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HIGH COURT OF CHHATTISGARH, BILASPUR

MAC No. 1348 of 2014

1. Ram Bhajan Rajak S/o Shri Charku Ram, aged about 65 years, Occupation- Contractor, Resident of Village- Shyahi, Post- Kamdeeha (B), Tahsil- Wadrafnager, Revenue and Civil District- Balrampur (Chhattisgarh) (Owner/Non-applicant No. 1).

---- Appellant

Versus

1. Dhanmanti Kanojiya, Wd/o Late Shri Shivchand Kanojiya, aged about 32 years, (Applicant No. 1/claimant)

2. Rahul Kumar S/o Late Shri Shivchand Kanojiya, aged about 17 years, Occupation- Student, Class- 11th,

3. Nitish Kumar S/o Late Shri Shivchand Kanojiya, aged about 15 years, Occupation- Student, Class- 7th,

   The claimant No. 2 and 3 are minor, through natural guardian mother namely Smt. Dhanmanti Kanojiya Wd/o Late Shri Shivchand Kanojiya

4. Ramnandan Kanojiya S/o Late Shri Dukhi Kanojiya, aged about 75 years,

5. Anjaniya Devi W/o Ramnandan Kanojiya, aged about 70 years,

   All the claimants/applicants are resident of village- Karamdiha (B), Tahsil- Wadrafnagar, District- Balrampur (C.G.) at present C/o Ashok Kanojiya, Ghasiyapara, Post- Prtappur, Revenue and Civil District- Surajpur (C.G.)

6. Dukhi Kanojiya, S/o Rambhajan Rajak, aged about 38 years, Resident of Village- Syahi, Post- Karamdiha (B), Tahsil – Wadrafnagar, Revenue and Civil District- Balrampur (Chhattisgarh) (Driver/Non-applicant No. 2)

7. The Oriental Insurance Company, Limited, Branch Office- Ambikapur, District- Surguja (C.G.) (Insurer/Non-applicant No. 3).

---- Respondents

For Appellant	: Shri Sunil Tripathi, Advocate.
For Respondent Nos 1 to 5	: Shri Vinit Kumar Pandey, Advocate.
For Respondent No. 7/I.C.	: Shri Arvind Shrivastava, Advocate

Hon'ble Shri Gautam Chourdiya, J

Judgment On Board

25.03.2019

1. This appeal is filed by the appellant/owner under Section 173 of the Motor Vehicles Act, 1988 (henceforth "the Act") challenging the award dated 29th November, 2014 passed by Additional Motor Accident Claims Tribunal, Pratappur, District Surajpur in Claim Case No.50/2013, awarding compensation of Rs.15,07,000/- in favour of claimants along with interest @ 07.50% per annum from the date of filing of claim petition till its actual payment, fastening liability on the non-applicants No.1 & 2 i.e. owner & driver of the offending vehicle while exonerating non-applicant No. 3/ Insurance Company from its liability to pay compensation to the claimants.

2. As per averments made in the claim petition are that when on 26.03.2013, deceased- Shivchand Kanojiya, who was ready-made cloth vendor, was sitting in Pick-up Van (offending vehicle) bearing registration No. CG-15/A/2258 along with his goods in the backside of vehicle in order to protect his goods, due to rash and negligent driving of the driver of the offending vehicle /non-applicant No. 2- Ram Bhajan Rajak, Shivchand Kanojiya fell down from the vehicle and sustained grievous injuries and when he was shifted to Mission Hospital, Ambikapur for treatment, during treatment, he died.

3. On claim petition being filed by the claimants, who are unfortunate widow, children and parents of deceased -Shivchand

Kannojiya, under Section 166 of the Act, the Tribunal considering the evidence led by the parties, by the impugned award granted compensation as mentioned above, fastening liability upon the appellant/owner of the offending vehicle, while exonerating the respondent No. 3/Insurance Company from its liability to pay compensation to the claimants.

