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HIGH COURT OF CHHATTISGARH, BILASPUR

MAC No. 1225 of 2012

1. Balram Gupta, S/o Bharat Gupta Aged About 31 Years, R/o Pandatarai, P.S. Pandatarai, Distt. Kabirdham (C.G.)

2. Ganesh Gupta S/o Shobha Ram Gupta, Aged About 37 Years, R/o village Pondi, P.S. Bodla, Distt. Kabirdham (CG),

---- Appellants

Versus

1. Kanjara Bai, W/o Late Leela Ram Dewangan Aged About 42 Years

2. Chait Ram Dewangan S/o Late Leela Ram Dewangan Aged About 17 Years

3. Ravi Lal Dewangan S/o Late Leela Ram Dewangan Aged About 10 Years

4. Ku. Malti D/o Late Leela Ram Dewangan

   Respondents No.2 to 3 Minors, Through respondent No.1- Mother- Kinjara Bai

5. Rohit Kumar Dewangan S/o Late Leela Ram Dewangan Aged About 19 Years

   All 1 to 5 residents of village Agrikhurd, P.S. Thankhamhariya, Distt. Bemetara C.G. Pin- 491993.

6. Manager, Bhartiya Axa General Insurance Company Ltd. 1st Floor, Chawla Complex, Devendra Nagar Road, Sai Nagar, Raipur C.G., District : Raipur, Chhattisgarh

---- Respondents

For Appellants	:	Mr. V.G. Tamaskar, Advocate
For Respondents No.1 to 5	:	Mr. Anurag Singh, Advocate on behalf of Mr. Manoj Paranjpe, Advocate
For Respondent No.6	:	None though served.

Order On Board By Hon'ble Shri Justice Parth Prateem Sahu

05/04/2019

1. Appellants - owner & driver of offending vehicle bearing registration No.CG09-B-0175 has preferred this appeal questioning correctness of award dated 28.9.2012 passed by the Additional Motor Accident Claims Tribunal, Bemetara, District Durg (for short 'the Claims Tribunal') in Claim Case No.11/12 awarding compensation of Rs.1,99,000/- to claimants for death of deceased Ramkumar and fixing liability on them to pay amount of compensation awarded.
2. Claimants/respondents No.1 to 5 have also filed cross-appeal challenging the impugned award passed by Claims Tribunal to be on lower side.
3. Brief facts for disposal of this appeals are that on 25.12.2011 at about 11.30 p.m. in the night, Manohar, Shivnath, Ramkumar & Suraj Nirmalkar were returning on motorcycle bearing registration No.CG07-M-0565 to their village Agrikhurd from village Dashrangpur. Shivnath was driving said motorcycle and other three were travelling as pillion riders. On the way near village Agrikala, said motorcycle dashed with a truck bearing No.CG09-B-0175, which was parked on the road without indicators or parking lights. Driver and all pillion riders of said motorcycle died on the spot. The accident was reported to the police based on which offence under Sections 283 & 304A of IPC was registered vide Crime No.274/2011 and after completion of investigation, final report was filed before the Chief Judicial Magistrte, Kawardha. Claimants i.e. family members of deceased Ramkumar, have filed claim application claiming Rs.60,00,000/- as compensation

under various heads on the grounds mentioned therein.

4. Appellants - owner & driver of offending vehicle, filed their reply to claim application and pleaded that occupants of motorcycle were found to have consumed liquor and driver was driving motorcycle in a high speed. Driver of truck had parked his truck down the road with indicators and parking lights only to answer call of nature and in the meantime, accident took place. It was also pleaded that on the date of accident driver of offending vehicle was having valid & effective license and offending vehicle was fully insured, therefore, non-applicant - Insurance Company is liable to pay compensation, if any, awarded by the Claims Tribunal.

5. Insurance Company also submitted its separate reply and denied claim of claimants. 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 & effective driving license and offending vehicle was also not having valid permit to run on road. At the time of accident four persons were travelling on motorcycle, which is more than its seating capacity, and therefore the claimants are not entitled for any amount of compensation.

6. Learned Claims Tribunal on the basis of pleadings and evidence available on record passed award in favour of claimants after recording a finding that there is contributory negligence on the part of occupants of motorcycle and further exonerated insurance company on the ground that there is violation of conditions of insurance policy as on the date of accident there was no valid permit to run the offending vehicle on road. The Claims Tribunal awarded a sum of

Rs.1,99,000/- as compensation.

