

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**MAC No. 1073 OF 2013**

The National Insurance Co. Ltd. through its Sr. Divisional Manager,
D.O.-B1, Taha Complex, Ring Road-I, Priyadarshini Nagar, Bilaspur
C.G.

---- Appellant**Versus**

1. Ramshankar Vishwakarma S/o Late Dhanaram Vishwakarma aged About 37 Years R/o village Salhekapa (Mahuwakapa), P.O. Kargikala, P.S. and Tahsil Takhatpur, Revenue and Civil District Bilaspur C.G.
2. Balvindar Singh Rai S/o Shri Achar Singh Rai aged About 23 Years R/o 27 Kholi Chowk, Ward No. 1, Mungeli Road, Bilaspur, P.S. Civil Lines, Tahsil and Revenue and Civil District Bilaspur C.G.
3. Achar Singh Rai S/o Shri A.S. Rai R/o 27 Kholi Chowk, Ward No. 1, Mungeli Road, Bilaspur, P.S. Civil Lines, Tahsil and Revenue and Civil District Bilaspur C.G.

---- Respondents

For Appellant	:	Mr. R.N. Pusty, Advocate.
For Respondent No. 1	:	Mr. Samir Singh, Advocate
For Respondents No. 2 & 3	:	Mr. Manoj Mishra, Advocate

Hon'ble Shri Justice Parth Prateem Sahu
Judgment On Board

15/01/2019

1. The appellant/Insurance Company has assailed the impugned award dated 30/11/2012 passed by 6th Additional Motor Accident Claims Tribunal, Bilaspur, C.G. (in short 'Claims Tribunal') in Claim Case No.75/2011, wherein the learned Claims Tribunal awarded Rs.2,76,000/- in an injury case.

2. Brief facts for disposal of this appeal, are that, on 26/06/2011, respondent No.1/claimant - Ramshankar Vishwakarma was travelling on a motorcycle bearing its registration No.CG 10/EC/1446 and going to village Salehkapa from Kota along with driver of the motorcycle. It has been further pleaded that on the way, they met with another friend and while they were talking with him on left side of the road, at that relevant time, one WagonR car bearing its registration No.CG 10/BC/8363 driven by respondent No.2 rashly and negligently, dashed the motorcycle, on which, respondent No.1/claimant was sitting. In the aforementioned accident, he sustained multiple injuries over different parts of the body including fracture injury over right leg and right hand. The motorcycle was also damaged badly.
3. Thereafter, the matter was reported to the concerned police station and Crime No.228/2011 has been registered against respondent No.2 for the offenses punishable under Sections 279, 337 and 338 of the Indian Penal Code.
4. In an accident, respondent No.1/claimant suffered fracture injury over his right thigh as also over ankle joint (*Takhana*). The claimant filed an application under Section 166(1) of the Motor Vehicles Act, 1988 (for short 'M.V. Act') for grant of compensation claiming Rs.5,10,000/- in total on all heads mentioned therein that he sustained permanent

disability at the extent of 50%, for which, certificate was issued by the Medical Board.

5. Respondents No.2 and 3, who are driver and owner have submitted their reply to the claim application and denied adverse pleadings made in respect to the accident. They have further pleaded that on the date of accident, the offending vehicle bearing its registration No. CG 10/BC/8363 was insured with the appellant/Insurance Company from 01/02/2011 to 31/01/2012, therefore, the liability, if any, for payment of compensation would be on the insurance company.
6. The appellant/insurance company submitted its reply to the claim application and denied the fact of accident as also the fact of injuries as pleaded by respondent No. 1/claimant in his claim application. It has been further pleaded that at the time of accident, respondent No.1/claimant was travelling on the motorcycle in intoxicated condition and further that he was not having a valid and effective driving license to drive the motorcycle. The appellant/insurance company has also taken a plea that there was composite negligence on the part of driver of the motorcycle, therefore, respondent No. 1/claimant was not entitled for any amount of compensation.
7. The learned Claims Tribunal after considering the pleadings and evidence of the respective parties, arrived at a conclusion that respondent No. 1/claimant (injured) sustained functional permanent

disability to the extent of 30% and while assessing the income of injured as Rs.3,000/- per month, awarded a sum of Rs.2,76,000/- in total including Rs.86,000/- towards medical expenses. It is this award, which is subject matter of challenge in this appeal.

