

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Order Reserved on 08/02/2019****Order Delivered on 05/04/2019****MAC No. 1237 of 2012**

1. Smt. Ganeshiya Nirala W/o Punitram Nirala Aged About 40 Years.
2. Punitram Nirala S/o Bisouha Nirala Aged About 42 Years.
3. Dolmal Nirala S/o Punitram Nirala Aged About 16 Years.
4. Ku. Chameli Nirala D/o Punitram Nirala Aged About 13 Years.
5. Mohanlal Nirala S/o Punitram Nirala Aged About 10 Years.
6. Harishankar Nirala S/o Punitram Nirala Aged About 6 Years.

Appellant Nos. 3 to 6 being minor on behalf of through their legal guardian
 Father- Appellant No.2 Punitram Nirala. All R/o Village. Tumgaon, P.S.
 Tumgaon, P.O. Tumgaon, Distt. Mahasamund C.G.

----Appellants**Versus**

1. Charan Singh S/o Gurudev Singh Aged About 50 Years, Employee Under Smt. Chhaya Nigam W/o Hira Lal Nigam, R/o. H/no. 06, Ekta Nagar, Gudhiyari, P.S. Gudhiyari, P.O. Raipur, Distt. Raipur C.G. (Driver).
2. Smt. Chhaya Nigam W/o Hiralal Nigam, R/o. H/no. 6, Ekta Nagar, Gudhiyari, P.S. Gudhiyari, P.O. Raipur, Distt. Raipur C.G. (Owner).
3. The Oriental Insu. Com.Ltd, Thru- Divisional Manager, Divisional Office, Kutchery Chowk, Raipur, P.S. Golbazar, P.O. Raipur, Distt. Raipur C.G.
4. Dilip Chandrakar S/o Radheshyam Chandrakar Aged About 35 Years, R/o. Ward No. 1, Tumgaon, P.S. Tumgaon, P.O. Tumgaon, Distt. Mahasamund C.G.
5. The ICICI - Lombard Gen. Insu. Co. Ltd. Thru- Branch Manager, Branch Office, Lalganga Shopping Mall, G.E. Road, Raipur, P.S. Golbazar, P.O. Raipur, Tah. & Distt. Raipur C.G.

---- Respondents

For Appellants	:	Shri Shivendu Pandya, Advocate.
For Respondent No.3.	:	Shri Sandeep Shrivastava, Advocate.
For other Respondents	:	None.

Hon'ble Shri Justice Parth Prateem Sahu**CAV Order**

1. By the instant appeal, the appellants/claimants have challenged the impugned award dated 28.04.2012 passed by the Seventh Additional Motor Accident Claims Tribunal, Raipur, C.G (in short 'the Tribunal') in Claim Case No.65 of 2011, whereby the Tribunal awarded a total sum of Rs.72,500/- in a death case after deducting 25% towards contributory negligence of the deceased himself.

2. Brief facts necessary for disposal of this appeal are that on 27.06.2010 at about 10 P.M Deepak Nirala was traveling on his motorcycle bearing registration No. C.G.06/K/3807 and going towards his house, when he reached near Ghanshyam Hotel Tumgaon at National Highway, dashed with a stationary trailer bearing registration No.C.G.04/JA/2469 and died on spot.
3. On account of untimely death of the deceased, appellants/claimants who are parents and siblings of the deceased have filed a claim application under Section 166 of the Motor Vehicles Act, 1988 (for short "the Act of 1988") before the Claims Tribunal and claimed Rs.10 lacs as compensation.
4. Respondent No.1 who was driver of the trailer did not appear and remained ex-parte.
5. Respondent No.2-owner of trailer submitted reply to the claim application and pleaded that the trailer was parked by the side of the road and at the time of accident parking lights and indicators of the trailer were on. He further pleaded that the deceased himself in drunk condition drove his motorcycle in a rash and negligent manner and dashed with stationary trailer from its back side. He also pleaded that accident took place due to sole negligence of the driver of motorcycle.
6. Non-applicant No.3/Insurance Company submitted its reply to the claim application and denied all the adverse pleading made in claim application. Further it has been stated that there is violation of conditions of the insurance policy as on the date of accident there was no valid and effective license with driver, there was no valid permit of the trailer which is in violation of the conditions of the insurance policy, therefore, pleaded for its exoneration. It was also pleaded that as on the date of accident police of the concerned Police Station after investigation of report submitted closure

report, mentioning that the deceased driver of the motorcycle to be negligent in accident.

