. In the given facts and circumstances of the case, the contention of the appellant that the deceased was a gratuitous passenger stands negatived. The judgments which have been relied on by learned counsel for the Insurance Company before this Court in the matters of **National Insurance Co. Ltd. Vs. Cholleti Bharatamma and others**, **2008 1 SCC 423** and **Ramashray Singh Vs. New India Assurance Co. Ltd. And others, (2003) 10 SCC 664**, are both distinguishable of the facts of the present case, where the status of the deceased traveling in the vehicle involved in two judgments referred to by the appellant, are entirely different.

10. So far as there being breach of policy condition of the vehicle not having a valid permit or the driver not having a valid driving license is concerned, there is no evidence which has come on record to accept the said contention of the appellant, except the fact that there appears to be a deliberate or willful act on the part of the owner and driver and their non-appearance in

the Court in spite of service being made effective upon them during the course of the proceedings. Thus, for this willful act of noncooperation during trial by the owner and driver, an adverse inference has to be drawn against them.

11. In the said circumstances, it can be said that in the given factual matrix, the liability of the discharge of the payment of compensation would be upon the Insurance Company with a rider that the said amount can be recovered from the owner and driver applying the principle of 'pay and recovery'. Thus, the present appeal preferred by the appellant stands partly allowed to that extent and it is held that the Insurance Company/Appellant shall pay the entire amount of compensation and can recover the same from the owner and driver later.

12. So far as cross-objection raised by the claimants is concerned, if we look into the pleadings of the evidence of the claimants themselves, this Court does not find any perversity in the findings arrived at by the Tribunal in taking Rs.2600/- to be the monthly wages of the deceased, as the Tribunal has rightly taken Rs.100/- to be the per day wages of the deceased at the time of the accident and it has also taken into consideration 26 days during which she could have been engaged. Thus, the calculation of the compensation made by the Tribunal also seems to be proper, legal and justified and there is no scope for other inference so far as the quantum of compensation is concerned.

13. Accordingly, the appeal of the insurance company is partly allowed and the cross-objection/appeal of the claimants being devoid of merits, is liable to be and is hereby dismissed.

Sd/-

Judge

(P. Sam Koshy)

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