

IN THE HIGH COURT FOR THE STATES OF PUNJAB AND
HARYANA AT CHANDIGARH

FAO No.2474 of 2010

Date of Decision.28.11.2017

National Insurance Company Ltd.

.....Appellant

Vs

Vipra Jain and others

.....Respondents

2. **FAO No.3466 of 2011**

Vipra Jain

.....Appellant

Vs

Surinder and others

.....Respondents

CORAM:HON'BLE MR. JUSTICE AMIT RAWAL

Present: Mr. Sandeep Suri, Advocate
for the appellant in FAO No.2474 of 2010 and
for respondent No.5 in FAO No.3466 of 2011.

Mr. Sagar Aggarwal, Advocate
for the appellant in FAO No.3466 of 2011 and
for respondent No.1 in FAO No.2474 of 2010.

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AMIT RAWAL J.(ORAL)

This order of mine shall dispose of two appeals bearing Nos.2474 of 2010 and 3466 of 2011. FAO No.2474 of 2010 has been filed at the instance of the insurance company challenging the award passed by the Tribunal on the premise that once the accident had occurred involving two vehicles, there is no apportionment of the percentage of liability and FAO No.3466 of 2011 at the instance of the claimant for enhancement of compensation on the ground that the appellant-claimant had suffered 25% permanent mental disability, who was 23 years old at the time of accident i.e. on 12.08.2005, thus, diminished her chance of marriage and deprived of the future prospects, as she was working as Lecturer earning ₹10,400/- per

Mr. Sandeep Suri, learned counsel appearing on behalf of the appellant in FAO No.2474 of 2010 confined his argument on the premise that in the instance case two vehicles bearing registration No.HR-46A-7430 i.e. three wheeler tempo and maruti zen car bearing registration No.HR-42D-0052 insured with the appellant-insurance company were involved. The appellant-claimant was travelling in the maruti zen car, which according to the averment in the claim petition hit in the three wheeler tempo, resulting into injuries on her person, owing to the overturn of the vehicle. No doubt, the FIR was registered against the driver of the three wheeler tempo but the fact of the matter remains that as per the averment in the claim petition, the accident had occurred owing to the negligence of both the vehicles, therefore, it was incumbent upon the Tribunal to apportion the liability to some extent as the liability to satisfy the entire amount of compensation is fastened upon the insurer of the maruti zen car. Therefore, the finding recorded in paragraph 46 of the award, which is extracted herein below, is liable to be modified.

“46. The vehicles bearing registration No.HR-42D-0052 i.e. Maruti Zen Car and HR-46A-7430 i.e. three wheeler tempo have been held to be responsible for causing the accident. As laid down in Syed Irbahim's case (supra) and Narinder Kaur's case (supra), the claimant can recover the compensation amount from any or both of them. The claimant now wants to recover the compensation amount from the insurer of the car i.e. the respondent No.6. As such, the respondents No.4 to 6 are jointly and severally held liable to pay the compensation amount to the claimant and the respondent No.6 being insurer shall have the first liability to pay the compensation amount to the claimant. This issue is accordingly decided in favour of the claimant.”

He further submitted that the compensation is liable to be

apportioned in that manner and it cannot be said to be a case of composite

negligence.

Per contra, Mr. Sagar Aggarwal, learned counsel appearing on behalf of the appellant-claimant while refuting the submissions made on behalf of Mr. Suri submits that it has come in the testimony of the RW3, Surinder, who was driving the three wheeler tempo that due to rash and negligent driving of the driver of the car, it hit against the three wheeler and therefore, he had been falsely implicated. Despite, extensive cross-examination, nothing surfaced that the driver of the three wheeler tempo was negligent.

He further states that even the three wheeler was not insured. In support of his contention, he relied upon the judgment of Hon'ble Supreme Court in ***Khenyei Vs. New India Assurance Co. Ltd. and others*** ***2015(9) SCC 273*** to submit that where the claimant suffered injuries on account of joint tort feasons, it would be a case of composite negligence and therefore, the insurance company would be entitled to seek recovery of the amount to the extent this Court arrives at but the claimant cannot be deprived of entire compensation and emphasis was laid down on the finding rendered in paragraph 18 of the aforementioned judgment.

He further submits that the appellant-claimant was serving as a Lecturer in B.M. Institute of Engineering and was drawing a salary of ₹10,400/- per month but the Tribunal provided a very meager sum under the heads of disability and future loss of earning. No compensation on account of loss of marriage prospects and future prospects has been taken into consideration, much less, transportation, attendant charges and special diet. The Tribunal should have applied a multiplier of 18 by taking the income as ₹10,400/-, therefore, there is scope for enhancement.