7. Non-applicant No.4 who is owner of the said motorcycle submitted his reply and stated that on the date of accident ill fated trailer was parked on road in night without their being any parking lights or indicators which shows the negligence of driver of the stationary trailer.
8. Applicant No.5/Insurance Company also submitted its reply to claim application and denied all the adverse pleading made in application. It was pleaded that driver of motorcycle do not come in the purview of third party, as he himself was driving the motorcycle and further pleaded for dismissal of the claim application.
9. Learned counsel for the appellants would submit that the Tribunal erred in holding the deceased himself to be contributory negligent to the extent of 75% in accident. He submits that it is a case of composite negligence of trailer driver. He places his reliance on the matters of **Archit Saini & Anr Vs. Oriental Insurance Company Limited & Ors** reported in **2018 (1) TAC 696 (S.C)** and **Kaliram Sahu & Ors Vs. Ghamanlal Dewangan & Ors** reported in **2014 (1) C.G.L.J. 431** to support his contention. He further submitted that the Tribunal erred in not assessing the income of the deceased appropriately and further that no amount towards future prospects has been awarded. Ignoring that on the date of accident deceased was aged about 21 years only. He argues that the findings recorded by the Tribunal are liable to be set aside and the amount of compensation awarded be suitably enhanced.
10. Per contra learned counsel appearing for respondent No.3/Insurance Company supported the impugned award and argued that learned Tribunal rightly assessed the contributory negligence of the deceased motorcyclist, who dashed with stationary trailer parked by the side of road. He further argued that

at the time of accident, trailer was parked on the side of road and indicators and parking lights were on.

11. I have heard learned counsel for the parties and perused the records.

12. So far as, first argument of learned counsel for the appellants with regard to contributory negligence assessed by the Tribunal and holding the deceased driver of motorcycle to be contributory negligent to the extent of 75% is concerned, on perusal of Naksha Panchnama Ex.P-3 available on record clearly mentions that the trailer was standing on side of road. From other documents it also reveals that police had registered criminal case against the driver of motorcycle only ie. Deepak Nirala and not against driver of the trailer.

13. The appellants/claimants got examined AW-2 Hemlal Koshle, who claims himself to be an eye-witness of the accident. He stated in his evidence that trailer was standing on middle of the road and when deceased Deepak Nirala was traveling on his motorcycle and going towards his shop slowly met with an accident. He also submitted that the trailer was standing on middle of the road without any parking lights or indicators.

14. On considering of the documentary evidence ie Ex.P-3 and oral evidence of so-called eye-witness one thing is clear that the statement of AW-2 Hemlal Koshle cannot be accepted as gosseple truth in view of Ex.P-3 which is Naksha Panchanama prepared by police during course of investigation. Ex.P-3 was prepared by Police who was not a witness of either side and perusal of which shows that the trailer was parked on side of the road. The driver of the trailer did not make his appearance and he was proceeded ex-parte. Driver of trailer could be the best witness to prove the negligence of the deceased or to State that the trailer was parked with back light and indicators on proper place of parking.

15. The owner of trailer only submitted the written statement but he also did not enter into witness box before the Tribunal. Even the insurance company has not produced any witness in support to their claim of contributory negligence on the part of the deceased himself.
16. From perusal of material available on record particularly document Ex.P-3 is taken into consideration it only bears that the trailer was standing on side of the road and it does not mention that the trailer was parked down the road. It also does not mention that parking lights or indicators of the trailer were on so that vehicle can be identified from a distance in night and same is the evidence of AW-2 Hemlal Koshle. The accident took place in night at about 10:00 PM when the stationary trailer was parked though on the side of the road but without any parking lights or indicators and, therefore, it cannot be said that there was no contributory negligence on the part of the driver of trailer. The road made by the Government was for running of the vehicles on it and not for parking of vehicles on any part of it particularly when it is a National High Way road. There is no specific evidence on record to show that the trailer was parked down the road or away from road but the documents available on record Ex.P-3 only mentions that the trailer was parked on side of the road. On high ways two wheelers are to be plied on left side of road and in case at hand accident took place on left side of road where offending vehicle was parked without indicators.
17. Learned Claims Tribunal recorded a finding that trailer was parked on side of road without indicators or parking lights and the same was not challenged.
18. From the material available on record it is clear that the trailer was standing on side of road and not down the road.
19. The law of torts by Hon'ble Justice G.P. Singh, the following propositions of law regarding contributory negligence have been stated:-

“It is to be noted that negligence of the plaintiff which can be described as contributory negligence must have casual connection with the damaged suffered by him.

