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**HIGH COURT OF CHHATTISGARH, BILASPUR****MAC No. 1074 OF 2013**

The National Insurance Co. Ltd. through its Sr. Divisional Manager,  
D.O.-B1, Taha Complex, Ring Road-I, Priyadarshini Nagar, Bilaspur  
C.G.

**---- Appellant****Versus**

1. Ravishankar Kaushik S/o Gopal Prasad Kaushik aged About 21 Years R/o village Salhekapa (Mahuwakapa), P.O. Kargikala, P.S. and Tahsil Takhatpur, Revenue and Civil District Bilaspur C.G.
2. Balvindar Singh Rai S/o Shri Achar Singh Rai aged About 23 Years R/o 27 Kholi Chowk, Ward No. 1, Mungeli Road, Bilaspur, P.S. Civil Lines, Tahsil and Revenue and Civil District Bilaspur C.G.
3. Achar Singh Rai S/o Shri A.S. Rai R/o 27 Kholi Chowk, Ward No. 1, Mungeli Road, Bilaspur, P.S. Civil Lines, Tahsil and Revenue and Civil District Bilaspur C.G.

**---- Respondents**


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| For Appellant             | : | Mr. R.N. Pusty, Advocate.  |
| For Respondent No. 1      | : | Mr. Samir Singh, Advocate  |
| For Respondents No. 2 & 3 | : | Mr. Manoj Mishra, Advocate |

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**Hon'ble Shri Justice Parth Prateem Sahu**  
**Judgment On Board**

**15/01/2019**

1. The appellant/Insurance Company has assailed the impugned award dated 30/11/2012 passed by 6<sup>th</sup> Additional Motor Accident Claims Tribunal, Bilaspur, C.G. (in short 'Claims Tribunal') in Claim Case

No.76/2011, wherein the learned Claims Tribunal awarded Rs.73,000/- in an injury case.

2. Brief facts for disposal of this appeal, are that, on 26/06/2011, respondent No.1/claimant – Ravishankar Kaushik was travelling on a motorcycle bearing its registration No.CG 10/EC/1446 and going to village Salehkapa from Kota along with driver of the motorcycle. It has been further pleaded that on the way, they met with another friend and while they were talking with him on left side of the road, at that relevant time, one WagonR car bearing its registration No.CG 10/BC/8363 driven by respondent No.2 rashly and negligently, dashed the motorcycle, on which, respondent No.1/claimant was sitting. In the aforementioned accident, he sustained multiple injuries over different parts of the body including fracture injury over right leg. The motorcycle was also damaged badly.
3. Thereafter, the matter was reported to the concerned police station and Crime No.228/2011 has been registered against respondent No.2 for the offenses punishable under Sections 279, 337 and 338 of the Indian Penal Code.
4. In an accident, respondent No.1/claimant suffered fracture injury in his right leg. The claimant filed an application under Section 166(1) of the Motor Vehicles Act, 1988 (for short 'M.V. Act') for grant of compensation claiming Rs.5,05,000/- in total on all heads mentioned

therein that he sustained permanent disability at the extent of 20%, of mild nature, for which, certificate was issued by the Medical Board.

5. Respondents No.2 and 3, who are driver and owner have submitted their reply to the claim application and denied adverse pleadings made in respect to the accident. They have further pleaded that on the date of accident, the offending vehicle bearing its registration No. CG 10/BC/8363 was insured with the appellant/Insurance Company from 01/02/2011 to 31/01/2012, therefore, the liability, if any, for payment of compensation would be on the insurance company.
6. The appellant/insurance company submitted its reply to the claim application and denied the fact of accident as also the fact of injuries as pleaded by respondent No. 1/claimant in his claim application. It has been further pleaded that at the time of accident, respondent No.1/claimant was travelling on the motorcycle in intoxicated condition and further that he was not having a valid and effective driving license to drive the motorcycle. The appellant/insurance company has also taken a plea that there was composite negligence on the part of driver of the motorcycle, therefore, respondent No. 1/claimant was not entitled for any amount of compensation.
7. The learned Claims Tribunal after considering the pleadings and evidence of the respective parties, arrived at a conclusion that respondent No. 1/claimant (injured) sustained functional permanent

disability to the extent of 10% and while assessing the income of injured as Rs.3,000/- per month, awarded a sum of Rs.73,000/- in total including Rs.1,200/- towards medical expenses, Rs.5,000/- towards physical and mental agony and Rs.2,000/- towards special diet. It is this award, which is subject matter of challenge in this appeal.