I have heard learned counsel for the parties and appraised the paper book. There is some force in the submissions of Mr. Suri, for the evidence brought on record does not prove entire negligence of the maruti zen car, though the said car was overturned by the impact of the three wheeler tempo, therefore, negligence of the three wheeler tempo cannot be ruled out. At the best, it would be a case of negligence to the extent of 50:50 between the three wheeler tempo and the maruti zen car. The FIR was also registered against the driver of the three wheeler tempo. But the aforementioned view would not deprive the appellant-claimant to seek recovery of the compensation from the insurance company of the maruti zen car, in view of the finding rendered by the Hon'ble Supreme Court in *Khenyei's case (supra)*. For the sake of brevity, paragraph 18 of the same reads as under:-

“18. This Court in Challa Bharathamma & Nanjappan (supra) has dealt with the breach of policy conditions by the owner when the insurer was asked to pay the compensation fixed by the tribunal and the right to recover the same was given to the insurer in the executing court concerned if the dispute between the insurer and the owner was the subject-matter of determination for the tribunal and the issue has been decided in favour of the insured. The same analogy can be applied to the instant cases as the liability of the joint tortfeasor is joint and several. In the instant case, there is determination of inter se liability of composite negligence to the extent of negligence of 2/3rd and 1/3rd of respective drivers. Thus, the vehicle - trailer-truck which was not insured with the insurer, was negligent to the extent of 2/3rd. It would be open to the insurer being insurer of the bus after making payment to claimant to recover from the owner of the trailer-truck the amount to the aforesaid extent in the execution proceedings. Had there been no determination of the inter se liability for want of evidence or other joint tortfeasor had not been impleaded, it was not open to settle such a dispute and to recover the amount in execution proceedings

but the remedy would be to file another suit or appropriate proceedings in accordance with law. What emerges from the aforesaid discussion is as follows:

(i) In the case of composite negligence, plaintiff/claimant is entitled to sue both or any one of the joint tortfeasors and to recover the entire compensation as liability of joint tortfeasors is joint and several.

(ii) In the case of composite negligence, apportionment of compensation between two tortfeasors vis a vis the plaintiff/claimant is not permissible. He can recover at his option whole damages from any of them.

(iii) In case all the joint tortfeasors have been impleaded and evidence is sufficient, it is open to the court/tribunal to determine inter se extent of composite negligence of the drivers. However, determination of the extent of negligence between the joint tortfeasors is only for the purpose of their inter se liability so that one may recover the sum from the other after making whole of payment to the plaintiff/claimant to the extent it has satisfied the liability of the other. In case both of them have been impleaded and the apportionment/ extent of their negligence has been determined by the court/tribunal, in main case one joint tortfeasor can recover the amount from the other in the execution proceedings.

(iv) It would not be appropriate for the court/tribunal to determine the extent of composite negligence of the drivers of two vehicles in the absence of impleadment of other joint tortfeasors. In such a case, impleaded joint tortfeasor should be left, in case he so desires, to sue the other joint tortfeasor in independent proceedings after passing of the decree or award.

It is a case of composite negligence, therefore, the claimants should not be deprived of the compensation owing to the fact that she has suffered 25% disability. Even the salary certificate Ex.PW4/A has though been proved through the testimony of PW4 but in the cross-examination, he did not bring on record the salary register and other account books that the college was paying the aforementioned amount. In my view, the document

Without commenting any further, in the absence of any educational qualification or concrete evidence about the income of the claimant as ₹10,400/-, I will take the income of the claimant as ₹5000/- per month. Since the claimant at the time of the accident was 23 years of age and as per the statement made at bar was unmarried owing to 25% mental disability, the compensation is liable to be increased. By taking the monthly income as ₹5000/- and by adopting multiplier of 18, the compensation for loss of earning capacity on account of 25% permanent disability comes to ₹2,70,000/-. I will provide another ₹1 lac each for loss of marriage prospect and pain and suffering and ₹50,000/- for loss of amenities. Rest of the heads i.e. medical expenses and miscellaneous are maintained to the tune of ₹1,15,000/- and ₹10,000/- respectively.

In total, the compensation payable shall be ₹6,45,000/-. The amount in excess over what has already been provided by the Tribunal shall also attract interest @6% from the date of filing of the appeal till realization.

In view of the aforementioned fact, the award of the Tribunal is modified. However, liberty is granted to the appellant-insurance company in FAO No.2474 of 2010 to recover 50% of the amount of compensation from the driver and owner of the three wheeler tempo bearing registration No.HR-46A-7430 in accordance with law.

Resultantly, both the appeals are allowed to the above extent.

(AMIT RAWAL)
JUDGE

November 28, 2017
Pankaj*

Whether reasoned/speaking Yes

Whether reportable Yes