

213(1/2)

**IN THE HIGH COURT OF PUNJAB & HARYANA
AT CHANDIGARH**

FAO No.8504 of 2015 (O&M)
Date of Decision: 06.03.2019

New India Assurance Company Ltd.

Appellant

Versus

Lalita and others

Respondents

FAO No.8091 of 2015

Lalita and another

Appellants

Versus

Ajay Kumar and others

Respondents

CORAM: HON'BLE MR. JUSTICE AVNEESH JHINGAN

Present: Mr. Vinod Gupta, Advocate
for the appellant [in FAO No. 8504 of 2015]
for respondent No.3 [in FAO No.8091 of 2015].

Mr. Vivek Khatri, Advocate
for the appellants [in FAO No.8091 of 2015]
for respondents No.1 and 2 [in FAO No.8504 of 2015].

None for respondents No.3 & 4 [in FAO No.8504 of 2015]

None for respondents No.1 & 2 [in FAO No.8091 of 2015]

AVNEESH JHINGAN, J (Oral):

The award dated 03.09.2015 passed by the Motor Accident Claims Tribunal, Hisar [for brevity 'the Tribunal'] has been assailed in two separate appeals, one by the insurer of Car bearing registration No.HR-20Y-6100 [hereinafter referred to as 'offending

vehicle'] and another by the legal heirs of Sumit Malik.

The grievance raised by learned counsel for the insurer is that the Tribunal erred in holding that the accident was caused due to the rash and negligent driving of the offending vehicle and not deciding the issue of contributory negligence. The claimants have filed the appeal seeking enhancement of compensation awarded under Section 166 of the Motor Vehicles Act, 1988 [for brevity 'the Act']. Since both the appeals arise from the same award and same accident, both are being disposed of by a common order.

Brief facts necessary for adjudication of the present appeals are that on 14.10.2012, Sumit Malik alongwith Ajay and Vikas was travelling in the offending vehicle which was being driven by Ajay. At about 04:00 A.M., the offending vehicle dashed against a stationary truck bearing registration No. HR-16C-3137. As a result of the impact, Sumit Malik sustained grievous injuries and died at the spot. FIR No. 373, dated 14.10.2012 was registered at Police Station Meham.

A claim petition was filed by wife and mother of the deceased. In the claim petition, the driver, owner and insurer (i.e. The New India Assurance Company Ltd.) of the offending vehicle were arrayed as respondents No.1 to 3 respectively.

The claimants examined eye witness Nafe Singh (PW-3) to prove that accident was caused due to the rash and negligent driving of the offending vehicle.

The Tribunal considering the facts and appreciating the evidence adduced held that the accident was caused due to the rash and negligent driving of the offending vehicle in which the deceased was an occupant. The owner, driver and insurer were held jointly and severally liable to pay the compensation.

The Tribunal assessed the annual earning of the deceased as ₹1,99,000/- relying upon the Income Tax Returns produced before it; 1/3rd deduction for self-expenses was made and multiplier of '16' was applied. The Tribunal awarded ₹21,80,000/- alongwith interest @ 7% per annum. The amount awarded included ₹55,200/- under the conventional heads.

Learned counsel for the insurer argues that the claimants erred in not impleading the owner, driver and insurer of the truck as respondents. He argues that the Tribunal erred in holding that the accident was caused due to the rash and negligent driving of the offending vehicle and not deciding the issue of contributory negligence.

The contentions raised by learned counsel for the insurer are not well founded. The Tribunal relying upon the deposition of PW-3 Nafe Singh and on the cross-examination of RW-1 Ajay, came to the conclusion that the truck was parked at the *kacha* portion of the road and hence the accident took place as a result of rash and negligent driving of the offending vehicle.

There is another aspect to the matter that the deceased

was the occupant of the offending vehicle and not the driver. Even if it is assumed that there is contributory negligence, the occupant of the offending vehicle cannot be held responsible for the same. The compensation awarded cannot be deducted on account of contributory negligence. For the claimants, it is a case of composite negligence and they are entitled to recover compensation from both or any of the joint tort-feasor.

In the present case, the claimants discharged their onus that the accident was caused due to rash and negligent driving of the offending vehicle.

The grievance raised by learned counsel for the insurer that the extent of composite negligence of drivers of both the vehicles should have been held by the Tribunal deserves rejection. In absence of the impleadment of the owner, driver and insurer of the truck, the said issue could not have been decided by the Tribunal. The issue is no longer *res-integra*.