8. Learned counsel appearing for the appellant/insurance company submitted that the respondent No. 1/claimant had not sustained injury of permanent nature. He further submitted that the disability certificate (Exhibit P-18) issued by the Medical Board with respect to 20% mild disability and further that the period and validity of the certificate is only for three years from the date of its issuance, therefore, the injury sustained by respondent No. 1/claimant cannot be treated as permanent disability. He further submitted that though respondent No. 1/claimant was a pillion rider, but as at the time of accident, three persons were travelling on one motorcycle, which is violative to provisions of Section 128 of the M.V. Act, therefore, there is contributory negligence on the part of respondent No.1/claimant, but the learned Claims Tribunal has not assessed the contributory negligence and not deducted any amount to that effect. He lastly submitted that as the driver of the motorcycle as well as insurance company of the motorcycle have not been arrayed as one of the

party respondents in the claim application, therefore, the claim application ought to have dismissed on the ground of non-joinder of necessary party.

- 9.** Learned counsel appearing for respondent No. 1/claimant submitted that the disability certificate (Exhibit P-18) was issued by District Medical Board, Bilaspur and after minute examination of the injuries sustained by respondent No. 1/claimant, the disability certificate showing the mild disability of respondent No. 1/claimant to the extent of 20% has been rightly issued. He further submitted that looking to the disability certificate as well as the evidence of the doctor i.e. Dr. S.S. Bhatia (AW-2), the learned Claims Tribunal has rightly assessed the functional disability of respondent No. 1/claimant to the extent of 10% and it does not call for any interference. He lastly submitted that as respondent No. 1/claimant was a pillion rider, therefore, the theory of contributory negligence would not be applicable to him and for him, it would be a case of composite negligence on the part of the driver of WagonR car i.e. respondent No. 2.
- 10.** Learned counsel appearing for respondents No. 2 and 3 supported the impugned award passed by learned Claims Tribunal.
- 11.** I have heard learned counsel appearing for the parties and perused the records carefully.

- 12.** On perusal of Exhibit P-5, which is admission sheet of Chhattisgarh Institute of Medical Sciences, CIMS Hospital, Bilaspur, it would show that respondent No.1/claimant had suffered multiple abrasions on right knee, pelvis and swelling on the right thigh as also the fracture injury over his right femur bone. He had enclosed the disability certificate issued by the District Medical Board, Bilaspur on 23/06/2012. One of the Doctors of the Medical Board was examined as AW-2, namely, Dr. S.S. Bhatia before the learned Claims Tribunal. Dr. S.S. Bhatia (AW-2) categorically stated about the injuries and also stated that there is non-union of fracture of right femur bone and also the muscles of the thigh got weak. Even in cross examination, he has categorically stated that there was non-union of fracture injuries sustained by respondent No. 1/claimant.
- 13.** This is a case where respondent No.1/claimant has examined himself before the Medical Board for assessing his disability almost after more than 11 months from the date of accident and the Medical Board after examination of respondent No. 1/claimant, issued a certificate showing 20% mild permanent disability.
- 14.** In view of the above circumstances and looking to the nature of injuries as also the part of the body, on which, fracture injury was sustained which remained non-union for more than 11 months, it

cannot be said that respondent No. 1/claimant has not sustained permanent disability.

15. In view of the aforementioned discussions and looking to the nature of medical documents, permanent disability certificate as well as evidence with respect to the disability certificate of Dr. S.S. Bhatia (AW-2), the argument of the learned counsel for appellant/insurance company that the disability sustained by respondent No. 1/claimant was not of permanent nature is not sustainable. Irrespective of the percentage of disability shown in the disability certificate, the learned Claims Tribunal rightly assessed the disability to the extent of 10% though learned Claims Tribunal has not mentioned in detail as to how the percentage of disability has been assessed by it.
16. The Hon'ble Supreme Court has taken into consideration the issue with respect to norms of calculating the disability affecting the earning capacity on the basis of permanent disability in the matter of ***Raj Kumar v. Ajay Kumar and another***<sup>1</sup>, in which, the Hon'ble Supreme Court held as under:-

“12. Therefore, the Tribunal has to first decide whether there is any permanent disability and if so the extent of such permanent disability. This means that the tribunal should consider and decide with reference to the evidence:

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<sup>1</sup> (2011) 1 SCC 343

(i) whether the disablement is permanent or temporary;

(ii) if the disablement is permanent, whether it is permanent total disablement or permanent partial disablement,

(iii) if the disablement percentage is expressed with reference to any specific limb, then the effect of such disablement of the limb on the functioning of the entire body, that is the permanent disability suffered by the person.

