NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

MAC No. 394 of 2013

1. Kamla Devi W/o Ballaram @ Balaram Aged About 27 Years R/o. Village-Bayang, P.S. And Tah. And Distt. Raigarh C.G.
2. Roshan S/o Late Ballaram @ Balaram Aged About 9 Years .
3. Ku. Roshani D/o Late Ballaram @ Balaram Aged About 7 Years.
4. Ritik S/o Late Ballaram @ Balaram Aged About 5 Years.

   Sl. No.2 to 4 are Minors, Thru- Mother Smt. Kamla Devi.
5. Rama Bai W/o Late Itwaru Aged About 55 Years.

   All R/o. Village- Domadiha, Tah. Sarangarh, Distt. Raigarh C.G., Present Add.- Chhote Seepat, Tah. And P.S. Malkharoda, Distt. Janjgir-Champa C.G.

---- Appellants

Versus

1. Rajnish @ Chintu Wilson S/o Samuyal Bright Masih.
2. Aashalata Wilson W/o Samuyal Bright Masih.

   Both are R/o. Village- N.D.-60, C.S.E.B. Colony, Korba, Tah. And Distt. Korba C.G.
3. The New India Insu. Co. Ltd. Thru- Branch Manager, New India Insu. Co. Ltd., Office-Transport Nagar, Korba, Tah. And Distt. Korba C.G.

---- Respondents

For Appellants	:	Shri Manoj Kumar Sinha, Advocate.
For Respondents No.1 & 2	:	None.
For Respondent No.3	:	Shri Saurabh Sharma, Advocate.

Hon'ble Shri Justice Parth Prateem Sahu

Order on Board

17/06/2019

1 Appellants/claimants have filed this appeal under Section 173 of the Motor Vehicles Act, 1988 (for short 'the Act of 1988') challenging award dated 02.03.2013 passed by learned 2nd Additional Motor Accident

Claims Tribunal, Sakti, Distt. Janjgir-Champa (for short 'the Tribunal') in Claim Case No.29/2012 whereby the Tribunal allowed claim application in part and awarded total sum of Rs.66,93,968/- as compensation in a death case along with interest @ 7% p.a. and fastened liability upon non-applicant No.2/ respondent No.2- herein to pay amount of compensation.

2 Needless to mention here that appeal preferred by owner of offending vehicle challenging the impugned award has been dismissed for non-compliance of order passed by this Court.

3 Brief facts relevant for disposal of this appeal are that on 17.05.2011 at about 7:30 pm, appellant- Ballaram @ Balaram along with his brother-in-law Shivshankar was coming to Village Chote Sipat from Village- Malkharoda on his motorcycle bearing registration No.CG11/DC/2570. Ballaram @ Balram was driving said motorcycle and Shiv Shankar was traveling as pillion rider. On the way near Village- Chote Sipat, one Tractor bearing registration No.CG12-D-8158, (hereinafter shall be referred to as "the offending vehicle"), driven by respondent No.1-Rajnish @ Chintu Wilson, dashed against their motorcycle as a result of which both of them fell down from motorcycle and sustained grievous injuries. In the aforesaid accident, Ballaram @ Balaram (driver) succumbed to his injuries on spot. In the said accident, Shiv Shanker (pillion-rider) also suffered severe injuries. Matter was reported to Police Station – Malkharoda based on which crime bearing No.91/2011 was registered against driver of offending vehicle i.e. respondent No.1-Rajnish @ Chintu Wilson.

4 Appellants/Claimants, who are legal representatives of deceased Ballaram @ Balaram, filed claim application under Section 166 of the Act of 1988 before competent Claims Tribunal claiming Rs.1,43,64,728/- as compensation on the grounds mentioned therein.

5 Respondent Nos. 1 & 2/ non-applicants No.1 & 2, driver & owner of offending vehicle, submitted their reply to claim application and denied all adverse averments made in claim application. They further pleaded that false report has been lodged against them and their vehicle was not involved in accident in question. They further pleaded that on the date of accident offending vehicle was driven by respondent No.1-Rajnish @ Chintu Wilson (driver of offending vehicle) with valid and effective driving license and vehicle was insured with respondent No.3/Insurance Company, therefore, liability, if any, would be of insurance company.