8. Learned counsel appearing for the appellant/insurance company submitted that the respondent No. 1/claimant had not sustained injury of permanent nature. He further submitted that the disability certificate (Exhibit P-27) issued by the Medical Board with respect to 50% moderate disability and further that the period and validity of the certificate is only for three years from the date of its issuance, therefore, the injury sustained by respondent No. 1/claimant cannot be treated as permanent disability. He further submitted that though respondent No. 1/claimant was a pillion rider, but as at the time of accident, three persons were travelling on one motorcycle, which is violative to provisions of Section 128 of the M.V. Act, therefore, there is contributory negligence on the part of respondent No.1/claimant, but the learned Claims Tribunal has not assessed the contributory negligence and not deducted any amount to that effect. He lastly submitted that as the driver of the motorcycle as well as insurance company of the motorcycle have not been arrayed as one of the party respondents in the claim application, therefore, the claim

application ought to have dismissed on the ground of non-joinder of necessary party.

- 9.** Learned counsel appearing for respondent No. 1/claimant submitted that the disability certificate (Exhibit P-27) was issued by District Medical Board, Bilaspur and after minute examination of the injuries sustained by respondent No. 1/claimant, the disability certificate showing the disability of respondent No. 1/claimant to the extent of 50% has been rightly issued. He further submitted that looking to the disability certificate as well as the evidence of the doctor i.e. Dr. S.S. Bhatia (AW-2), the learned Claims Tribunal has rightly assessed the functional disability of respondent No. 1/claimant to the extent of 30% and it does not call for any interference. He lastly submitted that as respondent No. 1/claimant was a pillion rider, therefore, the theory of contributory negligence would not be applicable to him and for him, it would be a case of composite negligence on the part of the driver of WagonR car i.e. respondent No. 2.
- 10.** Learned counsel appearing for respondents No. 2 and 3 supported the impugned award passed by learned Claims Tribunal.
- 11.** I have heard learned counsel appearing for the parties and perused the records carefully.

- 12.** On perusal of Exhibit P-8, which is a discharge summary, it would show that respondent No.1/claimant had suffered fracture of shaft femur bone right with compound fracture, dislocation of right ankle with compound fracture of 2nd, 3rd 4th, 5th metacarpals of right hand with fracture dislocation of MCP joint of little finger of right hand with hypovolemic shock. This discharge summary issued by Moolchand Memorial Hospital, Juniline, Bilaspur, in which, it has been mentioned that respondent No.1/claimant was admitted in the hospital on 26/06/2011, wherein he underwent for an operation on 27/06/2011 and discharged on 10/07/2011.
- 13.** From perusal of Exhibit P-8 itself, it is clear that respondent No. 1/claimant had sustained severe injuries over his right leg. He had enclosed the disability certificate issued by the District Medical Board, Bilaspur on 23/06/2012. One of the Doctors of the Medical Board was examined as AW-2, namely, Dr. S.S. Bhatia before the learned Claims Tribunal. Dr. S.S. Bhatia (AW-2) categorically stated about the injuries and also stated that there is non-union of fracture of right ankle and also that in the right ankle itself, developed Osteoarthritis. He further stated that there was non-union of femur bone also. Even in cross examination, he has categorically stated that there was non-union of fracture injuries sustained by respondent No. 1/claimant.

- 14.** This is a case where respondent No.1/claimant has examined himself before the Medical Board for assessing his disability almost after more than 11 months from the date of accident and the Medical Board after examination of respondent No. 1/claimant, issued a certificate showing 50% moderate permanent disability.
- 15.** In view of the above circumstances and looking to the nature of injuries as also the part of the body, on which, fracture injuries were sustained which remained non-union for more than 11 months, it cannot be said that respondent No. 1/claimant has not sustained permanent disability.
- 16.** In view of the aforementioned discussions and looking to the nature of medical documents, permanent disability certificate as well as evidence with respect to the disability certificate of Dr. S.S. Bhatia (AW-2), the argument of the learned counsel for appellant/insurance company that the disability sustained by respondent No. 1/claimant was not of permanent nature is not sustainable. Irrespective of the percentage of disability shown in the disability certificate, the learned Claims Tribunal rightly assessed the disability to the extent of 30% though learned Claims Tribunal has not mentioned in detail as to how the percentage of disability has been assessed by it.
- 17.** The Hon'ble Supreme Court has taken into consideration the issue with respect to norms of calculating the disability affecting the earning

capacity on the basis of permanent disability in the matter of ***Raj Kumar v. Ajay Kumar and another***¹, in which, the Hon'ble Supreme Court held as under:-

“12. Therefore, the Tribunal has to first decide whether there is any permanent disability and if so the extent of such permanent disability. This means that the tribunal should consider and decide with reference to the evidence:

(i) whether the disablement is permanent or temporary;

(ii) if the disablement is permanent, whether it is permanent total disablement or permanent partial disablement,

(iii) if the disablement percentage is expressed with reference to any specific limb, then the effect of such disablement of the limb on the functioning of the entire body, that is the permanent disability suffered by the person.

