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HIGH COURT of CHHATTISGARH, BILASPUR

MAC No. 973 of 2013

- Oriental Insurance Company Ltd. in front of Rajiv Plaza, Bus Stand Bilaspur C.G. Civil and Revenue District Bilaspur C.G. Pin Code 495001

------Appellant

VERSUS

1. Vidya wati wd/o Late Gend Lal aged about 30 years Residence Gram Barour, Thana Marwahi, District Bilaspur C.G. **---------Claimant**
2. Monu Yadav @ Moti @ Tirra aged about 20 years R/o Gram Marwahi Thana Marwahi and Distt. Bilaspur C.G. **--------Driver**
3. Mohammad Farid S/o Abdul aged about 40 years R/o Gram Marwahi, Thana Marwahi District Bilaspur C.G. **-----Owner**

-------**Respondents**

For Appellant	:	Mr. Deepak Gupta, Advocate.
For Respondent No. 1	:	Mr. Dhirendra Prasad Mishra, Advocate
For Respondent No. 2 & 3	:	Mr. Rakesh Pandey, Advocate

Hon'ble Shri P.R. Ramachandra Menon, Chief Justice
Hon'ble Shri Parth Prateem Sahu, Judge
Judgment on Board

Per Parth Prateem Sahu, J.

23/06/2020

1. The appellant-Insurance Company has filed this appeal challenging the liability fastened upon it by the Additional Motor Accident Claims Tribunal, Pendra Road by impugned award dated 31-07-2013 in Claim Case No. 86/2011, whereby learned Claims Tribunal allowed the claim application, awarded Rs. 4,40,500/- as compensation, to be bad in law. Cross objection is also filed by the Respondent-claimant challenging the award of compensation to be inadequate.

2. Facts relevant for disposal of this appeal are that on 21-10-2010 at about 10:00 pm, when Gend Lal Kewat (deceased) was going to village Ushar on his motor cycle, on the way, he was dashed by a Bolero Jeep bearing Registration No. CG10 F 0457 (hereinafter referred to as “offending Jeep”) driven by Respondent 2/ Non-applicant 1. In the aforementioned accident, Gend Lal suffered grievous injuries over his person and succumbed to those injuries on spot. Respondent 1/ claimant, who is widow of deceased Gend Lal filed claim application seeking total

compensation of Rs. 30,30,000/- on account of death of late Gend Lal in a road accident, mentioning therein that the deceased was earning Rs. 1,000/- per day from the business of fishery. It was also pleaded that deceased was also owing 5.50 acre agricultural land and from that he was earning Rs. 2 lakh per year.

3. Respondent 2 and 3/ Non-applicant 1 and 2, who are driver and owner of the offending Jeep, submitted reply to claim application and denied all the adverse pleadings made against them. They have denied the fact of accident and pleaded that on the date of accident, Respondent 3 Owner of the offending Jeep had gone to Shahdol along with his family members on his jeep. They have also pleaded that a false and fabricated case has been registered against them. On the date of accident, offending Jeep was insured with Non-applicant 3/ appellant-Insurance Company and the liability, if any, for payment of compensation will be upon Non-applicant 3/ appellant- Insurance Company.

4. Appellant/ Non-applicant 3-Insurance Company submitted its reply to the claim application denying the pleadings made in the claim application and pleaded that the nature of work of the deceased was labour, the amount of compensation claimed is highly exaggerated, there was no valid and effective driving licence with Respondent 2/ Non-applicant 1. Respondent 3/Owner of the offending Jeep had handed over the vehicle to a driver who was not having valid and effective driving licence to drive the vehicle. It was also pleaded that there was breach of conditions of insurance policy, thus, the Insurance Company is not liable to satisfy the amount of compensation.

5. The learned Claims Tribunal based upon the pleadings and evidence placed on record by the respective parties formulated as many as 7 issues for consideration including the issue whether the 2nd Respondent was having valid and effective driving licence on the date of accident. On appreciation of pleadings and evidence placed on record by the respective parties, learned Claims Tribunal held that deceased Gend Lal died in a road accident occurred due to rash and negligent driving by Respondent 2/ Non-applicant 1 driver of the offending vehicle

which was owned by Respondent 3/ Non-applicant 2 and insured by the appellant. On the date of accident, driver of the offending Jeep was not possessing valid and effective driving licence. After recording the aforementioned findings, learned Claims Tribunal partly allowed the claim application by assessing the income of the deceased as Rs. 3,000/- per month, awarded a total sum of Rs. 4,40,500/- and fastened liability upon the appellant by holding that the Insurance Company failed to prove violation of conditions of insurance policy.

6. Mr. Deepak Gupta, learned counsel appearing for Appellant-Insurance Company submits, that once the Tribunal arrived at a finding that on the date of accident, driver of offending Jeep was not possessing valid and effective driving licence then the liability for making payment of amount of compensation cannot be fastened upon the Appellant. He further submits, that once it is held by the Tribunal that the driver was not possessing valid driving licence then the finding recorded with respect to issue no. 5 i.e. whether Respondent 2 was driving the Jeep in violation of conditions of Insurance Policy, to be not proved is *per se* erroneous and not sustainable. He also submits, that the claimant failed to prove income of the deceased by adducing cogent and reliable piece of evidence, therefore, the amount of compensation awarded by the Claims Tribunal is on higher side.

