IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

Date of Decision:7.12.2017

1. FAO No. 5893 of 2015 (O&M)

Mamta & Others

... Appellants

Versus

Ranjit Singh and others

... Respondents

2. FAO No. 6917 of 2015 (O&M)

IFFCO Tokio General Insurance Co. Ltd.

... Appellant

Versus

Mamta and others

... Respondents

CORAM:- HON'BLE MR. JUSTICE RAJIV NARAIN RAINA

Present: Mr.Ashwani Arora, Advocate for the appellant in FAO No.5893 of 2015 & respondents no.1 to 5 in FAO No.6917 of 2015

Mr.Ravinder Arora, Advocate & Mr.Neeraj Khanna, Advocate for the appellant in FAO No.6917 of 2015

Ms.Sheenu Sura, Advocate for respondent no.3 in FAO No.5893 of 2015

<u>RAJIV NARAIN RAINA, J.</u> (Oral)

1. These are cross-appeals filed by the Insurance Company and the claimants. They can both be decided by this common order.

2. The death in this case due to fatal accident was of the pillion rider on the ill-fated motor cycle. His brother- Ranjit Singh was riding the motor cycle involved in the accident. The case is that a truck hit them from

behind and fled away. The accident happened on 24th October, 2013 at about 6.30 am. Both the brothers were removed to General Hospital, Sector 6, Panchkula from where Balwinder Singh was referred to PGI, Chandigarh where he succumbed to injuries two days later. The deceased left behind his widow, 26, two minor children aged 6 and 3 and a half years and father and mother aged 58 and 60 years, respectively.

3. Insurer admitted that offending motor cycle was insured with the company. However, pleaded that the accident in question took place due to the sole negligence of the driver of an unknown vehicle, and therefore, the claim was not maintainable against the offending motor cycle. An FIR (Ex.R4) was registered against the driver of an unknown vehicle. The value to be attached to the statement of PW2 Jagdev Chand alleged eye-witness of the accident has been a hotly contested fact. The Insurance Company urges that his statement cannot be relied upon since he was introduced for the first time on 27th October, 2014 when his testimony was recorded in court. There was no mention in the claim petition that there was any eye-witness to the accident.

4. The Insurer contends that Ranjit Singh the motor-cycle rider was an eye-witness and has not been examined, which proves his connivance with the claimants. The Insurance Company argued before the Tribunal upon completion of evidence that it cannot be asked to compensate for the loss caused to the claimants by their own family member. Insurance Company relied on a range of seven judgments duly noticed by the Tribunal in paragraph 9 of the award. The Tribunal considered the weightage to be attached to the statement of Jagdev Chand. He relied on it, even though the witness admitted that he had not made the statement regarding the accident before any authority. The Tribunal thought

that merely because he never went to the police does not mean that he did not witness the accident. This reasoning cannot be faulted with as illogical.

5. Furthermore, the Tribunal considered the submission of the Insurance Company that just because the witness could not tell the make, model and colour of the motor-cycle would not mean that his statement on oath should be brushed aside. The statement made in FIR cannot over-ride the statement made in witness-box on oath. Notwithstanding in the FIR, no negligence was attributed to Ranjit Singh. The third reason which swayed the Tribunal to lean in favour of the claimants was regarding non-examination of respondent no.1, Ranjit Singh, brother of the deceased.

6. If claimants failed to produce him as a witness, then Insurance Company could have summoned him as witness and examined him to prove that the accident took place not in a manner projected or that rash and negligent driving was attributed to the driver of unknown truck. The Tribunal thought that the claimants cannot be made to suffer, even if the accident took place due to negligent driving of a member of the family. The very purpose of getting the vehicle insured is to meet out such an unforeseen liability.

7. It could not be disputed on facts that the offending motor-cycle was covered by a package policy and as such the Insurance Company is liable to indemnify the insured for the death arising out of the accident to a pillion rider. For these reasons, the judgment cited by the Insurance Company was distinguished on facts. The Tribunal applied the doctrine of last opportunity indicating that every person who had last opportunity to avoid accident by exercise of proper care, will also be held responsible for the accident, in an accident involving two or more vehicles, where a third

party (other than drivers and/or owners of the vehicles involved) claims damages.

