NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

MAC No. 458 of 2014

- United India Insurance Company Limited Thru- Branch Manager, Station Road, In front of Chouhan Auto, Paras Complex, Durg, Tah. And Distt. Durg C.G., Through- Its Authorised Authority, Divisional Manager, Divisional Office- 2nd Floor Gurukripa Towers, Vyapar Vihar Road, Bilaspur, Distt. Bilaspur, Chhattisgarh

---- Appellant

Versus

1. Smt.Kailash Devi, Wd/o Late Jageshwar Prasad Sahu Aged About 42 Years
2. Preet Lal, S/o Late Jageshwar Prasad Sahu Aged About 25 Years
3. Phamendra Kumar Sahu, S/o Late Jageshwar Prasad Sahu Aged About 23 Years

   Respondents- 1 to 3 all are r/o Sector- 5, Block-3D, SPA Bhilai, PS Sector-6, Tah & Distt – Durg (CG)
4. Kanhaiya Lal Yadav S/o Kishan Lal Yadav Aged About 28 Years R/o Bus Stand, Sikosa, Tah. Gunderdehi, Distt. Balod Chhattisgarh (Driver of Mahindra Pickup No.CG-07 C-2843)
5. Navin Kumar Chandrakar S/o Brij Mohan Chandrakar Aged About 28 Years R/o Bus Stand, Sikosa, Tah. Gunderdehi, Distt. Balod, Chhattisgarh (Registered owner of Mahindra Pickup No.CG-07-C-2843)

---- Respondents

For Appellant	:	Shri Dashrath Gupta, Advocate
For Respondents-1, 2 and 3 (Claimants)	:	Shri PR Patankar and Shri Vedant Bhelonde, Advocates

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Hon'ble Shri Justice Parth Prateem Sahu

Order on Board

19.12.2019

1. Challenge in this appeal is to the award dated 28.01.2014 passed by learned Sixth Additional Motor Accident Claims Tribunal, District-Durg, Chhattisgarh (for short, 'Claims Tribunal') in Claim Case No.134 of 2013 by which learned Claims Tribunal partly allowed claim application of respondents No.1 to 3 / Claimants and awarded total compensation of Rs.63,82,064/- along with simple interest @ 6% per annum.

2. Facts of the case, in nutshell, are that on 30th April, 2013 at about 9 pm Jageshwar Prasad Sahu along with his wife i.e. non-applicant No.1/respondent No.1 herein was going on his motorcycle bearing registration No.CG 07 LN 2221, towards his residence situated in Bhilai. When they reached near Gunderdehi Chowk, at that time, one Mahendra Pick-up bearing registration No.CG07-C-2843 (for short 'offending vehicle'), driven by non-applicant No.1/respondent No.4, dashed motorcycle of Jageshwar Prasad Sahu, as a result of which he suffered grievous injuries on various parts of his body and succumbed thereto on the spot. Accident was reported to the Police Station, Gunderdehi, District Balod, based on which Crime bearing No.52 of 2000 was registered against respondent No.4 for commission of offence punishable under Sections 337, 338 & 304-A of the Indian Penal Code.

3. Claimants/respondents No.1 to 3, who are widow & children of deceased respectively, filed claim application before the competent Claims Tribunal claiming total compensation of Rs.81,16,640/- under various heads on the ground that on the date of accident, deceased Jageshwar Prasad Sahu was aged about 47 years, he was employed as 'Senior Technician/Electrician' in RSM Rail Mill Department of the Bhilai Steel Plant and thereby getting Rs.45,940/- per month as salary.

4. Non-applicants No.1 & 2/respondents No.4 & 5 herein submitted their reply to claim application and have admitted the fact that non-applicant No.1 is driver and non-applicant No.2 is registered owner

of offending vehicle. They denied other adverse pleadings made in the application with respect to accident and further pleaded that non-applicant No.1 was not driving the offending vehicle rashly and negligently and it is the deceased who was driving his motorcycle in a rash & negligent manner due to which he fell down on the road and suffered grievous injuries. It was also pleaded that on the date of accident, non-applicant No.1 was having valid & effective driving licence and the offending vehicle was insured with non-applicant No.3/appellant Insurance Company. Therefore, amount of compensation, if awarded, is payable by the Insurance Company.

5. Appellant Insurance Company submitted its separate reply to claim application and pleaded that the insurance company is not liable to satisfy the impugned award for the reason that the offending vehicle was plied on road in violation of essential conditions of insurance policy, amount of compensation claimed in claim application is highly exaggerated.

6. On the basis of pleadings of respective parties, the Claims Tribunal framed as many as seven issues for consideration and on appreciation of the pleadings and evidence placed on record, allowed claim application in part and awarded a total sum of Rs.63,82,064/- as compensation after assessing monthly income of the deceased as Rs.45,940/-.

7. Shri Dashrath Gupta, learned counsel for appellant/Insurance Company submits that learned Claims Tribunal committed error in

assessing monthly income of the deceased as Rs.45,940/- and in awarding an amount of Rs.1,00,000/- each to major sons of deceased under the head of 'loss of love & affection'. He further submits that learned Claims Tribunal failed to consider that there was contributory negligence on the part of deceased, who was driving motorcycle at the time of accident, as the accident was result of head-on collusion between two vehicles. He submits that in the above circumstances, the amount of compensation is required to be re-calculated and to be modified accordingly.

