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HIGH COURT OF CHHATTISGARH, BILASPUR

Judgment reserved on : 25.10.2018

Judgment delivered on : 14.12.2018

MAC No. 254 of 2014

- Smt. Rajsri Goyal W/o Shri Vijay Goyal R/o Rajeev Vihar, ITI Rampur, Post/out Post- Rampur, Tah. Civil And Revenue Distt. Korba C.G. Owner of Vehicle Auto No. CG 12E 5066.

---- Appellant

Versus

1. Smt.Pili Bai Dewangan W/o Late Ramlal Dewangan Aged About 50 Years.
2. Pravin Kumar Dewangan S/o Late Ramlal Dewangan Aged About 32 Years
3. Pawan Kumar Dewangan S/o Late Ramlal Dewangan Aged About 29 Years

All Caste Dewangan, R/o Purani Basti, Korba, at present MIG 2/28, RP Nagar, Phase-I, Post Kosabadi, Korba, Tahsil, Civil & Revenue Distt. Korba (CG) - **Claimants**

4. Sunil Kumar Dubey S/o Phoolchand Dubey Aged About 38 Years R/o Ramsagar Para, Darri Road, Korba, Post, P.S. Tah., Civil and Revenue Distt. Korba, C.G. Driver of Vehicle Auto No. CG 12E 5066.

5. Branch Manager Bajaj Allianz General Insu.Co.Ltd., Thru- Branch Manager, Branch Office- Shiv Mohan Sadan, First Floor, Vidhan Sabha Road, Pandri, Raipur, Tah. Civil And Revenue Distt. Raipur C.G., - Insurance Co. of Vehicle Auto No. CG 12E 5066.

---- Respondents

For Appellants	:	Shri Anand Kumar Gupta, with Shri Goutam Khetrapal, Advocates.
For Respondents	:	None.

Hon'ble Shri Gautam Chourdiya, J

C A V Judgment

This appeal has been filed by the appellant/owner under Section 173 of the Motor Vehicles Act, 1988 (in short “the Act”) against the award dated 9.1.2014 passed by Motor Accident Claims Tribunal, Korba (CG) in Claim Case No.47/2009 whereby in a death case the Tribunal has awarded Rs.12,63,900/- with interest @ 6% p.a. from the date of application till realization in favour of the claimants, fastening liability on the appellant/owner along with respondent No.4/driver jointly and severely to satisfy the award.

02. As per averments made in the claim petition, on 4.2.2009 deceased Ramlal, aged 56 years, earning Rs.30,000/- per month being Superintendent in SECL, was going on his scooter bearing No. CG 12 ZM 7321 from Korba to Rajgamar. However, on the way, respondent No.4 Sunil Kumar Dubey by driving offending vehicle Auto bearing registration No. CG 12E 5066 in a rash and negligent manner, dashed the vehicle of the deceased, as a result of which Ramlal sustained grievous injuries and died during the course of treatment in hospital.

03. On claim petition being filed by the claimants under Section 166 of the Act, the Tribunal considering the evidence led by both the parties by the impugned award granted compensation in favour of the claimants as mentioned above.

04. Learned counsel for the appellant submits that the Tribunal has wrongly exonerated the insurance company of its liability and failed to consider that the insurance company was taking contrary plea, on the one hand the insurance company pleaded that there was no insurance of the offending vehicle on the date of accident and on the other, pleaded that there was breach of condition of the policy. He further submits that as per record of the criminal case registered against the driver, at the time of accident the offending vehicle was in stationary condition and as such, there was no requirement of permit for the said vehicle. Further, the offending vehicle being Auto Rickshaw, there was no requirement of obtaining permit for such vehicle as per provisions of the Act. Further, the Tribunal has failed to consider that the accident occurred due to negligence on the part of the deceased and not due to rash and negligent driving of the offending vehicle. Lastly, he submits that though he has also challenged the quantum of compensation in the appeal, but he is not pressing the same.