6 Respondent No.3/Insurance Company also submitted reply to claim application and denied all adverse pleadings made therein. It has been pleaded that there is violation of condition of insurance policy as on the date of accident driver of offending vehicle was not possessing valid and effective driving license and that offending vehicle was not having valid permit to run on road. It has further been pleaded that at the time of accident, driver of offending vehicle was under influence of liquor. As the offending vehicle was plied in breach of conditions of insurance policy, therefore, the insurance company is not liable to indemnify insured.

7 Learned Claims Tribunal on appreciation of pleadings and evidence placed on record by respective parties has held that there is violation of

condition of insurance policy as on the date of accident driver of offending vehicle was under the influence of alcohol, which amounts to violation of provisions of Section 185 of the Act of 1988 and accordingly exonerated Insurance Company from its liability. On the basis of above findings, the Tribunal allowed claim application in part and awarded total sum of Rs.66,93,968/- to the claimants as compensation.

8 Learned counsel for appellants/claimants submitted that the Tribunal committed error in awarding very meager amount under other conventional heads. He further submitted that the Tribunal failed to appreciate the fact that Dr. R.P. Kurre (NAW-2) had not conducted medical examination of the deceased to assess percentage of liquor in his blood and only on the basis of oral evidence of the said doctor erroneously exonerated the insurance company. Learned counsel for the appellants, in alternate, argued that even if it is admitted for the sake of argument only, that the vehicle was driven by respondent No. 1 in drunken condition then keeping in mind the fact that deceased was a third party, the Tribunal ought to have issued direction to first pay the amount of compensation by the insurance company and then to recover the same from owner of offending vehicle i.e. Respondent No.2.

9 None appeared on behalf of respondents No.1 & 2 though served.

10 Learned counsel for respondent No.3/Insurance Company vehemently argued that Dr. R.P. Kurre- NAW-2 has very specifically and categorically mentioned about of condition of respondent No.1 driver of offending vehicle that he was not in a position to stand properly and therefore, it is

apparent that he was not having control over offending vehicle which resulted in accident in question. He further argued that the Tribunal has correctly exonerated insurance company from its liability as there was violation of conditions of insurance policy, because on the date of accident vehicle was plied on road in contravention of provisions of Section 185 of the Act of 1988. He further submits that in the given facts and circumstances of case, the Tribunal has rightly not issued direction of pay and recover against the insurance company.

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

12 So fas as the ground raised by learned counsel for the appellants that the Tribunal has wrongly exonerated insurance company from its liability is concerned, I have perused evidence of Dr. R.P. Kurre who was examined as NAW3-2 as well as MLC report dated 17.05.2011 marked as Ex.D-4 and on perusal of MLC report, which was prepared within few hours of accident, specifically mentions that driver of offending vehicle suffered two abrasion injuries, his both eyes were congested and smell of alcohol is coming from his breath. Dr. RP Kurre (NAW3-2) proved MLC report in his evidence before the Tribunal by stating the facts mentioned in it. Para-4 of evidence of Dr. RP Kurre (NAW2-3) reads thus:-

> "4.-मैने आहत को मुलाहिज के दौरान पाया कि उसके सिर के बाल छितरे बिखरे हुआ था वो लड़खड़ा रहा था और वह समय एवं स्थान नहीं बता रहा था । उसकी दोनों आंखे लाल थी । और उसके श्वास से एल्कोहल की गंध आ रही थी । और आहत मुलाहिज के समय अंडरवियर के सिवाय और दुसरा कपड़ा नहीं पहना हुआ था । मेरे मतानुसार आहत अत्यधिक

शराब के प्रभाव में था । मेरे द्वारा दी गई रिपोर्ट प्रदर्श डी – 4 है जिसे अ से अ भाग बने हस्ताक्षर मेरे हैं ।"

13 It is true that blood sample report was not taken immediately after medical examination of driver of offending vehicle to ascertain percentage of alcohol present in blood of driver, but looking to his condition, as mentioned in MLC report which was proved by the doctor examined the driver, it is clear that on the date of accident, driver of offending vehicle was not having control over vehicle which he was driving as a result of which accident took place. Condition of driver can also be ascertained from the fact that he was not in his senses as at the time of accident he was found driving his vehicle with underwear only and no other clothes were found on his body. Therefore, the finding recorded by the Tribunal that there is violation of condition of insurance policy cannot be said to be an erroneous finding warranting interference by this Court.