4. Learned counsel for the appellant/owner of the offending vehicle would submit that the learned Claims Tribunal has erred in exonerating the Insurance Company from its liability to pay compensation as non-applicant No. 3- Insurance Company did not examine any witness to establish its defence that the deceased was sitting the offending vehicle as a gratuitous passenger, whereas the claimants themselves pleaded that the deceased was sitting in the offending vehicle alongwith his goods as caretaker. He further submits that the learned Claims Tribunal has further erred in fastening the liability upon owner of the offending vehicle only on the basis of averments made in the written statement of non-applicant No. 3/Insurance Company stating therein that deceased Shivchand Kanojiya was sitting in the offending vehicle as gratuitous passenger and the non-applicant No. 3/Insurance Company is not statutorily liable to cover the risk of gratuitous passenger sitting in the offending vehicle nor had undertaken such risk by entering into special contract and by charging extra premium therefor. Therefore, appeal deserves to be allowed, fastening liability upon non-applicant No. 3/Insurance Company.

5. Also heard on cross-objection filed by the respondents No. 1 to 5/claimants under Order 41 Rule 22 of the Code of Civil of Procedure

seeking enhancement of amount under award.

6. Learned counsel for the respondents No. 1 to 5/claimants would submit that Claims Tribunal has fallen in error in assessing the income of deceased as Rs.9,000/- per month and thereby in awarding low compensation of Rs. 15,07,000/- whereas income of the deceased as Rs.15,000/- per month by working as ready-made cloth vendor. He also submits that no future prospect awarded to the claimants and amounts awarded under the head of conventional heads are shockingly on lower side, which deserves to be enhanced suitably in view of the judgment of the Supreme Court in the matter of and others ***National Insurance Co. Ltd. Vs. Pranay Sethi, (2017) 16 SCC 680***. He also submits that it is very difficult for the claimants to recover the amount of compensation from the owner of the offending vehicle therefore, it is prayed that an order may be passed to direct the Insurance company to first pay the awarded amount to the claimants and then to recover it from the owner and driver of offending vehicle in view of the judgment of the Supreme Court in the matter of ***Manuara Khatun and others Vs. Rajesh Kumar Singh and others, (2017) 4 SCC 796***.

7. Learned Counsel appearing for respondent No. 3/Insurance Company submits that learned Claims Tribunal has rightly exonerated the Insurance Company from its liability to pay compensation because it is a specific breach of policy as there is no any provision for sitting the passengers in the backside of the cabin of pickup (van) and except the deceased, three other persons were also sitting the backside of the cabin of pickup (Van) alongwith their goods, which is in violation of

policy conditions.

Learned counsel for the Insurance Company also opposes the contention made by learned counsel for the respondents No. 1 to 5 /claimants that as owner has not pleaded the order that first the Insurance Company would pay compensation to the claimants and then recover it from the owner & driver of the offending vehicle ("Pay & recover") and he is the very much competent to pay the compensation to the claimants, therefore, there is no requirement for passing the order of "Pay & Recover" in the instant case.

8. Heard and perused the material available on record and the award impugned.

9. As per pleadings of the claimants made in the claim petition as mentioned in paragraph 11 of the impugned award, at the time of accident, deceased was sitting in the backside of the cabin of the pickup (van) alongwith his goods and three to four other passengers were also sitting in the cabin of pickup (Van) along with their goods i.e. grocery items and ready-made cloths, and due to rash and negligent driving of the driver of the offending vehicle deceased fell down from the Pickup (Van) and due to which he sustained grievous injuries and died during the course of treatment. The above said facts are also supported with the documents submitted by the claimants in the form of Charge Sheet (Ex. P/1), which was filed against the driver of the offending vehicle and the conclusion of investigation find out by the Investigating Officer stating that at the time of accident, the deceased was sitting in outside of cabin and vide Ex. P/2 also supported the pleadings of the claimants. Dharmendra (Claimant witness No. 2) has

also specifically deposed in paragraph 5 & 6 of his statement, stated that deceased was sitting on the backside of the cabin of pickup (van) and that place is available only for loading of the goods. Driver of the offending vehicle has also admitted this fact in para 2 & 3 of his examination-in-chief that deceased was sitting upon the bundle of cloth and fell down from the backside of the vehicle and no any provision under the policy conditions for carrying the passenger in the goods vehicle. As per statement and pleadings of the claimants and evidence available on record, this fact is proved that 3 to 4 other passengers, as goods owner, were also sitting on the cabin of the offending vehicle and deceased was also carrying his goods and sitting on backside of the pick up Van.