8. It was also the contention of the Insurance Company that the second vehicle remained unknown and untraced and at the most, the Company could be saddled with 50% of the liability assessed as compensation. This contention was not accepted by the Tribunal holding that the case is of composite negligence, each wrong-doer being jointly and severally liable to the claimants for payment of entire compensation and they can proceed against them or both of them. Meaning thereby, even if the other vehicle involved in the accident is unknown, the claimant is entitled to get compensation from the Insurer of the offending motor-cycle. The Tribunal reasoned that in case of composite negligence, amount of compensation cannot be apportioned because the claimants cannot be compelled to proceed to recover the approtioned amount from each vehicle owner/insurer involved in the accident. On this reasoning, the Tribunal thought it reasonable to hold the driver of the motor-cycle negligent to the extent of 50% and unknown truck driver to the other half. However, in a case of composite negligence each wrong-doer is jointly and severally liable for payment of entire compensation with right to recover against the other wrong-doer because the tortfeasor who makes the payment will be free to recover/realize the amount paid from other tortfeasors. There is no provision in the law to make both the vehicles as party. The Insurer has to satisfy the claim and it is for it to take independent action for recovery of the sum against the owner. The Tribunal reached conclusion that the insurer was liable to indemnify insured under insurance cover of the motor-cycle. I have no reason to disagree with the finding of the Tribunal or to interfere with the credibility of the eye-witness giving sufficient allowance to the

claimants for the inability of the insurer to summon the driver Ranjit Singh and put him to cross-examination.

9. Mr.Arora, learned counsel for the claimants has relied on decision in **The Oriental Insurance Company Limited vs. Smt. Indro @ Indro Devi and others** (FAO No.1831 of 2014 decided on 8th January, 2016) wherein this Court held that a package policy in the law of insurance has to be understood as one covering the risk to a pillion rider in a motor-cycle accident and such cover will be triggered for its applicability in every situation that the event of death or injury takes place. This Court held that no further proof is necessary for making a claim for the representatives of the deceased in such a situation. K.Kannan, J. held as under:-

> "5...I will indeed hold to the next extreme situation of there being no requirement for proof of any negligence whatever when a claim is made by a representative of a person, who was killed by the use of a motor vehicle. The two factors that are required to be established are: (i) that the death was on account of use of a motor vehicle and (ii) the vehicle in which he was travelling was insured under a package policy. The liability shall be attracted immediately in the claim before a Tribunal."

10. Mr.Arora has brought to the notice of this Court that SLP (C) No.11233 of 2016 in **Indro @ Indro Devi**, supra was dismissed by the Supreme Court on 5th July, 2016. But the question of law was left open in.

11. He next relies on **Khenyei vs. New India Assurance Co. Ltd. and others,** AIR 2015 SC 2261 wherein it has been held by the Supreme as under:-

"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 tort feasors and to recover the entire compensation as liability of joint tort feasors is joint and several.

(ii) In the case of composite negligence, apportionment of compensation between two tort feasors 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 tort feasors 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 tort feasors 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 tort feasor 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 tort feasors. In such a case, impleaded joint tort feasor should be left, in case he so desires, to sue the other joint tort feasor in independent proceedings after passing of the decree or award."

12. Another case in point and rather close to facts of this case is in **Pawan Kumar and another etc. vs. Harkishan Dass Mohan Lal and others,** 2014 (2) RCR (Civil) (SC) 764 wherein the Supreme Court held

that the accident between unknown truck being the offending vehicle speeding away is a case of accident between unknown truck with Jeep, and offending vehicle speeding away left the occupant of the jeep dead. The MACT had declined claim holding that the truck alone was responsible for the accident and in absence of driver, owner and insurer of the said vehicle, no compensation can be awarded. The High Court, after noticing that both the vehicles were responsible for the accident apportioned the liability 70% and 30% between the driver and the owner of the respective vehicles. The Supreme Court held the driver/owner of both the vehicles jointly and severally liable to pay compensation and it is always open to the claimants to enforce the award against both or any of them. In the aforesaid case, the Supreme Court held as under:-

> "7. Where the plaintiff/claimant himself is found to be a party to the negligence the question of joint and several liability cannot arise and the plaintiff's claim to the extent of his own negligence, as may be quantified, will have to be severed. In such a situation the plaintiff can only be held entitled to such part of damages/compensation that is not attributable to his own negligence. The above principle has been explained in T.O. Anthony (supra) followed in K. Hemlatha & Ors. (supra). Paras 6 and 7 of T.O. Anthony (supra) which are relevant may be extracted herein below:
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> > "6. "Composite negligence" refers to the negligence on the part of two or more persons. Where a person is injured as a result of negligence on the part of two or more wrongdoers, it is said that the person was injured on account of the composite negligence of those wrongdoers. In such a case, each wrongdoer is