“The question simply whether the plaintiff or the deceased (in case of claims arising out of death) had failed to take reasonable care of his own safety which had contributed to the damaged”.

20. The Hon'ble Supreme Court in the matter of **Municipal Corporation of Greater Bombay Vs. Shri Laxman Iyer and Anr** reported in **AIR 2003 SC 4182** held as under :-

“6.....Where an accident is due to negligence of both parties, substantially there would be contributory negligence and both would be blamed. In a case of contributory negligence, the crucial question on which liability depends would be whether either party could, by exercise of reasonable care, have avoided the consequence of the other's negligence. Whichever party could have avoided the consequence of the other's negligence would be liable for the accident. If a person's negligent act or omission was the proximate and immediate cause of death, the fact that the person suffering injury was himself negligent and also contributed to the accident or other circumstances by which the injury was caused would not afford a defence to the other. Contributory negligence is applicable solely to the conduct of a plaintiff. It means that there has been an act or omission on the part of the plaintiff which has materially contributed to the damage, the act or omission being of such a nature that it may properly be described as negligence, although negligence is not given its usual meaning. (See Charlesworth on Negligence, 3rd Edn. Para 328). It is now well settled that in the case of contributory negligence, courts have the power to apportion the loss between the parties as seems just and equitable. Apportionment in that context means that damage are reduced to such an extent as the court thinks just and equitable having regard to the claim shared in the responsibility for the damage. But in a case where there has been no contributory negligence on the part of the victim, the question of apportionment does not arise.”

21. In the matter of **Pramodhkumar Rasikbhai Jhaveri Vs. Karmasey Kunvargi Tak & Ors** reported in **2000 (6) SC 455** held as under :-

“8. We do not think that these two reasons given by the High Court fully justify the accepted principles of contributory negligence. The question of contributory negligence arises when there has been some act or omission on the claimant's part, which has materially contributed to the damage caused, and is of such a nature that it may properly be described as 'negligence'. Negligence ordinarily means breach of a legal duty to care, but when used in the expression "contributory negligence" it does not mean breach of any duty. It only means the failure by a person to use reasonable care for the safety of either himself or his property, so that he becomes blameworthy in part as an "author of his own wrong.

9. Subject to non-requirement of the existence of duty, the question of contributory negligence is to be decided on the same principle on which the question of defendant's negligence is decided. The standard of reasonable man is as relevant in the case of plaintiff's contributory negligence as in the case of defendant's negligence. But the degree of want of care which will constitute contributory negligence, varies with the circumstances and the factual situation of the case. The following observation of the High Court of Australia in *Astley Vs. Austrust Ltd.* (1999) 73 ALJR 403 is worthy of quoting:

"A finding of contributory negligence turns on a factual investigation whether the plaintiff contributed to his or her own loss by failing to take reasonable care of his or her person or property. What is reasonable care depends on the circumstances of the case. In many cases, it may be proper for a plaintiff to rely on the defendant to perform its duty. But there is no absolute rule. The duties and responsibilities of the defendant are a variable factor in determining whether contributory negligence exists and, if so, to what degree. In some cases, the nature of the duty owed may exculpate the plaintiff from a claim of contributory negligence; in other cases, the nature of the duty may reduce the plaintiff's share of responsibility for the damage suffered; and in yet other cases the nature of the duty may not prevent a finding that the plaintiff failed to

take reasonable care for the safety of his or her person or property. Contributory negligence focuses on the conduct of the plaintiff. The duty owed by the defendant, although relevant, is one only of many factors that must be weighed in determining whether the plaintiff has so conducted itself that it failed to take reasonable care for the safety of its person or property."

22. In light of the aforementioned dictum of the Hon'ble Supreme Courts if the facts of the case in hand is considered it is undisputed that the trailer was parked on side of the road and not away from the road or down the road without any parking lights or indicators in night at about 10:00 p.m. Parking even on the side of road is not permissible. Roads are for running of vehicle. As the vehicle was parked without any indication, parking lights etc therefore the driver of trailer in the opinion of this court will also be equally negligent in accident particularly when the time of accident is 10:00 p.m.

23. For the foregoing reasons, this court finds that the Tribunal has not assessed the issues of contributory negligence correctly and therefore, the finding of contributory is not sustainable.

24. The Tribunal has only considered that the criminal case was registered against the driver of the motorcycle and closure report has been filed.

