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HIGH COURT OF CHHATTISGARH, BILASPUR

M. A. (C) No. 508 of 2013

The Divisional Manager, Oriental Insurance Company Ltd. Divisional Office No. 2, 2nd Floor, Chawla Complex, Sai Nagar, Devendra Nagar Road, Raipur C.G. (Insurer of Car No. CG04-DH-9939).

---- Appellant

Versus

1. Arun Agarwal son of Satyanarayan Agarwal aged 45 years.

2. Smt. Meena Agarwal wife of Arun Agarwal aged 40 years.

Both residents of Ward No. 8, Near Ram Mandir, Sakti Post Office Sakti, Tehsil Sakti, District Janjgir Champa (C.G.).

3. Sunil Agarwal son of Omprakash Agarwal aged 45 years resident of D-204, Sector-5, Devendra Nagar, Raipur C.G. [registered owner of Car No. CG04-DH-9939].

---- Respondents

For Appellant	:	Shri Sandeep Shrivastava, Advocate
For Respondents No.1 & 2	:	Shri Sachin Singh Rajput, Advocate
For Respondent No. 3	:	None

Hon'ble Shri Justice Parth Prateem Sahu

Judgment on Board

28/01/2019

1. By the instant appeal, the Insurance Company has challenged the legality, validity and propriety of the impugned award dated 07/03/2013 passed by learned 7th Additional Motor Accident Claims

Tribunal, Raipur, Chhattisgarh (hereinafter referred to as 'Claims Tribunal') in Claim Case No.16/2012 wherein the learned Claims Tribunal has partly allowed the claim application filed under Section 163(A) of the Motor Vehicles Act, 1988 (hereinafter referred to as 'M.V. Act') and passed an award of Rs.3,88,500/- in total on account of death of late Sawan Agrawal against non-applicants therein.

2. Brief facts for disposal of this appeal, are that, on 12/04/2011 at about 6.00 P.M., deceased Sawan Agrawal along with other persons were travelling in a Car bearing registration No. CG04/DH/9939 (hereinafter referred to as 'offending vehicle') owned by respondent No. 3 and insured with the present appellant. On the date of accident, the offending vehicle was driven by deceased Sawan Agrawal himself. When the offending vehicle reached near Uldagaon, it met with an accident by dashing pole on the side of the road and thereafter it turned turtle. In the aforementioned accident, Sawan Agrawal and Himanshu Agrawal sustained severe injuries. Both of them were immediately taken to the Jindal Hospital, Patrapali, Raigarh where after examination of both of them were declared dead.

3. On account of death of Sawan Agrawal (driver of the offending vehicle), parents of the deceased filed a claim application before the competent Claims Tribunal under Section 163(A) of the M.V. Act claiming Rs.8,39,000/- in total on all heads on the ground that their son was travelling in the offending vehicle and tyre of the vehicle might have burst, therefore, the said vehicle met with an accident.

4. Respondent No. 3, owner of the offending vehicle submitted his reply to the claim application and pleaded that he is owner of the offending vehicle bearing registration No. CG04/DH/9939. He further pleaded that on the date of accident, insurance policy i.e. 'Private Car Package Policy' (Comprehensive Policy) was in existence from 16/06/2010 to 15/06/2011 covering the risk as mentioned in the policy. He admitted that on the date of accident, offending vehicle was being driven by Sawan Agrawal and he was having valid and effective driving licence to drive the offending vehicle, therefore, the Insurance Company is liable to pay the amount of compensation.

5. Appellant/Insurance Company submitted its separate reply and denied all the adverse pleadings made in the claim application. It has been pleaded that the Insurance Company issued the insurance policy as pleaded and was effective from 16/06/2010 to 15/06/2011. It has been further denied that the accident took place due to bursting of the tyre of offending vehicle. It has been further pleaded that as the accident took place due to rash and negligent act of the driver of the offending vehicle, therefore, the application under Section 163(A) of the M.V. Act itself is not maintainable.

6. Learned Claims Tribunal on the basis of pleadings made by respective parties framed as many as five issues for consideration including the issue with respect to maintainability of the claim application under the provisions of Section 163(A) of the M.V. Act and while negating the said issue, allowed the claim application of the claimants in part and awarded a total sum of Rs.3,88,500/- as compensation.

