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HIGH COURT OF CHHATTISGARH, BILASPUR**M.A.(C) No. 955 of 2013**

The Oriental Insurance Co. Ltd. Thru- Its Divisional Manager,
Divisional Office, 1st Floor, Rama Trade Centre, Near Bus Stand,
Bilaspur, Revenue and Civil District Bilaspur, C.G., PIN 495001

---- Appellant**Versus**

1. Sumitra W/o Late Surendra Singh Aged About 28 Years R/o Chhuri, P.S. And Tah. Khargawan, Civil And Revenue Distt. Korla C.G.
2. Arun S/o Late Surendra Singh Aged About 8 Years Minor, Thru- Mother Smt. Sumitra Wd/o Late Surendra Singh, R/o Chhuri, P.S. And Tah. Khargawan, Civil And Revenue Distt. Korla C.G.
3. Pramila D/o Late Surendra Singh Aged About 5 Years Minor, Thru- Mother Smt. Sumitra Wd/o Late Surendra Singh, R/o Chhuri, P.S. And Tah. Khargawan, Civil And Revenue Distt. Korla C.G.
4. Mahesh S/o Late Surendra Singh Aged About 3 Years Minor, Thru- Mother Smt. Sumitra Wd/o Late Surendra Singh, R/o Chhuri, P.S. And Tah. Khargawan, Civil And Revenue Distt. Korla C.G.
5. Saroj Kumar Singh S/o Mohit Ram Singh Aged About 28 Years R/o Bharda, P.S. And Tah. Khargawan, Civil And Revenue Distt. Korla C.G.
6. Sudhanshu Jaiswal S/o Punna Lal Jaiswal R/o Sakaria, P.S. And Tah. Khargawan, Civil And Revenue Distt. Korla C.G.

---- Respondents

For Appellant:	Shri R. N. Pusty, Advocate.
For Respondents No. 1 to 4:	Shri Praveen Dhurandhar, Advocate
For Respondents No. 5 & 6:	None, though served.

Single Bench: Hon'ble Shri Sanjay Agrawal, J**Award On Board****02.07.2019**

1. This Miscellaneous Appeal has been preferred by the Appellant/Insurance Company under Section 173 of the Motor Vehicles Act, 1988 (hereinafter referred to as 'the Act') questioning the propriety of the award impugned dated 28.06.2013 passed by the Second Motor

Accident Claims Tribunal (hereinafter referred to as 'the Claims Tribunal') Manendragarh, District Koriya in Claim Case No. 163/2011, by which, the learned Claims Tribunal while fastening the liability upon the Insurance Company has awarded total amount of compensation to the tune of Rs.7,36,428 with 6% interest per annum from the date of filing of the claim petition till its realization.

2. Briefly stated the facts of the case are that on 15.05.2011 at about 8:00 PM, deceased Surendra Singh was coming from village Amka to his vilage Chhuri by his cycle and at the relevant time, he was dashed vehemently by the offending vehicle "Tractor" attached with its trolley bearing its registration Nos. C.G.-15-A-6476 and C.G.-15-A-6964 respectively. The vehicle in question was being driven rashly and negligently by Non-applicant No.1-Saroj Kumar Singh, owned by Non-applicant No.2-Sudhanshu Jaiswal and it was insured with the Appellant/Insurance Company. According to the Claim Petition, the deceased was a driver and running a poultry form, in which, he used to earn Rs. 6,000/- per month. It is pleaded further that on account of the alleged accident, the claimants are entitled to receive total compensation to the tune of Rs. 27,60,000/-.

3. The aforesaid claim has been contested by Non-applicants No. 1 & 2, driver and owner of the vehicle in question by submitting *inter alia* that no accident as such occurred with their vehicle and pleaded further that the deceased himself was responsible for the alleged accident as his cycle was dashed with the stone and because of it, he fell down and sustained the said injuries. Non-applicant No. 3/Appellant, the Insurance Company, while contesting the aforesaid claim stated that the deceased was

travelling at the relevant time in the Tractor as *Barati* and pleaded further that the said vehicle was insured exclusively for the agricultural purposes. However, it was used for other purposes by carrying passengers and, therefore, the insurance company cannot be held liable as the deceased was travelling as *Barati*. It is contested further on the ground that the driver of the vehicle was not possessing the valid and effective driving licence and, therefore, no liability could be fastened upon the insurance company.

4. After considering the evidence led by the parties, the Claims Tribunal has passed the award impugned while arriving at a conclusion that the alleged accident has occurred on 15.05.2011 at about 8:00 PM on account of the rash and negligent driving of the driver of the offending vehicle as he dashed vehemently against the deceased, who was coming from village Amka to his village Chhuri. As a consequence, while fastening the liability upon the Insurance Company and that by assessing the monthly income of the deceased to the tune of Rs. 5,000/-, awarded total amount of compensation to the tune of Rs. 7,36,428 with 6% interest per annum from the date of filing of the Claim Petition till its realization.