7. Learned counsel for appellants- Owner & Driver, argues that all the four persons travelling in the motorcycle were under intoxication of liquor. Four persons were riding on motorcycle as against seating capacity of two, which is in violation of provision of Section 128 of the Act, 1988. They were also not wearing headgear (helmet), as mandated under Section 129 of the Act of 1988. As the deceased persons themselves had violated the law, therefore, the claimants are not entitled for any amount of compensation.

8. Per contra, learned counsel for claimants/respondents No.1 to 5 submitted that there is no independent evidence available on record showing that occupants of motorcycle had consumed liquor. He further argues that the doctor, who conducted post-mortem examination, did not notice liquor smell in the stomach of deceased. It has also not been established by cogent evidence that reason of accident was only due to travelling of more than two persons in a motorcycle. Infact, accident occurred due to negligent parking of truck on the centre of road in night at about 11.30 p.m. without any parking light and indicators. The Claims Tribunal has rightly held driver of offending vehicle to be responsible for the accident.

In support of cross-appeal filed on behalf of respondents No.1 to 5, it has been argued that Claims Tribunal committed error in holding the deceased to be negligent to the extent of 50%; assessing monthly income of deceased at Rs.3,000/- ignoring nature of work which deceased was doing on the date of accident for earning livelihood; applying multiplier of 14 instead of 18 ignoring age of deceased on the date of accident i.e. 30 years, and in not awarding any amount towards future prospects of the deceased as on the date of accident deceased was only 23 years of age. Amounts awarded under other conventional heads are also on lower side. Lastly, it is submitted that respondent No.6-Insurance company may be directed to pay awarded sum to the claimants first and then recover the same from appellants herein.

9. Opposing the arguments raised by learned counsel for respondents in support of cross-appeal, learned counsel for appellants-owner & driver argued that if this Court finds the appeal filed by owner & driver of offending vehicle to be without any merit, then in that situation, learned Claims Tribunal has passed the award after considering all the facts and circumstances of case and law applicable to it which do not call for any interference.

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

11. To appreciate arguments advanced by learned counsel for appellants-owner & driver of offending vehicle regarding contributory negligence, I have perused documents of criminal case filed before learned Claims Tribunal. Perusal of Ex.P-17, which is post-mortem report of deceased Ramkumar Dewangan makes it clear that there is mention about 'smell like alcohol', but quantity/percentage of alcohol has not been mentioned. Other evidence available on record with respect to consumption of alcohol is evidence of Balram (NAW-1) i.e. driver of offending vehicle. Appellants have not examined the doctor, who conducted post-mortem of deceased, or any other independent witness to prove that deceased was in highly intoxicated condition.

Even otherwise the claimants in this appeal are legal heirs of pillion rider and not driver of motorcycle and as the owner & driver of offending vehicle have failed to prove by leading cogent, clinching and reliable evidence that occupants of motorcycle had consumed excessive liquor and being under the influence of liquor were not in a position to travel, the argument raised by learned counsel for appellants that the occupants of motorcycle were also contributory negligent is not sustainable. Even there is no specific evidence that cause of accident of deceased Ramkumar is consumption of liquor.

12. Next ground urged by appellants is that there is violation of provisions of Section 128 of the Act of 1988 as four persons were travelling in a motorcycle, which is having seating capacity of two only, and further they were not wearing headgear (helmet) as provided under Section 129 of the Act of 1988.

13. Section 127 & 129 of the Act of 1988 reads as under:-

> "**128. Safety measures for drivers and pillion riders** : (1) No driver of two wheeled motor cycle shall carry more than one person in addition to himself on the motor cycle and no such person shall be carried otherwise than sitting on a proper seat securely fixed to the Motor Cycle behind the driver's seat with appropriate safety measures;
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> (2) In addition to the safety measures mentioned in Sub-Section (1) the Central Government may prescribe other safety measures for the Drivers of two wheeled motor cycles and pillion riders thereon."
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> "**129. Wearing of protective head gear**: Every person

> driving or riding (otherwise than in a side car on a motor cycle of any class or description) shall, while in a public place wear a protective head gear of such description as may be specified by the State Government by rules made by it in this behalf, and different descriptions of head gears may be specified in such rules in relation to different circumstances or different class or description of motor cycle.”

