NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

M.A.(C) No. 705 of 2013

Reserved on 15.01.2020

Pronounced on 24.01.2020

1. Jitendra Kumar S/o Omprakash Sahu Aged About 22 Years R/o Khanduwa, Post, Tah. And P.S. Simga, Distt. Baloda Bazar, Civil Distt. Raipur C.G.
2. Koduram S/o Bainiram Sahu Aged About 60 Years R/o Khanduwa, Post, Tah. And P.S. Simga, revenue Distt. Baloda Bazar, Civil Distt. Raipur C.G.

---- Appellants

Versus

1. Naituram (Dead) Through Lrs. S/o As Per Honble Court Order Dated 10-04-2019.
   1.1 - (A). Hemant Nishad S/o Late Naituram Nishad Aged About 22 Years R/o Village - Patharra, Post Jevra, Police Station And District Bemetara Chhattisgarh.
2. Khorbaharin Bai W/o Naituram Nishad Aged About 45 Years R/o Patharra, Post- Jevra, P.S. Bemetara, revenue Distt. Bemetara, Civil Distt. Durg C.G.
3. The National Insurance Co.Ltd. Branch No. 1, Navin Bazar, Phool Chowk, G.E. Road, Raipur, 492001 C.G. Insurance Company, Policy No.285101/47/10/9700000155

---- Respondents

For Appellants:	Shri Rajkumar Pali, Advocate appears along with Shri Amit Kumar Sahu, Advocate.
For Respondents No. 1(A) & 2:	Shri Sanjeev Kumar Sahu, Advocate.
For Respondent No. 3:	Shri R. N. Pusty, Advocate.

Single Bench:Hon'ble Shri Sanjay S. Agrawal, J

CAV Award/Order

1. This Miscellaneous Appeal has been preferred by the driver and owner of the offending vehicle under Section 173 of the Motor Vehicles Act, 1988 (hereinafter referred to as 'the Act') questioning the legality and propriety of the award dated 29.06.2013 passed by the Additional Motor

Accident Claims Tribunal, Bemetara, (hereinafter referred to as 'the Claims Tribunal') in Claim Case No. 121/2012, whereby the learned claims Tribunal while allowing the claim in part has exonerated the Insurance Company from its liability. The parties to this appeal shall be referred hereinafter as per their description in the Claims Tribunal.

2. Briefly stated the facts of the case are that on 10.11.2011, deceased Taresh Kumar Nishad was returning to his home from his field and was dashed near the village Patharra by the offending vehicle "Tractor" attached with "Trolley" bearing registration numbers CG-04-D-5153 and CG-04-J-5154 respectively, owned by Non-applicant No.2- Koduram, insured with Non-applicant No.3-The National Insurance Company Limited. At the relevant time, it was being driven rashly and negligently by its driver, namely, Jitendra Kumar (Non-applicant No.1). As a result of which, the alleged accident occurred, whereby the deceased injured badly and expired during the course of his statement, giving rise to the institution of the claim petition under Section 166 of the Act, 1988 by his parents/Claimants, claiming a total amount of compensation to the tune of Rs.5,10,000/- under various heads.

3. Non-applicants No. 1 & 2 have contested the claim on the ground that the alleged accident was not caused due to rash and negligent driving of the driver of the offending vehicle and pleaded further that since the vehicle in question was insured with Non-applicant No.3/the National Insurance Company Limited, therefore, in case of any liability being fastened, it could be indemnified by the said company. Non-applicant No.3/Insurer has contested the claim mainly on the ground that the vehicle in question was being driven in violation of the terms and conditions of the

insurance policy as the driver of it was not holding the valid and effective driving licence, and therefore, no liability could be fastened upon it.

4. The Claimants have examined one of their witnesses in order to prove their claim, while none was examined by the Non-applicants.

5. After considering the evidence led by the Claimants, it has been held by the Claims Tribunal that the alleged accident occurred due to rash and negligent driving by the driver of the offending vehicle, resulting into sad demise of deceased Taresh Kumar Nishad. It held further that the vehicle in question was being used in violation of the insurance policy as it was insured for the agricultural purposes and the deceased was travelling while sitting on the mudguard of it. As a consequence, while exonerating the Insurance Company from its liability, the Tribunal has awarded a total amount of compensation to the tune of Rs.2,66,000/- with 6% interest per annum from the date of filing of the claim petition till its realization.