5. Being aggrieved, the appellant has preferred this appeal. Shri R. N. Pusty, learned counsel for the Appellant submits that the award impugned as passed by the Claims Tribunal while fastening the liability upon the insurance company is apparently contrary to law. He submits that the contents made in the FIR (Ex.P.1) would lead to an irresistible conclusion that the deceased was travelling in the Tractor as *Barati* and was thus a gratuitous passenger. He submits further that the reliance as placed by the Tribunal upon the statement of Kamal Pratap Singh, who was examined as Applicant Witness No. 3 is apparently not sustainable as he has not seen

the alleged incident and in fact, came out from his house after five minutes of occurrence of the alleged incident and as such no reliance could be placed upon the said witness by disbelieving the contents made in the documentary evidence like FIR (Ex.P.1). Without considering the evidence in its proper perspective, the Claims Tribunal has committed an illegality in fastening the liability upon the insurance company. In support, he placed his reliance upon the decision rendered in the matter of ***Oriental Insurance Co. Ltd. Vs. Premlata Shukla & Ors.*** and ***National Insurance Co. Ltd. Vs. Rattani & Ors.*** Reported respectively in (2007) AIR SCW 3591 and (2009) AIR SCW 992.

6. On the other hand, Shri Praveen Dhurandhar, learned counsel for the Respondents No.1 to 4/Claimants while supporting the award impugned submits that the deceased was coming by his cycle from village Amka to his village Chhuri and at that particular time, he was dashed vehemently by the offending vehicle Tractor and as such Tribunal has not committed any illegality in fastening the liability upon the insurance company by relying upon the statement of AW3, Kamal Pratap Singh. He submits further that even if it is held that the Insurance Company is not liable to indemnify the insured, then in that condition also the Insurance Company may be directed to pay the awarded amount to the Claimants with a direction to recover the same from driver and owner of the vehicle in question. In support, he placed his reliance upon the decision rendered in the matter of ***Manager, National Insurance Company Limited Vs. Saju P. Paul and another*** reported in (2013) 2 SCC 41.

7. I have heard learned Counsel for the parties and perused the entire record carefully.

8. On account of the accident occurred on 15.05.2011 at about 8:00 PM, a claim enumerated under Section 166 of the Act has been made by the legal representatives of the deceased Surendra Singh by alleging *inter alia* that the deceased was coming from village Amka to his village Chhuri and at the relevant time, he was dashed vehemently by the offending vehicle "Tractor". As a result of which, he sustained injuries, particularly, on his head and owing to the said incident, he expired.

9. The main contention of the Appellant/Insurance Company herein is that the deceased was in fact coming as *Barati* while travelling in the offending vehicle and the said fact has not been considered in its proper manner while disbelieving the contents made in the FIR (Ex.P.1) lodged by the deceased's father Ram Singh. In order to ascertain the said fact whether the deceased was travelling as *Barati* in the Tractor or not, for which, I have examined the statement of Sumitra Bai, who was examined as AW1. According to her deposition, particularly in her cross examination, it is evident that her husband Surendra Singh was coming while travelling in the Tractor and was returning after attending the wedding ceremony. Although, she was not the eyewitness but if her statement was examined along with the document, like FIR (Ex.P.1) produced by herself in order to establish the factum of incident, then it would lead to an irresistible conclusion that the deceased Surendra Singh was travelling as *Barati* in the said Tractor. This is the document which has not only been placed by the Claimants but have also placed their reliance upon it. The contents made therein, therefore, could not be disbelieved merely on the ground that the lodger of this report was not examined. In any case, oral statement of Kamal Pratap Singh (AW3) could not be relied upon in view of the

contents made in the said report (Ex.P.1), particularly, when he has not seen the accident and came out of his house after five minutes of the occurrence of it.

10. At this juncture, the principles laid down in the matter of ***Oriental Insurance Co. Ltd. Vs. Premlata Shukla & Ors.*** (supra) are to be seen where it has been held, under such a situation, at paragraphs 13, 14 &15, as under:-

13. However, the factum of an accident could also be proved from the First Information Report. It is also to be noted that once a part of the contents of the document is admitted in evidence, the party bringing the same on record cannot be permitted to turn round and contend that the other contents contained in the rest part thereof had not been proved. Both the parties have relied thereupon. It was marked as an Exhibit as both the parties intended to rely upon them.

14. Once a part of it is relied upon by both the parties, the learned Tribunal cannot be said to have committed any illegality in relying upon the other part, irrespective of the contents of the document been proved or not. If the contents have been proved, the question of reliance thereupon only upon a part thereof and not upon the rest, on the technical ground that the same had not been proved in accordance with law, would not arise.

