AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

MAC No. 775 of 2013

1. Surekha Yadav W/o Late Amrit Lal Yadav Aged About 27 Years R/o Memra, PS and Tehsil Pithora, Distrct Mahasamund, Chhattisgarh

2. Dasmoti Yadav W/o Late Devarchan Yadav Aged About 65 Years R/o Memra, PS and Tehsil Pithora, Distrct Mahasamund, Chhattisgarh

3. Ku. Karishma D/o Late Amrit Lal Yadav Aged About 3 Years Minor, Thru- Mother Surekha Yadav, R/o Memra, PS and Tehsil Pithora, Distrct Mahasamund, Chhattisgarh

4. Ku. Babli Yadav D/o Late Amrit Lal Yadav Aged About 6 Years Minor, Thru- Mother Surekha Yadav, R/o Memra, PS and Tehsil Pithora, Distrct Mahasamund, Chhattisgarh

---- Appellants

Versus

1. Naresh Nayak, S/o Nemichand Nayak Aged About 30 Years R/o Kishanpur, PS and Tehsil Pithora, Distrct Mahasamund, Chhattisgarh

2. Yogesh Kumar Nayak S/o Ghashiram Nayak R/o Khaparkhol, PS Pithora, Distrct Mahasamund, Chhattisgarh

3. United India Insurance Company Ltd. S/o through - Branch Manager, Madina Building First Floor, Kutchery Chowk, Raipur, Chhattisgarh -492001.

---- Respondents

For Appellants	:	Shri Kishore Narayan, Advocate
For Respondent No.3	:	Smt. Chitra Shrivastava, Advocate.

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

01/02/2019

1. The claimants/appellants have preferred this appeal seeking enhancement of the compensation awarded by the learned Additional Motor Accident Claims Tribunal, Mahasamund (for short 'the Claims Tribunal') vide award dated 11.12.2012 passed in Claim Case No.51/11 whereby the Claims Tribunal has awarded compensation of Rs.1,91,000/-

to the claimants/appellants herein on account of accidental death of Amritlal.

2. Facts of the case, in brief, are that on 12.2.2010 at about 5 am in the morning Amritlal Yadav (since deceased) was going on the bicycle from village Memra to his work place at Pithora and when he reached near village Teka, one Hero Honda Motorcycle bearing registration number CG04-DN-8587, which was being driven by respondent No.1 in a rash and negligent manner, dashed against him as a result of which he sustained grievous injuries on various parts of his body including head. He was immediately brought to the Government Hospital, Pithora where he succumbed to the injuries during the course of treatment. Claimants/ appellants herein, who are widow, children & mother of the deceased, have filed a claim application claiming compensation to the tune of Rs.10,41,640/- under various heads on the ground that all of them were dependent on earning of the deceased and due to his untimely death, they have been deprived of the dependency. In the claim application, they have pleaded that on the date of accident, the deceased was 28 years old, he was hale & hearty and working as “Nagar Sainik” in the office of District Commandant, Home Guard, Mahasamund and getting salary of Rs.3,655/- per month. Therefore, they are entitled to get compensation, as claimed by them, from the non-applicants, jointly and severally.

3. Respondent No.1 & 2, owner & driver of offending vehicle, filed their reply to the claim application denying that the deceased died due to accident caused by the offending motorcycle on account of rash and negligent driving by respondent No.1. It has further been stated that on the date of accident, the offending vehicle was fully insured and therefore respondent No.3-insurance company is liable to pay compensation, if any awarded by

the Claims Tribunal.

4. Respondent No.3 Insurance Company filed its separate reply and denied the averments made in the claim application except that on the date of accident the offending motorcycle was insured with it. It has been contended that no accident was occurred due to use of offending motorcycle as pleaded in the claim application. Even if it is presumed that the offending vehicle was involved in the accident, there was violation of the condition of insurance policy as on the date of accident the driver of offending vehicle was not having valid and effective license to drive the said vehicle. Therefore the insurance company is not liable for making payment of compensation, if any, to the claimants.