14 So far as other ground raised by learned counsel for appellants that the Tribunal committed error in not issuing pay and recover direction is concerned, provisions of Section 149 of the Act of 1988 read as under :-

149. Duty of insurers to satisfy judgments and awards against persons insured in respect of third party risks.—

(1). If, after a certificate of insurance has been issued under sub-section (3) of section 147 in favour of the person by whom a policy has been effected, judgment or award in respect of any such liability as is required to be covered by a policy under clause (b) of sub-section (l) of section 147 (being a liability covered by the terms of the policy) [or under the provisions of section 163A] is obtained against any person insured by the policy, then, notwithstanding that the insurer may be entitled to avoid or cancel or may have avoided or canceled the policy, the insurer shall, subject to the provisions of this section, pay to the person entitled to the benefit of the decree any sum not exceeding the sum assured payable thereunder, as if he were the judgment debtor, in respect of the liability, together with any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.

(2). No sum shall be payable by an insurer under sub-section (1) in respect of any judgment or award unless, before the commencement of the proceedings in which the judgment or award is given the insurer had notice through the Court or, as the case may be, the Claims Tribunal of the bringing of the proceedings, or in respect of such judgment or award so long as execution is stayed thereon pending an appeal; and an insurer to whom notice of the bringing of any such proceedings is so given shall be entitled to be made a party thereto and to defend the action on any of the following grounds, namely:—

(a) that there has been a breach of a specified condition of the policy, being one of the following conditions, namely:—

(i) a condition excluding the use of the vehicle—

(a) for hire or reward, where the vehicle is on the date of the contract of insurance a vehicle not covered by a permit to ply for hire or reward, or

(b) for organised racing and speed testing, or

(c) for a purpose not allowed by the permit under which the vehicle is used, where the vehicle is a transport vehicle, or

(d) without side-car being attached where the vehicle is a motor cycle; or

(ii) a condition excluding driving by a named person or persons or by any person who is not duly licensed, or by any person who has been disqualified for holding or obtaining a driving licence during the period of disqualification; or

(iii) a condition excluding liability for injury caused or contributed to by conditions of war, civil war, riot or civil commotion; or

(b) that the policy is void on the ground that it was obtained by the non-disclosure of a material fact or by a representation of fact which was false in some material particular."

15 In the case at hand, the deceased was a third party and not occupant of offending vehicle. It is not a case that amount of premium for covering risk of third party has not been paid. Issuance of insurance policy (Ex.D-2) covering risk of third party is not in dispute. Even the insurance company had not disputed issuance of insurance policy and payment of amount of premium for covering risk of third party.

16 In view of the above, insurance company cannot escape from its liability to satisfy the award passed in favour of claimants on account of death of a third party due to injuries suffered in a motor vehicular accident.

17 The Hon'ble Supreme Court in en number of cases, keeping in mind beneficial object of the Act of 1988, directed the insurer to first satisfy the award and then recover such amount from the insured. The direction of pay & recover has been considered by the Hon'ble Supreme Court in the matter of **National Insurance Co. Ltd. v. Challa Bharathamma and**

others reported in **(2004) 8 SCC 517**. Relevant portion of the said judgment reads as under:-

> "13. The residual question is what would be the appropriate direction. Considering the beneficial object of the Act, it would be proper for the insurer to satisfy the award, though in law it has no liability. In some cases the insurer has been given the option and liberty to recover the amount from the insured. For the purpose of recovering the amount paid from the owner, the insurer shall not be required to file a suit. It may initiate a proceeding before the concerned Executing Court as if the dispute between the insurer and the owner was the subject matter of determination before the Tribunal and the issue is decided against the owner and in favour of the insurer. Before release of the amount to the claimants, owner of the offending vehicle shall furnish security for the entire amount which the insurer will pay to the claimants. The offending vehicle shall be attached, as a part of the security. If necessity arises the Executing Court shall take assistance of the concerned Regional Transport Authority. The Executing Court shall pass appropriate orders in accordance with law as to the manner in which the owner of the vehicle shall make payment to the insurer. In case there is any default it shall be open to the Executing Court to direct realization by disposal of the securities to be furnished or from any other property or properties of the owner of the vehicle i.e. the insured. In the instant case considering the quantum involved we leave it to the discretion of the insurer to decide whether it would take steps for recovery of the amount from the insured."