If the Tribunal concludes that there is no permanent disability then there is no question of proceeding further and determining the loss of future earning capacity. But if the Tribunal concludes that there is permanent disability then it will proceed to ascertain its extent. After the Tribunal ascertains the actual extent of permanent disability of the claimant based on the medical evidence, it has to determine whether such permanent disability has affected or will affect his earning capacity.

13. Ascertainment of the effect of the permanent disability on the actual earning capacity involves three steps. The Tribunal has to first ascertain what activities the claimant could carry on in spite of the

permanent disability and what he could not do as a result of the permanent disability (this is also relevant for awarding compensation under the head of loss of amenities of life). The second step is to ascertain his avocation, profession and nature of work before the accident, as also his age. The third step is to find out whether (i) the claimant is totally disabled from earning any kind of livelihood, or (ii) whether in spite of the permanent disability, the claimant could still effectively carry on the activities and functions, which he was earlier carrying on, or (iii) whether he was prevented or restricted from discharging his previous activities and functions, but could carry on some other or lesser scale of activities and functions so that he continues to earn or can continue to earn his livelihood.”

17. Though the learned Claims Tribunal has not believed the nature of work as pleaded by respondent No. 1/claimant, but even if this Court consider that respondent No. 1/claimant is doing the work of Labour, then also looking to the part of the body, on which, he sustained permanent disability, the functional disability can very well be assessed. Even otherwise, it cannot be lost sight of the fact that these days the trend for doing the work of mason on its engagement is based on contractual basis i.e. wages is being given on his completion of particular measured work which is performance based

and it requires the person to be fully fit to earn the livelihood. Definitely, the working efficiency of the appellant is affected due to the injuries sustained by him causing permanent disability. In the opinion of this Court, learned Claims Tribunal has not committed any error while assessing the disability sustained by respondent No.1/claimant to the extent of 10% looking to the nature of work and employment for earning his livelihood.

18. The next ground raised by the learned counsel for appellant/insurance company is that learned Claims Tribunal has not considered that respondent No.1/claimant was also contributory negligent in the accident and not deducted any amount towards contributory negligence on the part of respondent No.1/claimant from the amount of compensation.
19. The argument as advanced by learned counsel for appellant/insurance company that the version of accident shown in the First Information Report (Exhibit P-1) as well as version of accident as pleaded in the claim application are different, therefore, *prima facie*, it is evident from reading of Exhibit P-1 as well as the claim application that respondent No.1/claimant suppressed the material facts and not approached before the learned Claims Tribunal with clean hands. He further submitted that due to head on collision between motorcycle as well as car, the accident took place and at the

time of accident, respondent No.1/claimant was travelling along with two persons in the motorcycle, therefore, as there was violation of Section 128 of M.V. Act, respondent No.1/claimant is also contributory negligent in the accident to the extent of 50%.

- 20.** From perusal of document (Exhibit P-1), which is a copy of the First Information Report available on record, it would show that the said information has been given by one Ramswaroop Kaushik, who admittedly neither present on the spot nor occupant of the vehicle. This fact was also not refuted by the counsel for the appellant/insurance company.
- 21.** The version made by the third person while registering the First Information Report before the police station cannot be made binding over the injured or the person travelling on the motorcycle unless and until there is specific proof brought on record by the party ascertaining that the pleadings made in the application is not correct.
- 22.** The evidence given by respondent No.1/claimant (AW-1) that at the time of accident, the motorcycle, on which, respondent No.1/claimant and other injured was travelling was driven by some 'Sonu' is not a correct statement made by him. The claimant in his claim case was examined on 20/11/2012, but the other injured in same accident Ramshankar Vishwakarma (respondent No. 1 in M. A. (C) No.1073 of 2013) was examined by the Claims Tribunal on 11/10/2012 wherein

he has clearly mentioned that it was respondent No.1/claimant herein who was driving the motorcycle. He has not been put specific question by the respondent No.1/claimant by confronting with the evidence of Ramshankar Vishwakarma recorded on earlier point of time and even not put any specific questions to him on that issue though he was cross-examined by the counsel representing the appellant before the Claims Tribunal. In view of the statement of Ramshankar Vishwakaram claimant in other appeal, respondent No. 1 can not be treated as pillion rider. To this effect the finding of Claims Tribunal is not sustainable.