25. The Tribunal committed an error in treating the closure report by the Police to be evidence with respect to the negligence on part of the deceased motorcyclist as it is not the evidence which could be relied upon in any other case but it is only a document which can be used as one of the fact and it is to be considered in the facts and circumstance, evidences available on the record and, thereafter to arrive at a fresh conclusion. In case at hand there is material to hold that the trailer was standing on the side of the road without any parking lights and the deceased who was driving in the night at about 10:00 p.m could not saw the trailer on side of the road and dashed with it.

26. In the judgment relied upon by the appellants i.e. **Archit Saini & Anr** (supra), the offending vehicle was parked on middle of road and on that facts of case, it was held there was composite negligence of trailer driver and in case of **Kaliram Sahu & Ors** (supra), the offending vehicle was also running at the time of accident, therefore, not applicable to the facts of the case.
27. In case at hand there are evidence that the trailer was standing on side of the road therefore the argument of the appellants that as there was no proper indication by trailer then it was composite negligence of driver of trailer is not sustainable.
28. In view of the aforementioned material available on record, this Court is of the opinion that the contributory negligence would be 50% each of driver of the motorcycle (deceased) and driver of the trailer.
29. Next argument raised by learned counsel appearing for the appellants that the Tribunal committed an error in holding income of the deceased as Rs.3,000/- per month ignoring the specific pleading that the deceased on the date of accident was 21 years old and earning Rs.4,000/- per month from his engagement in employment in a Jewellery shop.
30. Looking to the date of accident and also the evidence of AW-2 Hemal Koshle, who is an independent witness and stated that at the time of the accident deceased was going to Jewellery shop to sleep there. Even otherwise if considering the wage rate prevailing in the State on the date of accident income pleaded by the claimants ie. 4,000/- could not be said on higher side. The Tribunal without considering the wage rate prevailing in the State on the date of accident and nature of the employment pleaded by the claimants, only on the basis of presumption has assessed the income of the deceased as Rs.3,000/- which is not sustainable and is hereby set aside.

31. In the considered opinion of this Court that on the date of accident deceased was aged about 21 years and working as an employee in the Jewellery shop, the income of the deceased is assessed as Rs.4,000/- per month.
32. Learned counsel appearing for the appellants also raised a ground that the Tribunal has committed an error in deducting $\frac{1}{2}$ towards the personal expenditure including family members and that to the siblings to him, who are four in numbers. Though the deduction towards the personal expenses of unmarried persons $\frac{1}{2}$ is to be deducted but where dependents or the numbers of family are more than in that cases, the deduction towards personal expenditure can be made variable
33. In the case at hand, number of minor siblings of the deceased was four and, therefore, the deduction towards the personal expenditure to 50% made by the Tribunal is not sustainable and is hereby set aside. The deduction towards personal expenditure in the facts and circumstance of this case would be $\frac{1}{3}$.
34. In view of the aforementioned discussion, the impugned award passed by the Tribunal requires re-assessment and recalculation, which this Court proposes as follows.
35. The income of deceased to be taken as Rs.4,000/- per month and by adding 40% of the income towards future prospects in view of the guidelines issued by the Hon'ble Supreme Court in the matter of **National Insurance Co. Ltd Versus Pranay Sethi reported in (2017) 16 SCC 680** future prospects would come to Rs.1600/- and thereby the monthly income of the deceased would come to Rs.5,600/- (4000+1600) and the yearly income would be Rs.67,200/- (5600X12). On deducting $\frac{1}{3}$ towards the personal expenditure, yearly dependency would be Rs. 44,800/- (67,200 - 22,400). The deceased on the date of accident was aged about 21 years and therefore, the multiplier of 18 would be applicable (44,800X18). Total loss of dependency will come to

Rs.8,06,400/-. As the deceased was unmarried person, therefore, the claimant would also be entitled a sum of Rs.40,000/- for other conventional heads which make the total sum of Rs.8,46,400/- as compensation.

36. As held in preceding para the deceased himself was contributory negligent to the extent 50% and therefore, after deduction of the amount of 50% from total compensation, the claimants would be entitled to Rs. 4,23,200/-.

37. Now, the claimants will be entitled to receive a total sum of Rs. 4,23,200/- from respondent Nos.1, 2 & 3. The amount will carry @ 6% interest as awarded by the Tribunal from the date of application till its realisation.

38. The other condition imposed by the Tribunal will remain intact.

39. In view of the above, the appeal is allowed in part and the impugned award is modified in above terms.

Sd /-

(Parth Prateem Sahu)
Judge