05. Heard learned counsel for the appellant and perused the material available on record.

06. Admittedly, the accident occurred on 4.2.2009. As per Ex.D/3 i.e. certificate-cum-policy schedule issued on 7th September, 2009, the offending vehicle was insured from 3.2.2009 to 2.2.2010 midnight. According to insurance company the policy was cancelled on 7.10.2009 as per Ex.D/4 and intimation was sent to the owner of the offending vehicle as per NA-3 i.e. postal receipt. Thus, considering the period of insurance and the date on which the accident occurred, it is evident that on the date of accident the policy was in force. There is nothing on record to show that prior to 7.10.2009 the insurance policy was cancelled by the insurance company, rather the evidence goes to show that the same was cancelled more than seven months after the date of accident.

Though as per Ex.D/4 i.e. information of cancellation of insurance policy sent to the owner of the offending vehicle, fraud play has been alleged against the owner, but the insurance company has failed to explain as to why it remained idle for a considerable period of seven months from the date of issuance of insurance policy and did not take any step against such fraud play and became wiser only after the unfortunate accident, that too, more than seven months after the accident. This apart, the fact that on the date of accident insurance policy was in force also stands proved from the pleading of the insurance company itself, according to which the offending vehicle was being driven in violation of the policy conditions. In this view of the matter, it cannot be said that on the date of accident, the offending vehicle was not insured with the insurance company by virtue of cancellation of the insurance policy and as such, the Tribunal was not justified in recording a finding that on the date of accident, the insurance policy was not in existence.

07. As regards negligence on the part of the deceased, no any cogent and reliable evidence has been adduced by the insurance company to prove the said fact. NAW-1 Rajshree Goyal is not an eyewitness to the accident and she reached the spot after the accident

had occurred. NAW-2 Sunil Kumar, driver of the offending vehicle, has stated that his auto was in stationary condition and the deceased dashed the same but his statement is not supported by any other evidence on record. NAW-4 Asgar Khan and NAW-5 Pawan Kumar Singh have been examined by the insurance company, however, they did not state about the negligence of the deceased whereas claimants' witness No.1 Praveen Kumar Dewangan and CW-2 Mahavir Dewangan, eyewitness to the accident, have proved this fact that driver of the offending vehicle was driving the said vehicle in a rash and negligent manner and dashed the scooter of the deceased. As per Ex.P/1 i.e. charge sheet filed by the police under Section 304A of IPC, the driver Sunil Kumar Dubey was driving the vehicle rashly and negligently. The contents of the charge sheet find corroboration from the FIR (Ex.P/2) lodged by CW-2 Mahavir Dewangan and pleadings of the claimants. No report was lodged by driver Sunil Kumar Dubey against the deceased that the deceased was negligent in any manner. Thus, from the evidence on record, it does not appear that there was any negligence or contributory negligence on the part of the deceased and the Tribunal was justified in recording so after considering all the relevant aspects of the matter in paras 8 to 15 of the impugned award.

08. So far as breach of policy condition is concerned, as per Ex.D/3 the offending vehicle was insured with respondent No.5/insurance company as a passenger carrying – 3 wheel vehicle having carrying capacity of 6, it was a commercial vehicle and the policy was a package policy. The aforesaid fact has not been disputed by either of the parties.

09. In the given facts and circumstances of the case, it would be appropriate to refer to certain relevant provisions of the Act, which are as under:

> “2. ***Definitions*** : In this Act, unless the context otherwise requires,--
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> (25) of the Act : "motorcab" means any motor vehicle constructed or adapted to carry not more than six passengers

excluding the driver for hire or reward;

(47) "transport vehicle" means a public service vehicle, a goods carriage, an educational institution bus or a private service vehicle;

Section 66 : **Necessity for permits.**

1. No owner of a motor vehicle shall use or permit the use of the vehicle as a transport vehicle in any public place whether or not such vehicle Is actually carrying any passengers or goods save in accordance with the conditions of a permit granted or countersigned by a Regional or State Transport Authority or any prescribed authority authorising him the use of the vehicle in that place in the manner in which the vehicle is being used:

Provided that a stage carriage permit shall, subject to any conditions that may be specified in the permit, authorise the use of the vehicle as a contract carriage:

Provided further that a stage carriage permit may, subject to any conditions that may be specified in the permit, authorise the use of the vehicle as a goods carriage either when carrying passengers or not:

Provided also that goods carriage permit shall, subject to any conditions that may be specified in the permit, authorise the use of the vehicle for the carriage of goods for or in connection with a trade or business carried on by him.