23. The appellant/insurance company failed to brought any material on record as to how respondent No.1/claimant contributed in the accident even if it is held that respondent No.1/claimant himself is driving the vehicle in question, then also no clinching piece of evidence is brought on record by the appellant/insurance company in what manner respondent No. 1/claimant contributed in accident.
24. The Hon'ble Supreme Court while dealing with the issue of contributory negligence in the matter of ***Minu Rout & Anr. v. Satya Pradyumna Mohapatra & Ors.***<sup>2</sup>, dealt with the plea of contributory negligence taken by insurance company where neither the driver nor any independent witness was examined to prove the allegation of

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<sup>2</sup> 2013 AIR SCW 5375

contributory negligence. The Supreme Court, while setting aside the finding of contributory negligence, held as under:

“12. -----The Tribunal ought to have seen that non production of FIR has no consequence for the reason that charge sheet was filed against the truck driver for the offences punishable under Sections 279 read with Section 302 of IPC read with the provisions of the M.V. Act. The Insurance Company, though claimed permission under Section 170 (b) of the Motor Vehicles Act, 1988 from the Tribunal to contest the proceedings by availing the defence of the owner of the offending vehicle, it did not choose to examine either the driver of the truck or any other independent eye witness to prove the allegation of contributory negligence on the part of the deceased Susil Rout on account of which the accident took place as he was driving the car in a rash and negligent manner. In the absence of rebuttal evidence adduced on record by the Tribunal, the Tribunal should not have placed reliance on the charge-sheet- Exh. 1 in which the deceased driver was mentioned as an accused and on his death; his name was deleted from the charge sheet. The Tribunal has referred to certain stray answers elicited from the evidence of PW.2 and PW3 in their

cross-examination and placed reliance on them to record the finding on issue No. 1. For the aforesaid reasons, the findings and reasons recorded by the Tribunal on the contentious issue No. 1 holding that there is contributory negligence on the part of the deceased driver in the absence of legal evidence adduced by the Insurance Company to prove the plea taken by it that accident did not take place on account of rash and negligent driving of the truck driver is erroneous in law.”

25. Further, in the matter of ***Jiju Kuruvila and others v. Kunjuamma Mohan and others***<sup>3</sup>, the Hon’ble Supreme Court held as under:-

“20.5 The mere position of the vehicles after accident, as shown in a Scene Mahazar, cannot give a substantial proof as to the rash and negligent driving on the part of one or the other. When two vehicles coming from opposite directions collide, the position of the vehicles and its direction, etc. depends on a number of factors like the speed of vehicles, intensity of collision, reason for collision, place at which one vehicle hit the other, etc. From the scene of the accident, one may suggest or presume the manner in which the accident was caused, but in the absence of any direct or corroborative evidence, no

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<sup>3</sup> (2013) 9 SCC 166

conclusion can be drawn as to whether there was negligence on the part of the driver. In absence of such direct or corroborative evidence, the Court cannot give any specific finding about negligence on the part of any individual.”

- 26.** Reverting to the facts of the case, apart from the evidence of AW-1 and AW-2, the appellant/insurance company has not examined any witness in its support. From the evidence of AW-1 and AW-2, it cannot be gathered that respondent No.1/claimant is also contributory negligent in the accident. Even the driver of the other vehicle (offending vehicle) was not examined to say and prove that respondent No. 1 is negligent in accident in any manner.
- 27.** In view of the law laid down by the Hon'ble Supreme Court as discussed above and the evidence available on record, this Court is finding it difficult to accept the argument of learned counsel for the appellant that respondent No.1/claimant is also contributory negligent in any manner, therefore, this argument of learned counsel for the appellant is repelled.
- 28.** In the considered opinion of this Court, both the grounds raised by learned counsel for the appellant/insurance company are not sustainable in the eyes of law and it is hereby rejected.

- 29.** As a consequence, the appeal filed by appellant/insurance company being devoid of merit is liable to be dismissed and is hereby dismissed.

Sd/-

**(Parth Prateem Sahu)**  
**Judge**

Yogesh