8. Per contra, Shri PR Patankar, learned counsel appearing for the respondents/ claimants submits that learned Claims Tribunal has determined monthly income of the deceased on the basis of salary slip (Ex.P-5 & P-6) issued by the employer i.e. Bhilai Steel Plant; amount of Rs.1,00,000/- each was awarded to respondents No.2 & 3, who are children of deceased, under the head of loss of love & affection, which, looking to their age, cannot be said to be erroneous. Respondents No.2 & 3 have lost their father at their tender age and therefore learned Claims Tribunal was justified in awarding Rs.1,00,000/- each under the aforesaid head. He also submits that learned Claims Tribunal in the facts and circumstances of the case, has awarded just and reasonable amount of compensation to the claimants, which does not call for any interference.

9. Heard learned counsel for the parties and perused the record.

10. So far as income of the deceased on the date of accident for the purpose of calculation is concerned, it is to be taken on the basis of established income of deceased and that too, regular monthly salary in cases where deceased is under employment on the date of accident. For the purpose of ascertaining monthly income on the basis of salary, the amount payable to the claimants on the date of accident towards salary. which includes the basic pay, Dearness Allowance, incentives and other heads for which the said employee/ deceased/ claimant is entitled for every month. The amount as shown in Ex.P5 & P6 in column of miscellaneous income on Category Code 91 (Ex.P5) and Category code 72 (Ex P6), cannot be said to be regular income of deceased. On perusal of Ex.P5, which is salary slip of April 2013, it appears that under gross pay an amount of miscellaneous income i.e. Category Code 91 of Rs.9,520/- and Category Code LT of amount Rs.100/- is also added. Category code 91 has been specified in the document Ex.P5, salary slip itself as LTC encashment ie Leave Travel Concession and LTE Taxable. In Ex.P6, which is salary slip of March 2013, in miscellaneous income under code 72, Rs.26,221 is mentioned DR-Rs.1,716/- and LTE code 72 is towards Earn Leave encashment, DR (Reward) and LTE are taxable income.

11. The income as shown in both salary slips (Ex.P 5 and P6) under the head of miscellaneous income cannot be said to be a regular income/ salary of deceased. LTC encashment and leave encashment cannot be treated as monthly income. Likewise, LT and

DR i.e. reward also cannot be treated as regular income of deceased for the reason that though the said income has been shown in the salary slip, but it is shown on the head of miscellaneous income. Even from specification of codes in the salary slip, the headings shown will not fall in monthly salary/pay of deceased.

12. Learned Claims Tribunal for assessing monthly salary of deceased has taken into consideration salary slip of April 2013, in which his gross income has been shown as Rs.45,940/-. On a specific query being put to learned counsel for claimants as to what calculation of the amount shown in – column ie Rs.45,940/-, he submitted that total amount shown in the column of regular income including miscellaneous income is total of gross pay ie Rs.45,940/-. As this Court has already held that LTC encashment and LTE taxable cannot form part of salary of deceased, therefore, from the gross payment salary, as held by learned Claims Tribunal as Rs.45,940/-, amount of Rs.9,620/- (9520 + 100) is required to be deducted for assessing monthly income of deceased, which comes to Rs.36,320/- (45940 – 9620).

13. Other ground raised by learned counsel for appellant that learned Claims Tribunal committed error in awarding excessive amount on other heads, particularly an amount of Rs.1,00,000/- each to respondents No.2 & 3, children of deceased, under the head of love and affection is concerned, the heads under which amount of compensation is to be awarded do not provide for awarding of any

amount of compensation towards loss of love & affection. In the case at hand, an amount of Rs.1,00,000/- each to respondents No.2 & 3 on the head of love and affection is also not warranted because they were major on the date of filing of claim application. Being aged about 25 years & 23 years. The amount of compensation on the head of loss of love and affection to the tune of Rs.1,00,000/- each to the children of deceased is required to be deducted from the total amount of compensation to be awarded to the claimants.

14. Submission of learned counsel for appellant/Insurance Company that the deceased was also contributory negligent to the accident on the ground that the accident was the result of head-on collusion between two vehicles is concerned, I am not satisfied with the submissions made by learned counsel for appellant. Perusal of finding recorded by learned Claims Tribunal on the issue of contributory negligence would show that learned Claims Tribunal held that non-applicant 1, driver of offending vehicle did not enter into the witness box to prove the fact of contributory negligence, nor produced any other relevant document or evidence to prove the fact of contributory negligence. Learned Claims Tribunal also considered the evidence of Kalyan Singh, who was present on the spot at the time of accident and nothing has come in his statement to show that deceased was also contributory negligent for the accident in any manner.

15. The issue of contributory negligence is a fact which is required to be proved by a party who raises such plea as a defence. The fact of

negligence can be proved either by the driver of offending vehicle or any other person who is eyewitness to the accident.