14. A plain reading of above quoted provisions would show that those are safety measures provided under the Act of 1988. Violation of above provisions i.e. Sections 128 & 129, by itself may not lead to a finding of contributory negligence on the part of occupants of vehicle who were not driving two wheeler. Even otherwise, learned counsel for appellants neither pleaded nor argued with respect to shifting of liability for payment of compensation on the ground that there is no violation of conditions of insurance policy.

15. From the above discussions, it is clear that appellants have failed to prove that deceased Ramkumar, a pillion rider of motorcycle, was in any manner negligent for the accident warranting dismissal of claim application filed by his family members. Learned Claims Tribunal otherwise recorded a categorical finding that the offending vehicle - truck was parked on road itself without switching on parking lights or indicators and on account of which it has been found that driver of truck was negligent. In view of above, argument raised by learned counsel for appellants that claimants are not entitled for any amount of compensation as deceased himself was negligent is not sustainable and is hereby repelled.

16. So far as ground raised by learned counsel for claimants/respondent No.1 to 5 with respect to finding recorded by Claims Tribunal holding the deceased to be contributory negligent to the extent of 50% is concerned, in the opinion of this Court this finding of the Claims Tribunal is erroneous. It is not in dispute that deceased Ramkumar was not driving motorcycle rather he was travelling as a pillion rider, therefore, principle of contributory negligence will not be applicable to his claim application. The Hon'ble Supreme Court in the matter of ***T. O. Anthony v. Karvarnan and others*** reported in ***(2008) 3 SCC 748***, while dealing with issue of contributory negligence has held as under :-

> "6. "Composite negligence" refers to the negligence on the part of two or more persons. Where a person is injured as a result of negligence on the part of two or more wrongdoers, it is said that the person was injured on account of the composite negligence of those wrongdoers. In such a case, each wrongdoer is jointly and severally liable to the injured for payment of the entire damages and the injured person has the choice of proceeding against all or any of them. In such a case, the injured need not establish the extent of responsibility of each wrongdoer separately, nor is it necessary for the court to determine the extent of liability of each wrongdoer separately. On the other hand where a person suffers injury, partly due to the negligence on the part of another person or persons, and partly as a result of his own negligence, then the negligence on the part of the injured which contributed to the accident is referred to as his contributory negligence. Where the injured is guilty of some negligence, his claim for damages is not defeated merely by reason of the negligence on his part but the damages recoverable by him in respect of the injuries stand reduced in proportion to his contributory negligence.
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> 7. Therefore, when two vehicles are involved in an accident, and one of the drivers claims compensation from the other driver alleging negligence, and the other driver denies negligence or claims that the injured

> claimant himself was negligent, then it becomes necessary to consider whether the injured claimant was negligent and if so, whether he was solely or partly responsible for the accident and the extent of his responsibility, that is, his contributory negligence. Therefore where the injured is himself partly liable, the principle of "composite negligence" will not apply nor can there be an automatic inference that the negligence was 50:50 as has been assumed in this case. The Tribunal ought to have examined the extent of contributory negligence of the appellant and thereby avoided confusion between composite negligence and contributory negligence. The High Court has failed to correct the said error."

17. The Hon'ble Supreme Court in the above judgment has clearly held that contributory negligence would be applicable to driver of vehicle and not to its occupants. Therefore, in the case at hand, the deceased, who was travelling as a pillion rider, cannot be held to be contributory negligent and as such, the claimants are entitled to 100% compensation as assessed by the Claims Tribunal.

18. Next question which arises for consideration of this Court is whether learned Claims Tribunal has awarded just compensation to the claimants in the facts and circumstances of case.

19. In the claim application, though claimants have pleaded that deceased Rajkumar was working as 'Painter', but they failed to prove income of deceased by adducing cogent and reliable piece of evidence. Therefore, income of deceased is to be assessed on notional basis. As accident took place in the year 2011, therefore, income of deceased is to be taken on the basis of minimum wages prevailing in the district and State where the deceased was residing and doing work for earning his livelihood. As engagement and income of deceased has not been proved, therefore, engagement of deceased is to be presumed as a 'Labour' and looking to the date of accident, it would be proper to assess monthly income of deceased at Rs.4,000/-.