7. Learned counsel appearing for the appellant/Insurance Company submitted that learned Claims Tribunal committed an error in allowing the claim application under the provisions of Section 163(A) of the M.V. Act as the accident took place due to rash and negligent driving of the driver of the offending vehicle himself. He further submitted that the pleadings made in the claim application as well as evidence available on record with regard to the manner of accident are contrary to the each other and reason of the accident to which learned Claims Tribunal has not taken into consideration and erroneously allowed the claim application of the claimants. He lastly submitted that the impugned award passed by the learned Claims Tribunal is not sustainable.

8. Per contra, learned counsel appearing for respondents No. 1 and 2 submitted that on the date of accident, driver of the offending vehicle was possessing valid and effective driving licence to drive the vehicle, therefore, learned Claims Tribunal looking to the facts and circumstances and evidence available on record, rightly allowed the claim application and passed impugned award in favour of the claimants, which do not call for any interference.

9. I have heard learned counsel appearing for the parties and perused the records carefully.

10. The claimants in Paragraph-5 of their claim application filed under Section 163(A) of the M.V. Act have specifically pleaded that the tyre of the offending vehicle might have burst, due to which, it met with an accident. There is no confident way of pleading made in the claim application, but only on the basis of presuming some facts, pleadings have been made without there being any evidence. The claimants are not the eyewitness to the accident.

11. First Information Report has been filed as Ex. P-1 and *Dehati Nalishi* has been filed as Ex. P-3. From perusal of Ex. P-1 & Ex. P-3, which is reported by Himanshu Agrawal, son of Vinod Agrawal who is one of the occupants of the offending vehicle within one hour of the accident specifically mentions that on the date of accident i.e. 12/04/2011 at about 6.00 P.M., Sawan Agrawal was driving the offending vehicle with rash and negligent manner and dashed the pole on the side of the road, thereafter, the offending vehicle turned turtle. It has been mentioned that in the said accident, two persons, namely, Sawan Agrawal and Sanket Agrawal sustained severe injuries and other three persons, namely, Himanshu Agrawal, Nikunj Agrawal and Abhay Agrawal sustained simple injuries. Arun Kumar Agrawal, father of the deceased has been examined as AW-1, who stated that the accident took place when cow came on the road. He further stated in his cross-examination that he was not present on the spot.

12. Sanket Agrawal, who was said to be one of the occupants of the offending vehicle has been examined as AW-2, who stated that the accident took place only to save the cow which came on the road, but in his cross-examination, he stated that there is some negligence on the part of the driver of the offending vehicle as well.

13. From conjoint reading of pleadings of the claim application, copy of First Information Report (Ex. P-1) and *Dehati Nalishi* (Ex. P-3) as well as evidence of Arun Kumar Agrawal (AW-1) and Sanket Agrawal (AW-2), it is evident that the contents of the documents (Exs. P-1 & P-3) with respect to the cause of action to be the correct cause of action mentioned by one of the occupants of the vehicle while lodging *Dehati Nalishi* (Ex. P-3), on the basis of which, First Information Report has been registered (Ex. P-1). The fact of accident has been intimated within one hour of the time of accident by one of the occupants, in which, it has been specifically mentioned that the accident took place on account of rash and negligent driving of vehicle by its driver i.e. deceased Sawan Agrawal.

14. Ex. P-1 and Ex. P-3 does not bear any other reason for causing accident either by way of bursting of tyre or suddenly appearing of a cow on road. The complainant or informant of *Merg* intimation were known to the father of deceased, but at the time of filing of the claim application, only to suppress the rash and negligent act of deceased driver himself, they have pleaded the cause of action might be due to bursting of tyre. The omnibus pleading has been made only to bring their application within the purview of Section 163(A) of the M.V. Act. Subsequently, when they appeared before the learned Claims Tribunal as witnesses, it appears that to make their case more stronger, other reason of causing accident has been stated which *prima facie* appears to have been made an afterthought.