jointly and severally liable to the injured for payment of the entire damages and the injured person has the choice of proceeding against all or any of them. In such a case, the injured need not establish the extent of responsibility of each wrongdoer separately, nor is it necessary for the court to determine the extent of liability of each wrongdoer separately. On the other hand where a person suffers injury, partly due to the negligence on the part of another person or persons, and partly as a result of his own negligence, then the negligence on the part of the injured which contributed to the accident is referred to as his contributory negligence. Where the injured is guilty of some negligence, his claim for damages is not defeated merely by reason of the negligence on his part but the damages recoverable by him in respect of the injuries stand reduced in proportion to his contributory negligence.

7. Therefore, when two vehicles are involved in an accident, and one of the drivers claims compensation from the other driver alleging negligence, and the other driver denies negligence or claims that the injured claimant himself was negligent, then it becomes necessary to consider whether the injured claimant was negligent and if so, whether he was solely or partly responsible for the accident and the extent of his responsibility, that is, his contributory negligence. Therefore where the injured is himself partly liable, the principle of "composite negligence" will not apply nor can there be an automatic inference that the negligence was 50:50 as has been assumed in this case. The

> Tribunal ought to have examined the extent of contributory negligence of the appellant and thereby avoided confusion between composite negligence and contributory negligence. The High Court has failed to correct the said error."

The decision of the Tribunal in the present case is in sync with the declaration of law in the aforesaid case by the Supreme Court.

13. The case in **National Insurance Company Ltd. vs. Mewa Rani and others** (FAO No.1338 of 2014 decided on 11th March, 2014) also involves pillion rider and the offending vehicle speeding away without a trace. In the aforesaid case, this Court relied on the decision of the Supreme Court in **Pawan Kumar,** supra.

14. The decisions of this Court in **New India Assurance Company Ltd. vs. Smt. Bhago and others (FAO No.1545 of 2015 decided on 20th April, 2015)** and **The Oriental Insurance Company ltd. vs. Smt. Vandana Singh and others (FAO No. 4615 of 2003 decided on 13th September, 2010)** are in similar strain.

15. On quantum and assessment of compensatiopn, there is no dispute that the deceased was 28 years of age at the time of death. As against the claimed income of ₹ 15,000/-, the Tribunal has accepted only the minimum wages of an unskilled labourer at ₹ 7,023/-, as per the revised rates assessed by the Labour Department, UT Chandigarh vide Notification dated 17th May, 2013. The multiplier of 17 is appropriate. The Tribunal has not awarded compensation for future prospects and has rather over-compensated under conventional heads and these would have to be modified and scaled down as per recent judgment in **National Insurance Co. Ltd. vs. Pranay Sethi (SLP) (C) No. 25590 of 2014 decided on 31st October, 2017)** and accordingly, as against ₹ 13.00 lakhs awarded as

compensation with 7.5% interest from the date of accident to the date of payment, the award is modified by maintaining income of the deceased at ₹ 7,023/- per month, the annual income at ₹ 84,276/- with 40% future prospects which comes to ₹ 33,710/-. The total income with future prospects would work out at ₹ 1,17,986/- with 1/4th deduction, it would be ₹ 29,496/- leaving a balance income, after deduction at the rate of ₹ 88,490/-. When this figure is multiplied by 17, it works out to ₹ 15,04,330/-. On account of conventional heads i.e. funeral expenses, loss of estate and loss of consortium, the claimants would be entitled to ₹ 70,000/- and compensation awarded for love and affection, care and guidance to minor children and compensation above what has been allowed in Pranay Sethi, supra would have to be set aside.

16. In view of the above, the appeal filed by the Insurance Company i.e. FAO No. 6917 of 2015 is dismissed. The appeal filed by the claimants i.e. FAO No. 5893 of 2015 is partially allowed. Compensation is increased from ₹ 13.00 lakhs to ₹ 15,74,330/-. Rate of interest @ 7.5% per annum as awarded by the Tribunal is maintained. The apportionment amongst the claimants will remain as it is arranged in the award dated 4th May, 2015 passed by the Tribunal. Counsel fee and litigation costs is increased from ₹ 5,000/- to ₹ 10,000/- which difference will be in addition to ₹ 15,74,330/-.

(RAJIV NARAIN RAINA)
JUDGE

7.12.2017
MFK

Whether speaking/reasoned *Yes*

Whether Reportable *No*

Md. Firoz Khan
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