2. The holder of a goods carriage permit may use the vehicle, for the drawing of any public or semi-trailer not owned by him, subject to such conditions as may be prescribed.

3. The provisions of sub-section (1) shall not apply--

    a. To any transport vehicle owned by the Central Government or a State Government and used for Government purposes unconnected with any commercial enterprise;

    b. To any transport vehicle owned by a local authority or by a person acting under contract with a local authority and used solely for road cleansing, road watering or conservancy purposes;

    c. To any transport vehicle used solely for police, fire brigade or ambulance purposes;

d. To any transport vehicle used solely for the conveyance of corpses and the mourners accompanying the corpses;

e. To any transport vehicle used for towing a disabled vehicle or for removing goods from a disabled vehicle to a place of safety;

f. to any transpor vehicle used for any other public purpose as may be prescribed by the State Government in this behalf;

g. to any transport vehicle used by a person who manufactures or deals in motor vehicles or builds bodies for attachment to chassis, solely for such purposes and in accordance with such conditions as the Central Government may, by notification in the Offical Gazette, specify in this behalf;

h. to any transport vehicle owned by, and used solely for the purposes of, any educational institution which is recognised by the Central or State Government or whose managing committee is a society registered under the Societies Registration Act, 1860 (21 of 1860.) or under any law corresponding to that Act in force in any part of India;

i. to any goods vehicle, the gross vehicle weight of which does not exceed 3,000 kilograms;

j. subject to such conditions as the Central Government may, by notification in the Official Gazette, specify, to any transport vehicle purchased in one State and proceeding to a place, situated in that State or in any other State, without carrying any passenger or goods;

k. To any transport vehicle which has been temporarily registered under section 43 while proceeding empty to any place for the purpose of registration of the vehicle;

l. To any transport vehicle used for such purposes (other than plying for hire or reward) as the Central Government may, by notification in the Official Gazette, specify;

m. To any transport vehicle which, owing to flood, earthquake or any other natural calamity, obstruction on road, or unforeseen circumstances is required to be diverted through any other route, whether within or outside the State, with a view to enabling it to reach its destination;

n. to any transport vehicle used for such purposes as the Central or State Government may, by order, specify;

o. to any transport vehicle which is subject to a hire-purchase, lease or hypothecation agreement and which owing to the default of the owner has been taken possession of by or on behalf of, the person with whom the owner has entered into such agreement, to enable such motor vehicle to reach its destination; or

p. To any transport vehicle while proceeding empty to any place for purpose of repair.

4. Subject to the provisions of sub-section (3), sub-section (1) shall if the State Government by rule made under section 96 so prescribes, apply to any motor vehicle adapted to carry more than nine persons excluding the driver.

10. Thus, from perusal of the above provisions, it is clear that public passenger carrying vehicle having carrying capacity of six persons is covered under the definition of "transport vehicle" as per Section 2(47) of the Act and as per Section 66, there is no exemption from permit for such vehicle. Therefore, in this case, permit was required for plying the offending vehicle, however, no permit was produced by owner or driver of the vehicle either before the police or the Tribunal. As per Ex.D/10 which has been proved by NAW-6 Augastin Toppo, District Transport Officer, no motor vehicle can be used for the purpose of transport or carrying passenger without a valid permit and for the offending vehicle also permit was required.

