



were also awarded. In all, compensation of Rs.15,36,520/- along with interest was awarded.

Two-fold argument has been raised; (i) that the deceased was not wearing a helmet while driving the motorcycle, therefore, the Tribunal should have held it to be a case of contributory negligence, and (ii) that the compensation has been assessed on the higher side.

On the question of contributory negligence in causing of accident due to non-wearing of helmet by the deceased, Ld. Counsel for the appellant- insurer has placed reliance on Siby Paul vs. Praveen Kumar G.N. and others, 2010(5) RCR (Civil) 143, to contend that since the deceased was not wearing helmet, therefore, he was liable for contributory negligence.

In this case, the Division Bench of Kerala High Court was dealing with an appeal for enhancement of compensation, filed by injured and observed as under:-

“... .. When protection that a helmet provides to a rider is statutorily recognised and when it is mandatory under statute for the riders and drivers of two wheelers to wear the same, we feel it is a matter to be considered by the Motor Accidents Claims Tribunal as to whether the injured in a motor bike accident had suffered head injury and if so, whether at the time of accident the driver or pillion rider, as the case may be, who claims compensation for head injury was wearing a helmet. If the protective head gear, namely, helmet, the use of which is mandatory under Section 129 of the Act, was not worn by the drivers or pillion riders who sustained head injury, then contributory negligence can be assumed, if not for causing the accident but for sustaining injury which could have been prevented or the impact of which could have been reduced through compliance of the statutory provision by wearing a helmet. In fact the want of helmet for the rider may not be contributory to the accident. However, the use of helmet would prevent head injury or at least reduce the impact of the injury in the event of accident for the driver and pillion rider of the bike or two wheeler. Therefore, in our

*opinion, it is for the Tribunal to consider whether in case of claim of compensation for death or injury of drivers or pillion riders of two wheelers they were wearing helmet at the time of accident and if not whether wearing of helmet would have prevented the death or injury or reduced the impact of the injury and if the same should be reckoned as an aspect of contributory negligence for reducing the compensation amount...”*

The aforesaid observations indicate that the High Court required that in case of claim of compensation of drivers or pillion riders of two wheelers involving head injury the Motor Accident Claims Tribunal should consider whether they were wearing helmet at the time of accident and if not whether wearing of helmet would have prevented the death or injury or reduced the impact of the injury and whether it should be reckoned as an aspect of contributory negligence for reducing the compensation amount.

A Division Bench of Kerala High Court in a recent decision in **P.J. Jose v. Niyas (Kerala), 2016 (2) R.C.R.(Civil) 411** considered the earlier decision in ***Siby Paul's*** case (supra) and after going into the issue in detail, held that non-wearing of 'Helmet' may not have any relevance in causing the accident and could not be taken as a ground to fix contributory negligence on the part of the rider. It was observed :-

*“6. The learned counsel appearing for the insurance company submits that the consequence of non-wearing of the Helmet and the course that could be followed by the Tribunal in apportioning negligence had come up for consideration before a Division Bench of this Court and as per the judgment reported in ***Siby Paul v. Praveen Kumar (2010(5) R.C.R.(Civil) 143 : 2009 (1) KLT 322*** it has been held that it could be raised as a defence from the part of the insurance company to apportion the liability to an appropriate extent. The Tribunal, in the award, has referred to the instance of non-wearing of the 'Helmet' leading to the death of the deceased and in turn, has fixed 25% contributory negligence on the part of the rider. No other aspect was discussed by the Tribunal in the award. We find it difficult to agree with the proposition that non- wearing of 'Helmet', though an offence under the*

relevant provisions of the M.V.Act, could be taken as a ground to fix contributory negligence on the part of the rider. What is to be considered with regard to the apportionment of negligence is whether the party concerned had any role/part in causing or contributing to the accident. In other words, the consequence pursuant to the accident is not a circumstance to be weighed for fixation of negligence in causing the accident. With regard to the non-wearing of ' Helmet ' and resultant death because of the head injury, it is only a 'consequence' after the accident. Because of the non-wearing of ' Helmet ', the injury sustained to the head became fatal, leading to the death of the deceased. It is true that, had the deceased been wearing a ' Helmet ', probably his life could have been saved and the gravity of the injury would not have been this much severe, to have resulted in the death of the deceased. But the consequence because of the non-wearing of ' Helmet ' was not the reason for knocking down the rider of the motor cycle by the driver of the jeep which was coming from the opposite side and this being the position, negligence cannot be fixed on the shoulders of the rider of the vehicle merely for not wearing the ' Helmet '. The question is whether the matter should be referred to a Full Bench in view of the decision cited across the Bar i.e., **Siby Paul v. Praveen Kumar (2010(5) R.C.R.(Civil) 143 : 2009 (1) KLT 322)**.

