

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR**MAC No. 836/2012****Judgment Reserved on 05.09.2018****Judgment Delivered on 04.12.2018**

1. Padum Kumbhkar, S/o Kishan Lal, aged about 30 years,
 2. Kishan Lal Kumbhkar, S/o Govind Kumbhkar, aged about 50 years,
- Both R/o Village Lakhram, PS and Tahsil Ratanpur, District Bilaspur C.G.

---- Appellants**Versus**

1. Satel Ram Yadav, S/o Bagghra Yadav, aged about 44 years,
 2. Smt. Gayatri Yadav, W/o Satel Ram Yadav, aged about 42 years
- Both are resident of Village Lakhram, PS and Tashil Ratanpur, District Bilaspur C.G.
3. Iffco Tokio General Insurance Company Ltd., through the Branch Manager, Iffco Tokio General Insurance Co. Ltd. Lalganga Shopping Mall, G.E. Road, Raipur, District Raipur C.G.

---- Respondents

For Appellants	:	Shri Abhijit Mishra, Advocate.
For Respondent Nos. 1 & 2	:	Shri GVK Rao, Advocate.
For Respondent No.3	:	Shri Amrito Das Advocate with P. Acharya, Advocate.

Hon'ble Shri Gautam Chourdiya, J**CAV Judgment**

1. This appeal has been filed by the Driver and Owner of the offending vehicle challenging the award dated 22.03.2012 passed by the 4th Additional Motor Accident Claims Tribunal, Bilaspur in Claim Case No. 36/2011.

2. As per averments made in the claim petition on 09.02.2011 deceased Durgesh Yadav was standing by the side of the road along with his friends. At that time, non-applicant No.1 Driver of the offending vehicle Tractor (bearing engine and chesis No. 13760), owned by non-applicant No.2 and insured with non-applicant No.3, driving the same in a rash and negligent manner dashed the deceased, as a result of which, the deceased suffered grievous injuries and died during the course of treatment in hospital.
3. On claim petition being filed by the claimants, learned Tribunal considering the evidence led by both the parties by the impugned award granted a total compensation of Rs. 1,92,000/- with interest at the rate of 6% per annum from the date of application till its realization, fastening the liability on the appellants/driver and owner of the offending vehicle while exonerating the insurance company on the ground of breach of policy.
4. Counsel for the appellants submits that at the time of accident, the deceased was 14 years of age which is evidence from the document filed by the appellants along with application under Order 41 Rule 27 of CPC. Therefore, the Tribunal was not justified in recording a finding that the deceased was 24 years of age. Further, there is no evidence that the deceased was earning Rs.100/- per day and as such the Tribunal was not justified in considering the income of the deceased as Rs.3,000/- per month without any evidence. Learned counsel for the appellants further submits

that there was no breach on the part of the appellants, from the pleadings and evidence on record, it is clear that the deceased was standing on the road and not sitting in the tractor. But the learned Tribunal without any cogent evidence merely on the basis of final report and FIR has recording a finding that the deceased was sitting in the Tractor. In these circumstances, the Tribunal has committed an illegality in fastening the liability upon the appellants and exonerating the insurance company on the ground of breach of policy.

In compliance of the order dated 28.02.2018, learned counsel for the appellants apprised this Court that in Criminal Case No. 130/2011, the Judicial Magistrate First Class, Kota, District Bilaspur has acquitted appellant No.1 Padum Kumbhkar of the under Section 304A of IPC by giving him benefit of doubt. The record of the criminal case was called by this Court and the same is available with this Court. From perusal of the same, the fact regarding acquittal of appellant No.1 is found to be correct.

5. Counsel for the respondent/Insurance Company supports the award passed by the learned Tribunal and submits that document Ex.P-1 Final Report and Ex.P-2 FIR specifically mention this fact that the deceased was sitting on the board of engine, therefore, no liability can be fastened on the insurance company because insurance company has not taken any premium for any passenger sitting in the tractor.
6. Heard counsel for both the parties and perused the material available on record including the impugned award.

7. First this Court feels it proper to consider the application filed by the appellants under Order 41 Rule 27 CPC. Having heard learned counsel for the parties on the above application and from perusal of the documents annexed with this application i.e. a copy of relevant portion of *Dakhil Kharij* Register of the school, which is not the certified copy, this Court finds it difficult to accept the same at this stage because the appellants had every opportunity before the Tribunal to file any such document and prove the same. However, no explanation has been offered by the appellants as to why this document was not filed before the Tribunal and the same is being filed for the first time before this Court. The appellants have merely stated that due to lack of knowledge the said document could not be filed before the Tribunal. However, the explanation so offered by the appellants is not satisfactory and therefore, application I.A. No.2 is rejected. The Tribunal considering the postmortem report Ex.A-1 and merged intimation Ex.A-2 as well as the evidence of applicant witness No.1 Satel Ram (father of the deceased) and the pleadings of the claimants has recorded a finding that the deceased was 24 years of age on the date of accident which cannot be said to be unreasonable or irrational.
8. So far as the income of the deceased is concerned, though claimants have pleaded that the deceased was a Mason by profession and earning Rs.100/- per day, however, no documents or evidence could be adduced to substantiate

this said plea. Therefore, the Tribunal considering the minimum wages at the relevant time has taken the income of the deceased as Rs.3,000/- per month which also appears to be just and reasonable.