5. The Claims Tribunal after considering the pleadings and evidence placed on record (oral and documentary both) by the respective parties has partly allowed the claim of the claimants/appellants and while holding the deceased contributory negligent to the extent of 50% awarded compensation of Rs.1,91,000/- i.e. 50% of the total amount of Rs.3,82,000/- computed by the Claims Tribunal as compensation.

6. Learned counsel for the claimants/appellants submits that the Claims Tribunal has determined the income of the deceased on lower side ignoring the evidence brought on record to this effect i.e. Ex.P-11, which is a wage certificate issued by the District Commandant, Home Guard. He further submits that no such plea of contributory negligence was raised by the driver, owner or insurer of the offending vehicle in their reply to the claim application, therefore, the finding of the Claims Tribunal holding that deceased was also negligent for the said accident and accordingly deducting 50% from the awarded sum on account of contributory

negligent is not sustainable in law. The amount awarded by the Claims Tribunal under other conventional heads is also on lower side and needs to be enhanced suitably.

7. Learned counsel appearing for respondent No.3 has supported the impugned award and submitted that the Claims Tribunal has rightly assessed the monthly income of the deceased on the basis of honorarium mentioned in the wage certificate. She further submits that as there was head-on collision between the bicycle and motorcycle, therefore, the Claims Tribunal has rightly arrived at a conclusion that the deceased was contributory negligent to the extent of 50%. She further submits that a wrong multiplier has been applied by the Claims Tribunal while calculating the compensation.

8. I have heard learned counsel for the claimants/appellants and perused the record.

9. Appellants/claimants in support of their pleadings with respect to employment and earning of deceased Amritlal as 'Nagar Sainik' have brought on record the certificate dated 26.4.2010 (Ex.P-11) issued by the District Commandant, Home Guard, Mahasamund wherein it has been specifically mentioned that the deceased was getting Rs.70/- per day as honorarium, Rs.50/- per day towards diet and Rs.65/- per months towards cleaning & barbering. To prove this certificate (Ex.P-11) the claimants have examined one T.L. Chandrakar as AW-3, who was working as Assistant Grade II in the office of District Commandant, Home Guard, Mahasamund. He has stated that the honorarium and allowance are paid to the personnel on the basis of their attendance and a Nagar Sainik is entitled for honorarium of Rs.70/- per day, Rs.50/- per day towards diet

and Rs.65/- per month under the head of barber & washer-man. He has further stated that as per attendance register, the deceased had worked till 11.2.2010 and accordingly the wages were paid to him.

10. Though the Claims Tribunal has held that the claimants have been able to establish the income of deceased by proving certificate (Ex.P-11) according to which he was getting Rs.3,665/- per month, but while calculating the compensation has deducted the diet allowance of Rs.50/- per day i.e. Rs.1,500/-, from the income of the deceased, which is not sustainable and liable to be interfered with.

11. Further, the Claims Tribunal has not granted any compensation under the head of 'future prospects'. If a person is not in a permanent employment or self-employed or on a fixed salary then also there is every possibility of enhancement in his income due to one reason or the other periodically and therefore while calculating compensation to be awarded to the claimants, the future prospects are also to be added in the income of the deceased. The Hon'ble Apex Court has considered the issue of 'future prospects' in detail in the matter of **National Insurance Company Ltd. vs. Pranay Sethi** reported in **(2017) 16 SCC 680** and held thus:-

> “59.4. In case the deceased was self-employed or on a fixed salary, an addition of 40% of the established income should be the warrant where the deceased was below the age of 40 years. An addition of 25% where the deceased was between the age of 40 to 50 years and 10% where the deceased was between the age of 50 to 60 years should be regarded as the necessary method of computation. The established income means the income minus the tax component.”