11. NAW-1 Rajshree Goyal, owner of the offending vehicle, has stated that she produced RC book, insurance policy and driving licence but she remained silent in respect of production of permit before the police or the Tribunal. Likewise, NAW-2 Sunil Kumar, driver, has also admitted in his deposition in para-5 that only insurance papers were kept in the vehicle. He has also not submitted any permit before the police or the Tribunal. Thus, in view of the provisions of the Act, the nature of the offending vehicle and the evidence adduced by the parties, it stands proved that on the date of accident, the offending vehicle was being driven without permit, in contravention of the

conditions of the insurance policy.

12. As regards the issue of competence of the driver to drive the offending vehicle, though the driver was having licence to drive LMV vide Ex.D/2, which was valid from 15.3.1999 till 14.3.2020, the offending vehicle falls in the category of transport vehicle and there was no endorsement in the driving licence for driving transport vehicle, but in view of decision of the Hon'ble Supreme Court in the matter of ***Mukund Dewangan Vs. Oriental Insurance Company Ltd.***, reported in ***(2017) 14 SCC 663,*** the driver was competent to drive the offending vehicle. In the said matter it was observed as under:

> "Held, the effect of amendment of Form 4 by insertion of "transport vehicle" related only to categories which were substituted in the year 1994 and the procedure to obtain driving licence for transport vehicle of class of "light motor vehicle" continues to be the same – There was no requirement to obtain separate endorsement to drive transport vehicle, and if a driver is holding licence to drive light motor vehicle, he can drive transport vehicle of such class without any endorsement to that effect – Further held, even otherwise the Form could not control the substantive provisions carved out in Ss. 10(2)(d) and 10(2)(e) and the interpretation of the Form has also to be in tune with the Statement of Objects & Reasons and the provisions of the Act inserted by virtue of the amendment – Interpretation of Statutes – Basic Rules – Harmonious Construction – Subordinate/Delegated Legislation/Rules Under the Act – Central Motor Vehicles Rules, 1989, Form 4 and R.14 (before and after 28.03.2001)"

Applying the ratio of law laid down by the Supreme Court in the matter of **Mukund Dewangan (supra)**, it is apparent that the driver of the vehicle in question was holding the valid and effective driving license and even in absence of any endorsement as such in his driving license authorizing him to drive the said transport vehicle, it cannot be held that he was not possessing the valid and effective driving license at the relevant time. As such, the Tribunal was not justified in holding that the driver was not having a valid and effective driving licence to drive the offending vehicle.

13. In the matter of ***Manuara Khatun and others Vs. Rajesh Kumar Singh and others, (2017) 4 SCC 796***, the Hon'ble Supreme Court held as under:

> “13. The only question, which arises for consideration in these appeals, is whether the appellants are entitled for an order against the Insurer of the offending vehicle, i.e., (respondent No. 3) to pay the awarded sum to the appellants and then to recover the said amount from the insured (owner of the offending vehicle-Tata Sumo)-respondent No.1 in the same proceedings.
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> 14. The aforesaid question, in our opinion, remains no more res integra. As we notice, it was subject matter of several decisions of this Court rendered by three Judge Bench and two Judge Bench in past, viz., National Insurance Co. Ltd. vs. Baljit Kaur & Ors., (2004) 2 SCC 1, National Insurance Co. Ltd. vs. Challa Upendra Rao & Ors., (2004) 8 SCC 517, National Insurance Co. Ltd. vs. Kaushalaya Devi & Ors., (2008) 8 SCC 246, National Insurance Co. Ltd. vs. Roshan Lal, (2017) 4 SCC 803 and National Insurance Co. Ltd. vs. Parvathneni & Anr., (2009) 8 SCC 785.
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> 15. This question also fell for consideration recently in Manager, National Insurance Company Limited vs. Saju P. Paul & Anr., (2013) 2 SCC 41 wherein this Court took note of entire previous case law on the subject mentioned above and examined the question in the context of Section 147 of the Act. While allowing the appeal filed by the Insurance Company by reversing the judgment of the High Court, it was held on facts that since the victim was travelling in offending vehicle as "gratuitous passenger" and hence, the Insurance Company cannot be held liable to suffer the liability arising out of accident on the strength of the insurance policy. However, this Court keeping in view the benevolent object of the Act and other relevant factors arising in the case, issued the directions against the Insurance Company to pay the

awarded sum to the claimants and then to recover the said sum from the insured in the same proceedings by applying the principle of “pay and recover”.