The Supreme Court in **Khenyei v. New India Assurance Co. Ltd. and others, 2015(9) SCC 273** held as under:-

18. This Court in Challa Bharathamma & Nanjappan (supra) has dealt with the breach of policy conditions by the owner when the insurer was asked to pay the compensation fixed by the tribunal and the right to recover the same was given to the insurer in the executing court concerned if the dispute between the insurer and the owner was the subject-matter of determination for the tribunal and the issue has been decided in favour of the insured. The same analogy

can be applied to the instant cases as the liability of the joint tortfeasor is joint and several. In the instant case, there is determination of inter se liability of composite negligence to the extent of negligence of 2/3rd and 1/3rd of respective drivers. Thus, the vehicle - trailer-truck which was not insured with the insurer, was negligent to the extent of 2/3rd. It would be open to the insurer being insurer of the bus after making payment to claimant to recover from the owner of the trailer-truck the amount to the aforesaid extent in the execution proceedings. Had there been no determination of the inter se liability for want of evidence or other joint tortfeasor had not been impleaded, it was not open to settle such a dispute and to recover the amount in execution proceedings but the remedy would be to file another suit or appropriate proceedings in accordance with law. What emerges from the aforesaid discussion is as follows:

- (i) In the case of composite negligence plaintiff/claimant is entitled to sue both or any one of the joint tortfeasors and to recover the entire compensation as liability of joint tortfeasors is joint and several.*
- (ii) In the case of composite negligence, apportionment of compensation between two tortfeasors vis a vis the plaintiff/claimant is not permissible. He can recover at his option whole damages from any of them.*
- (iii) In case all the joint tortfeasors have been impleaded and evidence is sufficient, it is open to the court/tribunal to determine inter se extent of composite negligence of the drivers. However, determination of the extent of negligence between the joint tortfeasors is only for the purpose of their inter se liability so that one may recover the sum from the other after making whole of payment to the plaintiff/claimant to the extent it has*

satisfied the liability of the other. In case both of them have been impleaded and the apportionment/extent of their negligence has been determined by the court/tribunal, in main case one joint tortfeasor can recover the amount from the other in the execution proceedings.

(iv) It would not be appropriate for the court/tribunal to determine the extent of composite negligence of the drivers of two vehicles in the absence of impleadment of other joint tortfeasors. In such a case, impleaded joint tortfeasor should be left, in case he so desires, to sue the other joint tortfeasor in independent proceedings after passing of the decree or award.

It has been held by the Supreme Court that the claimants can sue any of the joint tort-feasor. In absence of any one of the joint tort-feasor, the extent of composite negligence cannot be decided.

In view of the decision of the Supreme Court, the insurer, if so desired, could have sued the owner, driver and insurer of the Truck in an independent proceedings.

In appeal filed by claimants, learned counsel contends that no future prospects have been awarded and the amounts awarded under the conventional heads be made in consonance with the decision of the Supreme Court in **National Insurance Company Limited Vs. Pranay Sethi and others, AIR 2017 (SC) 5157.**

Learned counsel for the insurer could not raise any serious dispute regarding awarding of future prospects in view of the decision of the Supreme Court in **Pranay Sethi's case** (supra).

There is no dispute between the parties with regard to loss of dependency i.e. ₹21,24,800/- calculated by the Tribunal. Having due regard to the decision of the Supreme Court in **Pranay Sethi's case** (supra), 40% future prospects are awarded as the deceased was 34 years old at the time of accident and was self-employed. 40% of ₹21,24,800 i.e. ₹8,49,920/- are awarded as future prospects.

The claimants shall also be entitled to ₹15,000/- each for funeral expenses and for loss of estate. ₹40,000/- are awarded to the widow for loss of consortium.

The net result is that the award dated 03.09.2015 is modified to the extent that the amount of ₹21,80,000/- awarded by the Tribunal is enhanced by ₹8,64,720/-.

The claimants shall be entitled to the enhanced amount alongwith interest @ 7.5% per annum from the date of filing of the claim petition till realization of the amount.

The appeal of the insurer is dismissed and the appeal of the claimants is allowed in afore-mentioned terms.

[AVNEESH JHINGAN]
JUDGE

March 06, 2019

pankaj baweja

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| 1. Whether speaking/ reasoned | : | Yes |
| 2. Whether reportable | : | Yes |