7. During the course of hearing, it is brought to the notice of this Court by the learned counsel for the respondent/insurance company that the accident was actually on the wrong side of the rider of the motor cycle. At the time of accident the rider of the motor cycle had virtually crossed the middle line, whereas the jeep which was coming from the opposite side was maintaining the correct side of the road. We have perused the relevant records. It is revealed from the materials on record that the road is lying East-West. The motor cycle was proceeding from the West to the East and the jeep was coming from the opposite side. The road is having a total width of 6.04 metres and the accident was at a spot of 3.24 metres from the Northern end of the road; which means, the motor cycle had already crossed the middle line of the road. In other words, the rider of the motor cycle was not maintaining his correct side and as such, there is contribution on his part in causing the accident. To put it more clear, the accident was not because of the non- wearing of ' Helmet ' but because of the negligence on the part of the rider in keeping his side as well, and in such circumstances, the fixation of negligence to an extent of 25% on the part of the rider of the motor cycle is not liable to be deprecated under any circumstance, though non-wearing of ' Helmet ' may not have any relevance in causing the accident. In the said circumstances, we do not find it necessary to cause the matter to be referred to larger bench.”

The question has also been considered by this Court in Rupinder Sharma Alias Komal Sharma v. SPR Basant Kumar (Punjab and Haryana) 2014 ACJ 869, wherein, it was held that merely because a person was not wearing a helmet he could not be held to be negligent in causing the accident.

*“4. The Tribunal was in error in finding that 20% deduction must be made for contributory negligence. Contributory negligence must be attributed to how the accident itself had taken place and not how he exposed himself to a danger of death. The concept is wrongly understood by the Judge in assuming that by not wearing helmet, he was guilty of contributory negligence. The contributory factor must be to the extent of collision and if he was not wearing helmet, he could not be stated to be a negligent "in causing the accident". He could be stated to be only negligent in not wearing helmet that "caused his death". I will not taking this to be the component for reduction of the damage assessed.”*

A Division Bench of the Allahabad High Court in New India Assurance Co. Ltd. v. Smt. Sharda Devi (Allahabad)(D.B.) 2013 ACJ 652 has also observed similarly :

*“5. The Tribunal has taken into consideration the statement of the wife, who was riding on the pillion, that his husband Rakesh was wearing helmet. Further in view of the findings based on oral evidence, which is not disputed that the motor cycle was being driven on the left side of the road and that Indica Car suddenly took a turn towards right and collided with the motor cycle, there was no question of applying principles of contributory negligence. The negligence in wearing helmet and allowing the children to ride on the back seat, common with most of lower middle class families travelling on two wheelers cannot be taken as composite or contributory negligence on the part of the deceased, when it is found that he was liable for any wrong doing in driving or otherwise on account of which accident was caused. The breach of rules in driving two wheeler without helmet and driving it with three pillion riders, by itself cannot be treated as composite or contribution to negligence on his part.”*

The afore-mentioned decisions make it clear that the injury or

death of the rider of a two-wheeler is a subsequent event, whereas, the

principle of 'contributory negligence' is about the contribution in causing the accident and, accordingly, it has been held that non-wearing of helmet, by itself, cannot be a reason for holding an accident to be result of 'contributory negligence'.

In this case, as has been noticed by the Tribunal, a perusal of the testimony of Manjit Kumar, an eye witness of the occurrence supported by copy of the FIR Ex. P 3 reveals that the road was under repairs and was opened from one side when driver of the JCB, without noticing Mohit Kumar, turned the bucket of the machine towards him which hit on his head and caused other injuries. The said version has remained unchallenged. The driver of the JCB did not depose to rebut this. Thus, his negligence was proved. There was no question of contributory negligence on the part of the deceased-the driver of the motorcycle.

Coming to the quantum of compensation, the Tribunal has assessed the income of the deceased considering him to be a daily wager. The case of the respondents – claimants was that the deceased was working as driver in Doha (Qatar) for the last many years and was having a valid DL proved as Ex.P1. However, in cross-examination, the widow of the deceased fairly admitted that she had no documentary proof of the income of her husband. It was, in these circumstances that the Tribunal assessed the income of the deceased @ Rs.7200/- per month treating him to be a daily wager, which in no manner, can be said to be excessive in July, 2014 when the accident had taken place.

However, in view of the decision of the Hon'ble Supreme Court in

**National Insurance Company Ltd. Vs. Pranay Sethi and others (2017)**

**16 SCC 680**, the amount of Rs.85,000/- awarded under the conventional heads is on higher side and needs to be re-assessed. This amount should have been Rs.40,000/- towards 'loss of consortium', Rs.15,000/- for `funeral expenses' and Rs.15,000/- towards 'loss of estate'. In other words, the amount of Rs.85,000/- awarded under the conventional heads deserves to be reduced to Rs.70,000/- as explained above. Ordered accordingly.

No other point was argued.

The appeal is accordingly disposed of . The Award of the Tribunal is modified to the extent that the appellants are held entitled to compensation of **Rs.15,21,520/-**, that is, **Rs.15,000/-** less than the amount awarded by the Tribunal.

The appeal has been disposed of without notice to the respondents – claimants to avoid unnecessary delay and expense. A copy of this order be conveyed to the claimants-respondents No.1, 2, 5 and 6. In the event of the said respondents having any objection, they may file application to that effect. On receipt of any such application, the same be listed for hearing.

It is made clear that this order has been passed on an appeal filed by the Insurance Company without hearing the claimants and is confined to the contentions raised herein. It is without prejudice to the rights of the claimants to separately agitate for enhancement on any ground that may be available to them.

April 18, 2018

( HARINDER SINGH SIDHU )

JUDGE

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|-----------------------------|----------|
| Whether Speaking / Reasoned | Yes      |
| Whether Reportable          | Yes / No |