16. R.M. Lodha, J. (as His Lordship then was and later became CJI) speaking for the Bench held in paras 20 and 26 as under: (Saju P. Paul Case)

> *“20. The next question that arises for consideration is whether in the peculiar facts of this case a direction could be issued to the Insurance Company to first satisfy the awarded amount in favour of the claimant and recover the same from the owner of the vehicle (Respondent 2 herein).*
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> *26. The pendency of consideration of the above questions by a larger Bench does not mean that the course that was followed in Baljit Kaur, (2004) 2 SCC 1 and Challa Upendra Rao, (2004) 8 SCC 517 should not be followed, more so in a peculiar fact situation of this case. In the present case, the accident occurred in 1993. At that time, the claimant was 28 years old. He is now about 48 years. The claimant was a driver on heavy vehicle and due to the accident he has been rendered permanently disabled. He has not been able to get compensation so far due to the stay order passed by this Court. He cannot be compelled to struggle further for recovery of the amount. The Insurance Company has already deposited the entire awarded amount pursuant to the order of this Court passed on 1-8-2011 (National Insurance Co. Ltd. vs. Saju P. Paul, and the said amount has been invested in a fixed deposit account. Having regard to these peculiar facts of the case in hand, we are satisfied that the claimant (Respondent 1) may be allowed to withdraw the amount deposited by the Insurance Company before this Court along with accrued interest. The Insurance Company (the appellant) thereafter may recover the amount so paid from the owner (Respondent 2 herein). The recovery of the amount by the Insurance Company from the owner shall be made by following the procedure as laid down by this Court in Challa Upendra Rao(supra).”*

19. We find no merit in any of the submissions. Firstly, as mentioned above, we find marked similarity in the facts of this case and the one involved in Saju P. Paul’s Case (supra). Secondly, merely because the compensation has not yet

been paid to the claimants though the case is quite old (16 years) like the one in Saju P. Paul's Case (supra), it cannot be a ground to deny the claimants the relief claimed in these appeals. Thirdly, this Court has already considered and rejected the argument regarding not granting of the relief of the nature claimed herein due to pendency of the reference to a larger Bench as would be clear from Para 26 of the judgment in Saju P. Paul's case (supra). That apart, learned counsel for the appellants stated at the bar that the reference made to the larger Bench has since been disposed of by keeping the issue undecided. It is for this reason also, the argument does not survive any more.

20. It is for all these reasons, we find no good ground to take a different view than the one consistently being taken by this Court in all previous decisions, which are referred supra, in this regard.

21. In view of the foregoing discussion, we are of the view that the direction to United India Insurance Company (respondent No. 3) - they being the insurer of the offending vehicle which was found involved in causing accident due to negligence of its driver needs to be issued directing them (United India Insurance Company-respondent No.3) to first pay the awarded sum to the appellants (claimants) and then to recover the paid awarded sum from the owner of the offending vehicle (Tata Sumo)-respondent No.1 in execution proceedings arising in this very case as per the law laid down in Para 26 of Saju P. Paul's case quoted supra."

14. Keeping in view the facts and circumstances of the present case and the judgment of the Apex Court in Manuara Khatun (supra), this Court feels it proper to order for "pay and recover" in this case. Hence, respondent No.5/Bajaj Allianz General Insurance Company Ltd. is directed to pay the awarded sum to the claimants and then recover the same from the owner (appellant herein) as per law laid down in *Saju P. Paul* (supra).

15. For the reasons mentioned above, the appeal stands disposed of with modification in the award impugned to the above extent.

Sd/

(Gautam Chourdiya)

Judge

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