In the present case, the claimants have pleaded and proved by adducing cogent and clinching evidence that the deceased was aged about 28 years; he was working as 'Nagar Sainik' in the office of District

Commandant, Home Guard, Mahasamund and getting monthly salary of Rs.3,600/- and therefore, in view of the aforesaid decision, future prospects at the rate of 40% have to be taken into consideration.

12. That apart, as per the decision of Hon'ble Supreme Court in the matter of Sarla Verma vs. Delhi Transport Corporation & others reported in (2009) 6 SCC 121, where the number of dependant family members is 4 to 6, the deduction towards personal and living expenses of the deceased should be one-fourth. Admittedly the number of dependent family members in the present case is four but the Claims Tribunal has deducted one-third towards personal expenditure of the deceased in place of one-fourth. Furthermore, as per claim application and post mortem report (Ex.P-6), on the date of accident the deceased was about 28 years of age. As per Sarla Verma's case (supra), in the age group of 26-30 years, multiplier of 17 is to be applied. Thus, the Claims Tribunal has committed an illegality in applying multiplier of 18 instead of 17.

13. So far as the deduction of 50% towards contributory negligence is concerned, the contributory negligence is a plea to be proved by the party raising the same by producing cogent evidence and material before the learned Claims Tribunal in their support. The Hon'ble Supreme Court while dealing with the issue of contributory negligence in the decision of ***Minu Rout & Anr. v. Satya Pradyumna Mohapatra & Ors., 2013 AIR SCW 5375***, 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 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."

14. In the matter of **Jiji Kuruvila & ors v. Kunjujamma Mohan & ors** reported in **(2013) 9 SCC 166**, the Supreme Court has 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 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."

15. In the case in hand also, nothing has been brought on record by respondent Nos.1 & 2 to show as to how the deceased, who was riding bicycle, was contributory negligent in any manner. Perusal of the reply jointly filed by respondent No.1 & 2 also reveals that no such plea of contributory negligence has been raised by them before the Claims Tribunal. The only factor taken into consideration by the Claims Tribunal for deciding the contributory negligence is head-on collision between bicycle and motorcycle. Thus, in absence of any such plea raised by respondents No.1 & 2 in their reply or any legally admissible evidence with regard to contributory negligence, the finding of the Claims Tribunal that there was contributory negligence on the part of the deceased to the extent of 50% is an erroneous finding and the same is accordingly hereby set aside.

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

17. Considering the documentary evidence available on record with respect to income of the deceased i.e. certificate Ex.P-11, the monthly income of the deceased is taken as Rs.3,600/- (Rs.120/- per day). In view of the law laid down in the matter of Pranay Sethi (supra), the income of the deceased is required to be enhanced by 40% towards future prospects and thus the monthly income of the deceased for the purpose of calculating the compensation comes to Rs.5,040/- per month (3600+1440). Having regard to the number of members in the family (4 members), one-fourth should be deducted towards personal living expenses of the deceased in view of the decision of the Hon'ble Apex Court in Sarla Verma's case

(supra). Therefore, after deduction of one-fourth towards personal expenses, the loss of annual contribution of the deceased to his family comes to Rs.45,360/- (5040 - 1/4th x 12). As on the date of accident the deceased was about 28 years of age, the multiplier of 17 would be applicable. By applying the multiplier of 17 to the annual income of the deceased, the total loss of dependency would come to Rs.7,71,120/- (45360x17). Besides this, the claimants/appellants are also entitled for a lump sum amount of Rs.70,000/- under the conventional heads. Thus, the claimants/appellants are entitled to a total compensation of Rs.8,41,120/- (7,71,120+70000). This amount of compensation shall carry interest @ 6% p.a. from the date of filing of claim application till its realization. Rest of the conditions mentioned in the impugned award shall remain intact.

18. Any amount paid to the claimants/appellants as compensation shall be adjusted from the total amount of compensation as calculated above.

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

Sd/-

(Part Prateem Sahu)
Judge

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