15. A party objecting to the admissibility of a document must raise its objection at the appropriate time. If the objection is not raised and the document is allowed to be marked and that too at the instance of a party which had proved the same and wherefor consent of the other party has been obtained, the former in our opinion cannot be permitted to turn round and raise a contention that the contents of the documents had not been proved and, thus, should not be relied upon. In *Hukam Singh (supra)*, the law was correctly been laid down by the Punjab and Haryana High Court stating;

"8. *Mr. G.C. Mittal*, learned counsel for the respondent contended that Ram Partap had

produced only his former deposition and gave no evidence in Court which could be considered by the Additional District Judge. I am afraid there is no merit in this contention. The Trial Court had discussed the evidence of Ram Partap in the light of the report Exhibit D.1 produced by him. The Additional District Judge while hearing the appeal could have commented on that evidence and held it to be inadmissible if law so permitted. But he did not at all have this evidence before his mind. It was not a case of inadmissible evidence either. No doubt the procedure adopted by the trial Court in letting in a certified copy of the previous deposition of Ram Partap made in the criminal proceedings and allowing the same to be proved by Ram Partap himself was not correct and he should have been examined again in regard to all that he had stated earlier in the statement the parties in order to save time did not object to the previous deposition being proved by Ram Partap himself who was only cross-examined. It is not a case where irrelevant evidence had been let in with the consent of the parties but the only objection is that the procedure followed in the matter of giving evidence in Court was not correct. When the parties themselves have allowed certain statements to be placed on the record as a part of their evidence, it is not open to them to urge later either in the same Court or in a court of appeal that the evidence produced was inadmissible. To allow them to do so would indeed be permitting them both to approbate and reprobate."

11. Likewise, in the matter ***National Insurance Co. Ltd. Vs. Rattani & Ors.*** (supra), it has been observed by the Supreme Court at paragraphs 7 and 13 as under:-

"7. We are not oblivious of the fact that ordinarily an allegation made in the first information would not be admissible in evidence *per se* but as the allegation made in the first information report had been made a part of the claim petition, there is no doubt whatsoever that the Tribunal and consequently the appellate courts would be entitled to look into the same.

13. The question as to whether burden of proof has been discharged by a party to the lis or not

would depend upon the facts and circumstances of the case. If the facts are admitted or, if otherwise, sufficient materials have been brought on record so as to enable a court to arrive at a definite conclusion, it is idle to contend that the party on whom the burden of proof lay would still be liable to produce direct evidence to establish that the deceased and the injured passengers were gratuitous passengers.

As indicated hereinbefore, the First Information Report as such may or may not be taken into consideration for the purpose of arriving at a finding in regard to the question raised by the appellant herein, but, when the First Information Report itself has been made a part of the claim petition, there cannot be any doubt whatsoever that the same can be looked into for the aforementioned purpose.”

12. By applying the principles laid down in the above matters to the case in hand, *vis-a-vis*, the endorsement made in the FIR (Ex.P.1), it is difficult to sustain the findings of the learned Claims Tribunal, which was based upon the statement of AW3 Kamal Pratap Singh. It is accordingly held that the deceased was travelling as *Barati* in the offending vehicle, which was insured exclusively for the agricultural purposes. The vehicle in question was, thus, used in utter violation of the terms and conditions of the insurance policy. As such, the Insurance Company cannot be held liable to indemnify the insured under the facts and circumstances of the case, particularly, when the deceased as observed herein above, was travelling as *Barati* in the alleged Tractor. Accordingly, the Award under appeal cannot be sustained and is hereby set aside and it is held that Non-applicants No. 1 & 2 (Respondents No. 5 & 6 herein), the driver and owner of the vehicle in question alone are responsible for the alleged accident occurred on 15.05.2011.

13. Now the question which arises for determination, based upon the

contention of Shri Dhurandhar, is as to whether under the facts and circumstances of the case, the Appellant/Insurance Company could be directed to pay the awarded amount to the Claimants with a direction to recover the same from the driver and owner of the offending vehicle on the principle of “pay and recover” remains no more *res integra* as held in the matter of ***Manager, National Insurance Company Limited Vs. Saju P. Paul and another*** reported in **(2013) 2 SCC 41** where it has been held at paragraphs 20 & 26 as under:-

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 no. 2 herein).

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 (National Insurance Co. Ltd. v. Baljit Kaur, (2004) 2 SCC 1: 2004 SCC (Cri) 370)* and *Challa Upendra Rao (National Insurance Co. Ltd. v. Challa Upendra Rao, (2004) 8 SCC 517: 2005 SCC (Cri) 357)* 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 01.08.2011 (*National Insurance Co. Ltd. v. Saju P. Paul, SLP No. 20127 of 2011*) 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 the case of *Challa Upendra Rao (National Insurance Co. Ltd. v. Challa Upendra Rao, (2004) 8 SCC 517: 2005 SCC (Cri) 357)*.

14. By applying the aforesaid principles to the case in hand, it would be just and proper to issue a direction to the Appellant/The Oriental Insurance Company Ltd. to first pay the awarded sum to the Claimants/Respondents No. 1 to 4 and then to recover the same from the driver and owner of the offending vehicle in execution proceedings arising in this very case.

15. The appeal is, accordingly, allowed and it is directed that the Appellant/ The Oriental Insurance Company Ltd. to pay the awarded amount of Rs.7,36,428 with 6% interest per annum from the date of filing of the Claim Petition till its realization to the Claimants/Respondents No. 1 to 4. Thereafter, the Appellant would be entitled to recover the entire paid awarded sum with interest from the driver and owner (Respondents No. 5 & 6 herein) of the offending vehicle in this very proceedings by filing execution application against them. No order as to costs.

Sd/-

(Sanjay Agrawal)
JUDGE