If the Tribunal concludes that there is no permanent disability then there is no question of proceeding further and determining the loss of future earning capacity. But if the Tribunal concludes that there is permanent disability then it will proceed to ascertain its extent. After the Tribunal ascertains the actual extent of permanent disability of the claimant based on the medical evidence, it has to determine whether such permanent disability has affected or will affect his earning capacity.

13. Ascertainment of the effect of the permanent disability on the actual earning capacity involves three steps. The Tribunal has to first ascertain what activities the claimant could carry on in spite of the permanent disability and what he could not do as a result of the permanent disability (this is also relevant for awarding compensation under the head of loss of

¹ (2011) 1 SCC 343

amenities of life). The second step is to ascertain his avocation, profession and nature of work before the accident, as also his age. The third step is to find out whether (i) the claimant is totally disabled from earning any kind of livelihood, or (ii) whether in spite of the permanent disability, the claimant could still effectively carry on the activities and functions, which he was earlier carrying on, or (iii) whether he was prevented or restricted from discharging his previous activities and functions, but could carry on some other or lesser scale of activities and functions so that he continues to earn or can continue to earn his livelihood.”

18. Though the learned Claims Tribunal has not believed the nature of work as pleaded by respondent No. 1/claimant, but even if this Court consider that respondent No. 1/claimant is doing the work of Labour, then also looking to the part of the body, on which, he sustained permanent disability, the functional disability can very well be assessed. Even otherwise, it cannot be lost sight of the fact that these days the trend for doing the work of mason on its engagement is based on contractual basis i.e. wages is being given on his completion of particular measured work which is performance based and it requires the person to be fully fit to earn the livelihood. Definitely, the working efficiency of the appellant is affected due to the injuries sustained by him causing permanent disability. In the opinion of this Court, learned Claims Tribunal has not committed any error while assessing the disability sustained by respondent

No.1/claimant to the extent of 30% looking to the nature of work and employment for earning his livelihood.

19. The next ground raised by the learned counsel for appellant/insurance company is that learned Claims Tribunal has not considered that respondent No.1/claimant was also contributory negligent in the accident and not deducted any amount towards contributory negligence on the part of respondent No.1/claimant from the amount of compensation.
20. The argument as advanced by learned counsel for appellant/insurance company that the version of accident shown in the First Information Report (Exhibit P-1) as well as version of accident as pleaded in the claim application are different, therefore, *prima facie*, it is evident from reading of Exhibit P-1 as well as the claim application that respondent No.1/claimant suppressed the material facts and not approached before the learned Claims Tribunal with clean hands. He further submitted that due to head on collision between motorcycle as well as car, the accident took place and at the time of accident, respondent No.1/claimant was travelling along with two persons in the motorcycle, therefore, as there was violation of Section 128 of M.V. Act, respondent No.1/claimant is also contributory negligent in the accident to the extent of 50%.

- 21.** From perusal of document (Exhibit P-1), which is a copy of the First Information Report available on record, it would show that the said information has been given by one Ramswaroop Kaushik, who admittedly neither present on the spot nor occupant of the vehicle. This fact was also not refuted by the counsel for the appellant/insurance company.
- 22.** The version made by the third person while registering the First Information Report before the police station cannot be made binding over the injured or the person travelling on the motorcycle unless and until there is specific proof brought on record by the party ascertaining that the pleadings made in the application is not correct. In the instant case, no such evidence has been brought on record by the learned counsel for the appellant/insurance company before the learned Claims Tribunal except showing that at the time of accident, three persons were travelling on the motorcycle.
- 23.** Even otherwise, if I consider the argument on behalf of the learned counsel for appellant/insurance company that there was head on collision and there would be contributory negligence on the part of the respondent No.1/claimant is also not sustainable because respondent No.1/claimant is travelling as pillion rider and for him, it would be a case of composite negligence on the part of the driver of the car driven by respondent No. 2.

24. The issue of contributory negligence with respect to the pillion rider has been dealt with by the Hon'ble Supreme Court in the matter of ***T.O. Anthony v. Karvarnan and others***², in which, the Hon'ble Supreme Court has held as under :-

“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.”

25. In view of the factual matrix of the case, the plea with respect to contributory negligence is not available to the appellant/insurance

² (2008) 3 SCC 748

company as respondent No.1/claimant is only pillion rider and he can not be held liable for act of others.

- 26.** In the considered opinion of this Court, both the grounds raised by learned counsel for the appellant/insurance company are not sustainable in the eyes of law and it is hereby rejected.
- 27.** As a consequence, the appeal filed by appellant/insurance company being devoid of merit is liable to be dismissed and is hereby dismissed.

Sd/-

(Parth Prateem Sahu)
Judge

Yogesh