9. So far as the liability part is concerned, the learned Tribunal considering a Final report Ex.P-1 and FIR Ex.P-2 has recorded a finding that the deceased was sitting on the board of the engine and since no premium was taken for covering the risk of passenger in the tractor. The Insurance Company is not liable to pay any compensation to the claimants. However, as per evidence of AW-1 father of the deceased in Para 2, he has stated that his son/deceased was standing by the side of the road and he died due to injuries sustained by him on account of rash and negligent driving by non-applicant No.1. He has specifically denied that the deceased was sitting in the tractor. Kishan Lal Kumbhkar owner of the vehicle has also been examined before the Tribunal and he has also stated that the deceased was standing by the side of the road and this fact has not been challenged in the cross-examination. In cross-examination this witness has categorically denied the suggestion put to him by the insurance company that the deceased was sitting in the tractor. Rajesh Kumar Kewat witness examined on behalf of the claimants has also stated that the deceased was standing by the side of the road and he died due to rash and negligent driving by non-applicant No.1. Further, driver of the offending vehicle non-applicant

No.1 has also stated that the deceased was standing by the side of the road near Raza Talab with his friends. Therefore, merely on the basis of final report and FIR it can not be said that the deceased was travelling in the offending vehicle.

10. Ex.D-1 is a statement given to Police by AW-1 Satel Ram Yadav. However, when this witness was confronted with the said statement, he denied to have made any such statement to the police. No other witness to the accident was examined by the insurance company. Further, the other eye witness to the accident Rajesh Kumar Kewat AW-2 has also denied to have made statement Ex.D-2 to the police. Though, Sanjay Kashyup in his statement Ex.D-3 has stated that the deceased was sitting in the tractor. However, he has not been examined by the Insurance Company before the Tribunal.

11. NAW-1 Irshad Ahmed examined by the Insurance Company has specifically stated that he has no knowledge about the accident and that he merely signed certain documents and his affidavit under Order 18 Rule 4 CPC was prepared by his counsel. Thus, from the evidence of this witness, it is clear that he is not an eye witness to the accident.

12. In a similar case, the High Court of M.P in the matter of **Oriental Insurance Company Limited Vs Lacchiram** reported in MPWN 2007 2 55, observed in para 3 as under:-

“3. We find that on account of failure of the Insurance Company to examine the person, who had lodged the FIR and the scribe of the FIR as also the person who

had communicated the said information to the Head Constable, merely on account of the recital in the FIR, it cannot be said that it contradicted the claim made by the claimant in his claim petition. As pointed out above the Insurance Company has also admitted that he was standing by the side of the road, but contrary to the rules. In the above state of factual matrix, the reliance of the learned counsel for the appellant on the decision of the apex Court in *Oriental Insurance Company Limited v. Devireddy. Konda Reddy and others* [2003 (II) MPWN 5 = 2003 ACJ 468] is in apt. In fact, the facts of the present case are similar to the facts contained in the decision of this Court in *Dhanwanti and others v. Kulwant Singh and others* [1994 ACJ 708]. In the said case despite investigating officer having been examined with respect to the statement made in the FIR, in the absence of any legal and cogent evidence by the Insurance Company, on the basis of the contents of the FIR the claim could not be defeated. We are, therefore, of the view that the stand of the respondent No.1 that he was standing by the side of the road when the truck hit him and ran over his leg is probable on test of preponderance of probabilities."

Recently the Hon'ble Supreme Court in the matter of **Smt. Suvarnamma & Anr. Vs United India Insurance Company Ltd. & Anr.** reported in 2018 (5) SCALE 516 has held that "*a mere statement that the victim was unlawfully travelling on the tractor, without any probable evidence cannot be taken into consideration, when the evidence to the contrary is available, in the form of deposition of an independent eyewitness*".

13. Thus, on the basis of the aforesaid discussions, this Court is of the opinion that the Tribunal was not justified in exonerating the Insurance Company on the ground of breach of policy and fastening the liability on the driver and owner of the offending vehicle.
14. In the result, the appeal is allowed and the the impugned award is hereby modified to the extent that it shall be the liability of respondent No.3/Insurance Company to satisfy

the award. If any amount has been deposited by the appellant/owner before the Tribunal, the same shall be recoverable from the Insurance Company. However, rest of the conditions shall remain intact.

Sd/-
(Gautam Chourdiya)
Judge

Akhilesh