15. In the aforementioned facts and circumstances of the case and nature of the pleadings as well as oral and documentary evidence available on record, evidence of Arun Kumar Agrawal (AW-1) and Sanket Agrawal (AW-2) could not be relied upon as they have made wrong statement in view of specific reason of the accident mentioned in the documentary evidence i.e. Exs. P-1 and P-3. Had it been a case of sudden appearance of cow on road, the said fact should have naturally been mentioned in *Merg* intimation as well as First

Information Report and also when the claim application has been filed after passage of long time from the date of accident. It is a case where occupant of the vehicle himself lodged the report, therefore, the contents of First Information Report (Ex. P-1) and contents of *Dehati Nalishi* (Ex. P-3) can be relied upon to consider the manner in which accident took place.

16. In view of the above, I am of the considered view that the accident took place due to rash and negligent driving of the driver of offending vehicle himself i.e. deceased Sawan Agrawal. Learned Claims Tribunal committed an error in not recording a categorical finding as to what was the reason for accident. The owner of the offending vehicle was examined as NAW-1 Sunil Agrawal, who in his evidence has stated that deceased Sawan Agrawal has borrowed his vehicle on the date of accident, which makes it clear that the deceased Sawan Agrawal was not an employed driver of the offending vehicle by respondent No. 3. As the offending vehicle was borrowed by the driver due to his relation with owner, therefore, the driver (borrower) has obtained the status of owner of the vehicle.

17. The issue with respect to the maintainability of the application under Section 163(A) of the M.V. Act on the death of the driver (borrower) himself has been considered by Hon'ble Supreme Court in the matter of **Ningamma and Another v. United India Insurance Company Limited[1],** in which, the Hon'ble Supreme Court held as under :-

> "12. In the light of the aforesaid submissions, the question that falls for our consideration is whether the legal representatives of a person, who was driving a motor vehicle, after borrowing it from the real owner meets with an accident without involving any other vehicle, would be entitled to compensation under Section 163-A of MVA or under any other provision(s) of law and also whether the insurer who issued the insurance policy would be bound to indemnify the deceased or his legal representative?
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> 22. In a case wherein the victim died or where he was permanently disabled due to an accident arising out of the aforesaid motor vehicle in that event the liability to make payment of the compensation is on the insurance company or the owner, as the case may be as provided under Section 163-A. But if it is proved that the driver is the owner of the motor vehicle, in that case the owner could not himself be a recipient of compensation as the liability to pay the same is on him. This proposition is absolutely clear on a reading of Section 163-A of the MVA. Accordingly, the legal representatives of the deceased who have stepped into the shoes of the owner of the motor vehicle could not have claimed compensation under Section 163-A of the MVA.

1 **(2009) 13 SCC 710**

> 33. There are indeed cases like *New India Assurance Co. Ltd. v. Sadanand Mukhi,* (2009) 2 SCC 417, wherein, the son of the owner was driving the vehicle, who died in the accident, was not regarded as third party. In the said case the court held that neither Section 163-A nor Section 166 would be applicable."

18. In the case in hand, there is ample evidence available on record that the deceased Sawan Agrawal had borrowed the offending vehicle and the said vehicle met with an accident while he was driving the same, therefore, he stepped into the shoes of the owner.

19. In the opinion of this Court, the instant case is squarely covered by the law laid down by Hon'ble Supreme Court in the matter of **Ningamma** (supra) and the application under Section 163(A) of the M.V. Act filed on behalf of the legal representatives of the deceased driver would not be maintainable.

20. The learned Claims Tribunal has committed an error in not deciding Issue No. 2 specifically by recording specific finding with respect to the reason for accident which took place on the basis of evidence and other materials available on record and further committed an error in misplacing its reliance in the matter of **Deepal Girishbhai Soni and Others v. United India Insurance Co. Ltd. Baroda[2],** (wrongly mentioned as *Deepal Girishbhai Soni and Others v. Oriental*

2 **(2004) 5SCC 385**

Insurance Co. Ltd. Baroda), which is on the almost different facts and not applicable to the present case.

21. In view of the above, appeal is allowed. The impugned award dated 07/03/2013 passed by learned 7th Additional Motor Accident Claims Tribunal, Raipur, Chhattisgarh in Claim Case No.16/2012 is hereby set aside.

Sd/-
(Parth Prateem Sahu)
Judge

Yogesh