18 In **Manuara Khatun and others v. Rajesh Kumar Singh and others** and **Mamoni Saikia Mohanty and others v. Rajesh Kumar Singh and others** reported in **(2017) 4 SCC 796,** the Hon'ble Supreme Court held thus:-

> "19. We find no merit in any of the submissions. Firstly, as mentioned above, we find marked similarity in the facts of this case and the one involved in *National Insurance Co. Ltd. v. Saju P. Paul, (2013) 2 SCC 41*. Secondly, merely because the compensation has not yet been paid to the claimants though the case is quite old (16 years) like the one in *Saju P. Paul's Case* (supra), it cannot be a ground to deny the claimants the relief claimed in these appeals. Thirdly, this Court has already considered and rejected the argument regarding not granting of

the relief of the nature claimed herein due to pendency of the reference to a larger Bench as would be clear from Para 26 of the judgment in *Saju P. Paul's Case (supra)*. That apart, learned counsel for the appellants stated at the bar that the reference made to the larger Bench has since been disposed of by keeping the issue undecided. It is for this reason also, the argument does not survive any more.

21. In view of the foregoing discussion, we are of the view that the direction to United India Insurance Co. Ltd. (respondent No. 3) - they being the insurer of the offending vehicle which was found involved in causing accident due to negligence of its driver needs to be issued directing them (United India Insurance Co. Ltd. respondent No.3) to first pay the awarded sum to the appellants (claimants) and then to recover the paid awarded sum from the owner of the offending vehicle (Tata Sumo)-respondent No.1 in execution proceedings arising in this very case as per the law laid down in Para 26 of *Saju P. Paul's* case quoted supra.

22. Accordingly, the appeals succeed and are allowed. Impugned order is modified to the extent that respondent No. 3-United India Insurance Company Ltd. is accordingly directed to pay the awarded sum to the appellants (claimants). Thereafter respondent No. 3 - United India Insurance Company Ltd. would be entitled to recover the entire paid awarded sum from the owner (insured) of the offending Vehicle (Tata Sumo)-respondent No.1 in these very proceedings by filing execution application against the insured."

19 Recently, in the matter of **Amrit Paul Singh and another v. Tata AIG General Insurance Company Limited and others** reported in **(2018) 7 SCC 558** Hon'ble Supreme Court while dealing with similar issue has held thus:-

"We are disposed to think so in view of the series of exceptions carved out in Section 66. The said situations cannot be equated with absence of licence or a fake licence or a licence for different kind of vehicle, or, for that matter, violation of a condition of carrying more number of passengers. Therefore, the principles laid down in Swaran Singh (supra) and Lakhmi Chand (supra) in that regard would not be applicable to the case at hand. That apart, the insurer had taken the plea that the vehicle in question had no permit. It does not require the wisdom of the "Tripitaka", that the existence of a permit of any nature is a matter of documentary evidence. Nothing has been brought on record by the insured to prove that he had a permit of the vehicle. In such a situation, the onus cannot be cast on the insurer. Therefore,

> the tribunal as well as the High Court had directed the insurer was required to pay the compensation amount to the claimants with interest with the stipulation that the insurer shall be entitled to recover the same from the owner and the driver. The said directions are in consonance with the principles stated in Swaran Singh (supra) and other cases pertaining to pay and recover principle."

20 Considering the ratio laid down in above decisions of Hon'ble Supreme Court as also considering beneficial object of the Act of 1988 as well, this Court is of the view that it will be in larger interest of justice to direct the insurer to first pay amount of compensation to claimants and then to recover it from insured i.e. owner of offending vehicle though in law it has no liability to pay amount of compensation.

21 Coming to next ground raised by learned counsel for appellants that the Tribunal had awarded very meager amount towards other conventional heads i.e. only 20,000/-.

22 Keeping in mind the dictum of Hon'ble Supreme Court in the matter of **National Insurance Company Ltd. vs. Pranay Sethi** reported in **(2017) 16 SCC 680**, this Court is of the view that appellants/claimants, who are wife & children of deceased, are entitled for a lump sum amount of Rs.70,000/- towards other conventional heads.

23 In view of above discussion, appellants/claimants are held entitled for total compensation of 67,43,968/- (Rs.66,73,968+70,000), instead of Rs.66,93,968/- as awarded by the Tribunal. The amount of compensation will carry interest @ 7% p.a. from the date of application till its realization. It is further directed that Insurance company will first pay entire amount of compensation to claimants and then recover the

same from owner of offending vehicle i.e. Respondent No.2 in accordance with guidelines issued by Hon'ble Supreme Court in the matter of **Oriental Insurance Company Limited v. Nanjappan** reported in **AIR 2004 SC 1631**. Rest of conditions of impugned award shall remain intact.

24 In the result, appeal is allowed in part and impugned award stands modified to the extent as indicated above.

Sd /-

(Parth Prateem Sahu)
Judge

Jamal