6. Being aggrieved, Non-applicants No. 1 & 2 have preferred this appeal. Shri Pali, learned counsel appearing for the Appellants submits that even in absence of the defence taken by the Insurance Company (Non-applicant No.3), the Tribunal has erred in holding that the vehicle in question, insured for the agricultural purposes, was being used in violation of the insurance policy. It is contended further by him that the only defence taken by the Insurance Company was that the driver of it was not holding the valid and effective driving licence, yet, the Claims Tribunal based upon its written arguments has exonerated the Insurance Company on finding that the deceased was travelling on the mudguard of the alleged vehicle, which was being used other than the agricultural purposes. The entire approach of the Tribunal exonerating the Insurance Company is, therefore,

not sustainable and deserves to be set aside.

7. On the other hand, Shri R. N. Pusty, learned counsel appearing for Insurer/Non-applicant No.3 has supported the award impugned.

8. I have heard learned Counsel for the parties and perused the entire record carefully.

9. From perusal of the record, it appears that the Claims Tribunal, while disbelieving the evidence of sole witness Naituram Nishad, has placed his reliance upon the documentary evidence like final report (Ex.P.1), First Information Report (FIR) (Ex.P.2), merg intimation (Ex.P.7) and Naksha Panchnama (Ex.P.8), has arrived at a conclusion that the deceased was returning from his field while sitting on the mudguard of the alleged offending vehicle, i.e., “Tractor-Trolley”. FIR with regard to the alleged accident, occurred on 10.11.2011, was lodged on 11.06.2012 by one Hemin Bai Nishad, i.e., after a period of seven months. However, the said witness (Naituram Nishad), who was the father of the deceased, has deposed contrarily to the said documentary evidence that it was lodged by him after three days of the said incident. The evidence of the witness was, therefore, not believable and the Claims Tribunal, thus, while disbelieving his statement, has rightly placed its reliance upon the said documentary evidence in arriving at a conclusion that the deceased was travelling by sitting on the mudguard of the alleged offending vehicle. Upto this, there is no infirmity in the finding of the Tribunal, but exonerating the Insurance Company on finding that the vehicle in question insured for the agricultural purposes, was being used other than its purposes in violation of the insurance policy, is, however, liable to be set aside as no defence as such was taken by the Insurance Company. The vehicle in question was being

driven by a person without having any valid driving licence and this was the only defence that was taken by the Insurance Company for its exoneration. It was, however, not pleaded anywhere that the vehicle in question was being used other than its agricultural purposes. No plea as such was, therefore, taken by the Insurance Company though required to be taken under Section 149(2)(a)(i) of the Act, 1988. That apart, no evidence whatsoever was led by the Insurance Company for the reasons best known to it. In absence of its defence and/or proof, it cannot be held that the vehicle in question was used in violation of the insurance policy merely on the basis that the deceased was travelling while sitting on the mudguard of the said offending vehicle. If the Insurance Company, in any case, wants to prove that it is not liable to indemnify the insured, then it is bound to prove the terms and conditions of the insurance policy. However, as observed hereinabove, no attempt whatsoever has been made in order to prove that the vehicle in question was being used in violation of the terms and conditions of the insurance policy.

10. At this juncture, the principles laid down by the coordinate Bench of this Court in the matter of "***Oriental Insurance Company Limited vs. Swatantra Kumar Verma and others*** passed on 20.09.2016 in **M.A. No. 216 of 2006** are to be seen, where at paragraph 11, it has been observed as under:-

> **11.** As far as the second ground raised by the insurance company is concerned, I am not in agreement with the submission. If the insurance company, in any case, wants to prove that it is not liable or that its liability is limited, but admits that the vehicle was insured with it, it is bound to prove the terms of the insurance policy. In this case, though the policy has been filed on record, no attempt has been made to prove the policy or conditions thereof. It is urged by Learned Counsel for the insurance company that relying upon this very insurance policy, the insurance company has made liable. The insurance

> company has not denied the fact that it has issued the insurance policy. The defence raised by the Company is that as per the terms of policy, it is not liable to cover liability in respect of passengers travelling in motor vehicles. This has to be proved by the insurance company. An insurance policy can even be tendered if it is not objected by the other side. To get itself excluded or to limit its liability the insurance company will have to prove the policy of insurance.

11. Applying the aforesaid principles to the case in hand, Non-applicant No.3/The National Insurance Company Limited, who has neither taken a defence nor has adduced any evidence to establish the fact that the vehicle in question was being used other than its purpose in violation of the insurance policy, cannot be exonerated from its liability and the finding of the Tribunal exonerating the Insurance Company, is, therefore, liable to be and is hereby set aside and, the Insurance Company is accordingly held liable to satisfy the award impugned by indemnifying the insured.

12. The appeal is, accordingly, allowed to the extent indicated herein above and rest of the observations made by the Claims Tribunal shall remain intact. No order as to costs.

Sd/-

(Sanjay S. Agrawal)
JUDGE

Nikita