10. The Supreme Court in the matter of **National Insurance Co. Ltd. Vs. Cholleti Bharatama and others**, **(2008) 1 SCC 423** has held that Motor Vehicles Act, 1988 does not contemplate that a goods carriage shall carry a large number of passengers with small percentage of goods as considerably the insurance policy covers the death or injuries either of the owner of the goods or his authorized representative.

11. If the facts of case are examined in light of the aforesaid judgment of the Supreme Court in case of **Cholleti Bharatamma (supra)**, it is quite apparent that in the instant case also deceased was trevelling in the outside of cabin whereas that place was provided only for carrying goods and no premium was taken for covering the risk of the passengers travelling in the offending vehicle by the insurance company; the provisions of Section 147 of the Act, in light of the

principles of law laid down by the Supreme Court in the above referred case; this Court is of the opinion that the Claims Tribunal was justified in exonerating the Insurance Company from its liability to pay compensation and rightly saddled the liability upon the non-applicants No. 1 & 2/driver and owner by the offending vehicle for paying compensation to the claimants.

13. So far as the cross-objection fled by the claimants/respondent Nos. 1 to 5 is concerned, counsel for the respondents No. 1 to 5 pleaded that in this case the Claims Tribunal has assessed income of the deceased as Rs. 9,000/- per month is on lower side whereas looking to evidence available on record no any documentary evidence or any income tax return is produced regarding the income of the deceased, therefore the learned Tribunal has rightly considered the income as aforesaid, which does not call for any interference. Furthermore, no future prospect has been awarded in view of the judgment of the Supreme Court in the matter of ***National Insurance Co. Ltd. Vs. Pranay Sethi, (2017) 16 SCC 680,*** therefore, looking to the age of the deceased i.e. below 40 years, 40% of the annual income should be added thereto towards future prospect and further Rs.70,000/- should be given towards incidental heads. Thus, the claimants are held entitled in the following manner :-

Sl. No.	**Heads**	**Calculation (in rupees)**
01.	Income of the deceased Rs.9,000/- per month	Rs.9,000 x 12 = Rs.1,08,000/-p.a.
02.	40% of (1) above to be added towards	Rs.1,08,000+

	future prospects.	Rs.43,200/- = Rs.1,51,200/-
03.	After 1/4th deduction towards personal and living expenses of the deceased	Rs.1,51,200-37,800/- = Rs. 1,13,400/-
04.	Multiplier of 17 to be applied	Rs.1,13,400x 17 = Rs.19,27,800/-
05.	Towards loss of estate, funeral expenses & loss of consortium	Rs.70,000/-
06.	Towards love & affection Rs. 5,000/-each to respondent Nos. 2 to 5	Rs. 20,000/- (as awarded by the Tribunal)
07.	**Total compensation**	Rs.20,17,800/-

Since the Tribunal has already awarded Rs.15,07,000/- after deducting the same from the above amount, the claimants are held entitled for additional compensation of Rs.5,10,800/- with interest @ 7.5% per annum from the date of application till realization.

14. So far as prayer made by counsel for the respondents No. 1 to 5/claimants with regard order of "Pay & recover" is concerned, keeping in view the decisions of the Supreme Court in **Manuara Khatun** (supra) and **Shivawwa and another Vs. Branch Manager, National India Insurance Company Limited and another**, **(2018) 5 SCC 762**, this Court feels it proper to order for pay and recover in this case.

15. In the result, the appeal filed by the owner is dismissed. However, cross appeal filed by the claimants is allowed to the extent indicated hereinabove. However, as observed above, it is the Insurance Company who shall first pay the compensation to the claimants as enhanced by this Court and then shall be at liberty to recover the same from the driver & owner of the offending vehicle. Rest

of the conditions mentioned in the impugned award shall remain intact.

16. It is made clear that amount, if any, is deposited by the owner pursuant to the impugned award, the same shall be adjusted.

Sd/-

(Gautam Chourdiya)

Judge

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