20. Learned Claims Tribunal has applied multiplier of 14 considering age of mother of deceased i.e. 42 years, which is contrary to law laid down by Hon'ble Apex Court in the matter of **Sube Singh v. Shyam Singh** reported in **(2018) 3 SCC 18** wherein the Hon'ble Supreme Court has held as under:-

> “4.On the basis of the finding recorded by the Tribunal and affirmed by the High Court, it is evident that the deceased was 23 years of age on the date of accident i.e. 22.9.2009. He was unmarried and his parents who filed the petition for compensation were in the age group of 40 to 45 years. The High Court relying on the decision in Ashvinbhai Jayantilal Modi2 held that multiplier 14 will be applicable in the present case, keeping in mind the age of the parents of the deceased. The legal position, however, is no more res integra. In Munna Lal Jain4 decided by a three-Judge Bench of this Court, it is held that multiplier should depend on the age of the deceased and not on the age of the dependants.........”

21. In view of above law laid down by Hon'ble Supreme Court, multiplier is to be applied on the basis of age of deceased at the time of accident and the Claims Tribunal has committed an error in applying multiplier on the basis of age of mother of deceased. In the case in hand, on the basis of post-mortem report of deceased, his age on the date of accident has been determined by Claims Tribunal as 23 years, therefore, appropriate multiplier would be 18.

22. Though deceased was unmarried on the date of accident but the Claims Tribunal looking to number of claimants had deducted one-third amount towards personal expenditure of the deceased. Looking to number of claimants, who are widow mother, minor brother, sister and old grandmother of deceased, and also considering the law laid down by Hon'ble Supreme Court in the matter of Sarla Verma (Smt.) & other v. Delhi Transport Corporation and another reported in (2009) 6 SCC 121, in the opinion of this Court, the Claims Tribunal has rightly deducted one-third amount from the income of deceased towards his personal expenditure.

23. For the foregoing discussions, this Court proposes to recalculate compensation amount payable to claimants/appellants.

24. As held above, monthly income of deceased is determined at Rs.4,000/- and by adding 40% towards future prospects, as held by the Hon'ble Supreme Court in the matter **National Insurance Company Ltd. vs. Pranay Sethi** reported in **(2017) 16 SCC 680**, monthly income of deceased is assessed at Rs.5,600/- (4000+1600). After deducting one-third towards personal expenditure of deceased, loss of dependency would come to Rs.3,733/- (1/3rd of 5600) per month. Annual loss of dependency is calculated at Rs.44,796/- (3733x12) and after applying multiplier of 18 to it, total loss of dependency is calculated at Rs.8,06,328/- (44796 x18). Besides this, a lump sum amount of Rs.30,000/- is also awarded towards other conventional heads. Claimants/respondent No.1 to 5, thus, become entitled to receive a total sum of Rs.8,36,328/- (8,06,328+30,000) as compensation for the death of deceased Rajkumar in the motor accident. Now the claimants are entitled for a total sum of Rs.8,36,328/- as compensation instead of Rs.1,99,000/- as awarded by the Claims Tribunal. This amount of compensation shall carry interest @ 6% p.a. from the date of filing of claim application till its realization.

25. As regards submission of learned counsel for claimants/respondents No.1 to 5 that there is violation of insurance policy only to the extent that offending vehicle was not having valid permit on the date of accident, therefore, the Insurance Company may be directed to first pay amount of award to claimants and then recover the same from owner of offending vehicle.

26. I have considered submission made by learned counsel for respondents No.1 to 5. Accident pertains to year 2011, claimants belong to poor family and till date they have not received entire amount of compensation as awarded by learned Claims Tribunal. Offending vehicle was insured with respondent No.6-Insurance Company. 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 doctrine 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."

27. 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.
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> 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.
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> 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."

28. 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."

29. 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.

30. In the result;

- appeal preferred by appellant- owner & driver of offending vehicle being devoid of any substance is liable to be and is hereby dismissed.
- cross-appeal of respondents No.1 to 5 is allowed in part and impugned award of the Claims Tribunal is modified to the extent indicated in Para-23 of this award.
- Insurance Company is though exonerated from its liability to pay compensation to the claimants, but keeping in mind the beneficial object of the Act of 1988 as also dictum of Hon'ble Supreme Court in above referred cases, this Court directs insurer of offending vehicle viz, respondent No.6 herein, to first compensate the claimants and have the said sum recovered from appellant No.1, owner of offending vehicle in the manner as provided in **Oriental Insurance Company Limited v. Nanjappan** reported in **AIR 2004 SC 1631**.
- Other conditions imposed by the Claims Tribunal will remain intact.

Sd/-
(Parth Prateem Sahu)
Judge

roshan/-