16. The Hon'ble Supreme Court while dealing with the issue of contributory negligence in the decision of ***Minu Rout & Anr. v. Satya Pradyumna Mohapatra & Ors., 2013 AIR SCW 5375***, dealt with the plea of contributory negligence taken by Insurance Company where neither the driver nor any independent witness was examined to prove the allegation of contributory negligence. The Supreme Court, while setting aside the finding of contributory negligence, held as under:

> "12. ...The Tribunal ought to have seen that non production of FIR has no consequence for the reason that charge sheet was filed against the truck driver for the offences punishable under Sections 279 read with Section 302 of IPC read with the provisions of the M.V. Act. The Insurance Company, though claimed permission under Section 170 (b) of the Motor Vehicles Act, 1988 from the Tribunal to contest the proceedings by availing the defence of the owner of the offending vehicle, it did not choose to examine either the driver of the truck or any other independent eye witness to prove the allegation of contributory negligence on the part of the deceased Susil Rout on account of which the accident took place as he was driving the car in a rash and negligent manner. In the absence of rebuttal evidence adduced on record by the Tribunal, the Tribunal should not have placed reliance on the charge-sheet- Exh. 1 in which the deceased driver was mentioned as an accused and on his death; his name was deleted from the charge sheet. The Tribunal has referred to certain stray answers elicited from the evidence of PW.2 and PW3 in their cross-examination and placed reliance on them to record the finding on issue No. 1. For the aforesaid reasons, the findings and reasons recorded by the Tribunal on the contentious issue No. 1

> holding that there is contributory negligence on the part of the deceased driver in the absence of legal evidence adduced by the Insurance Company to prove the plea taken by it that accident did not take place on account of rash and negligent driving of the truck driver is erroneous in law."

17. In case of ***Jiju Kuruvila and others v. Kunjujamma Mohan and others, (2013) 9 SCC 166***, the Hon'ble Supreme Court has held as under:-

> "20.5 The mere position of the vehicles after accident, as shown in a Scene Mahazar, cannot give a substantial proof as to the rash and negligent driving on the part of one or the other. When two vehicles coming from opposite directions collide, the position of the vehicles and its direction, etc. depends on a number of factors like the speed of vehicles, intensity of collision, reason for collision, place at which one vehicle hit the other, etc. From the scene of the accident, one may suggest or presume the manner in which the accident was caused, but in the absence of any direct or corroborative evidence, no conclusion can be drawn as to whether there was negligence on the part of the driver. In absence of such direct or corroborative evidence, the Court cannot give any specific finding about negligence on the part of any individual."

18. Hon'ble Supreme Court in aforementioned rulings, held that merely head on collusion between two vehicles cannot automatically be said that the accident occurred due to contributory negligence of both the drivers, nor it can be presumed on the basis of position of the vehicle as pointed out in Nazari Naksha/spot map. Hon'ble Supreme Court in categorical terms stated that contributory

negligence is required to be proved by the person or party asserting it.

19. In light of aforementioned law laid down by Hon'ble Supreme Court, if the facts of present case are considered, Insurance Company has not brought into record any cogent reliable piece of evidence to prove and support their contention of contributory negligence. No eyewitness has been examined by the Insurance Company. The driver of offending vehicle could be one of the important witnesses to prove the fact and issue of contributory negligence but in the case at hand, the driver of offending vehicle did not enter into witness box and prove the fact and issue of contributory negligence.

20. In view of above, in the opinion of this Court, learned Claims Tribunal has not committed any error in holding contributory negligence as it could not be proved.

21. For the foregoing discussions, this Court proposes to recalculate amount of compensation payable to claimants/ respondents herein.

22. Accordingly, income of deceased is taken as Rs.36,320/- per month as held above, and since at the time of accident the deceased was below the age of 50 years (47 years) and was in permanent government employment, therefore, in view of law laid down in the matter of **National Insurance Company Ltd. vs. Pranay Sethi** reported in **(2017) 16 SCC 680**, the established income of deceased is required to be increased by 30% towards future prospects, which comes to Rs.47,216/-(36320+10896). Thus, annual income of

deceased for the purpose of calculating compensation comes to Rs.5,66,592/- (47216 x 12). Out of this amount, 1/3rd is to be deducted towards personal and living expenses of deceased and after deducting 1/3rd, annual loss of dependency would come to Rs.3,77,728/- (566592-188864). By applying multiplier of 13, as applied by Claims Tribunal, to annual loss of dependency, total loss of dependency would come to Rs.49,10,464/- (377728x13). Besides this, claimants/ appellants are also entitled for a lump sum amount of Rs.1,25,000/- under other conventional heads. Thus, claimants/appellants are now entitled for a total compensation of Rs.50,35,4640/- (4910464+125000) instead of Rs.63,82,064/-. This amount of compensation shall carry interest @ 6% p.a. from the date of filing of claim application till its realization. Rest of conditions mentioned in the impugned award shall remain intact.

23. Any amount already paid to claimants/appellants as compensation shall be adjusted from the total amount of compensation as calculated above.

Sd/-
(Parth Prateem Sahu)
JUDGE

padma