7. Per contra, learned counsel appearing for Respondent 1 /claimant submits, that the Tribunal had rightly fastened the liability upon the Insurance Company as the Insurance Company had failed to prove the fact of breach of policy conditions. Cross objection has also been filed for enhancement of the amount of compensation awarded by the learned Claims Tribunal. He submits that the accident took place on 21-10-2010, but the Tribunal has not taken notice of minimum wages prevailing at that relevant time and assessed income of the deceased as Rs. 3,000/- per month only on notional basis. With reference to document Annexure A-1 filed along with cross appeal**,** the learned counsel further contended, that he has placed minimum wages structure prevailing in

Chhattisgarh State w.e.f. 01-10-2010 to 31-03-2011, to argue, that on the date of accident, the minimum wages of unskilled labour was Rs. 151.03 per day. Adding that he submits, that the Tribunal has not awarded any amount towards future prospects and the amount awarded towards other conventional heads is also on lower side.

8. Mr. Rakesh Pandey, learned counsel appearing on behalf of Respondent 2 and 3/ Driver and Owner, submits, that no material and evidence has been placed from the side of Insurance Company to prove that Respondent 2 was not possessing valid and effective driving licence. The burden to prove breach of conditions of insurance policy is upon the Insurance Company in which the Appellant has utterly failed. While supporting the impugned award, it is argued by Mr. Pandey that the Tribunal has awarded just and proper amount of compensation which does not call for any interference.

9. We have heard learned counsel for the parties. We have gone through the impugned award and perused the materials placed on record.

10. Claimant, in support of her claim application, has filed documents of criminal case as Ext. P-11 to P-18; Ext.P-18 is the seizure memo prepared by the Police Authority (Investigating Agency) and perusal of the same would show that the documents have been seized from Respondent 1 in presence of witness. The documents which were seized are, Registration Certificate of the offending Jeep and insurance papers. Copy of the Driving Licence is not available on record of criminal case as Respondent 2 failed to produce his Driving Licence. The learned Claims Tribunal considered the issue with regard to driving licence and after discussing it very elaborately, arrived at a finding that on the date of accident, Respondent 2 Driver of the offending Jeep was driving the offending Jeep without any valid and effective driving licence. But while deciding issue number 5, Tribunal held that the Insurance Company failed to prove the breach of conditions of insurance policy.

11. Order sheet dated 30-11-2012 of the learned Tribunal mentions that the counsel for non-applicant 3 produced 'insurance policy', copy of which, thereof, be given to counsel on opposite side. Copy of Policy is also available on record. Section 168 and 169 of the Motor Vehicles Act, 1988 (for short "the Act") caste duty upon the Tribunal to conduct enquiry and to pass just award. Section 3 prescribes for necessity of driving licence which reads as under:

> "3. **Necessity for driving licence.-** (1) No person shall drive a motor vehicle in any public place unless he holds an effective driving licence issued to him authorising him to drive the vehicle; and no person shall so drive a transport vehicle [other than(a motor cab or motor cycle) hired for his own use or rented under any scheme made under sub-section (2) of Section 75] unless his driving licence specifically entitles him so to do."

Perusal of Section 3 of the Act would show that the law restricts a person to drive motor vehicle in any public place unless he holds an effective driving licence.

12. Section 149 of the Act provides for defences available to the insurer, sub-section 2(ii) of Section 149 reads as follows:

> (ii) a condition excluding driving by a named person or persons or by any person who is not duly licensed, or by any person who has been disqualified for holding or obtaining a driving licence during the period of disqualification;"

13. The above reference of provision of Section 149, it is explicit that the defence is available to the insurer if the vehicle is being driven by any person who is not duly licenced. There cannot be an insurance policy of any vehicle contrary to the provisions of Motor Vehicles Act.

14. In the case at hand, the learned Claims Tribunal has recorded a categoric finding that on the date of accident, driver of the offending Jeep was not possessing valid and effective driving licence. In the aforementioned facts, if it is turned out that the driver of the offending Jeep was not possessing driving licence then there cannot be further finding that the Insurance Company failed to prove breach of

conditions of insurance policy because it is under the law that a person who inclines to drive any motor vehicle must be a holder of valid and effective driving licence. In the aforementioned facts of the case, we set aside the finding with regard to issue number 5 recorded by the learned Claims Tribunal that Insurance company failed to prove that on the date of accident, there was breach of conditions of insurance policy. The finding recorded by the Tribunal that driver of the offending Jeep was not possessing valid and effective driving licence has not been challenged by the driver and owner of the offending Jeep in an appeal and as such, the same has attained its finality.

15. Now the question arises that what will be the consequences if the driver of the motor vehicle/ offending vehicle was driving the vehicle without having any licence.

16. Section 3 of the Act, prohibits a person for driving a motor vehicle in a public place if he does not hold an effective driving licence. When once it is held that the driver of the offending vehicle was not possessing a valid and effective driving licence to drive the vehicle then the liability cannot be fastened upon the Insurance Company to satisfy the award, and in the facts and circumstances of the case, the liability to satisfy the amount of award would be upon the driver and owner of the offending vehicle jointly and severally.

17. Looking to the provisions of Section 149 of the Act, keeping in mind the object of the Act, a direction to pay and recover can be issued to the Appellant/ Insurance Company. The Hon'ble Supreme Court in the matter of ***Shamanna v. Oriental Insurance Co. Ltd.*** reported in **(2018) 9 SCC 650** has considered the issue of “pay and recover” and held that if the driver of the offending vehicle does not possess a valid driving licence, the principle of pay and recover can be ordered to direct the insurance company to pay the claimant first, and then recover the same from the owner of the offending vehicle and further held as under:

> “13. Since the reference to the larger Bench in *Parvathneni case (National Insurance Co. Ltd. v. Parvathneni, (2009) 8 SCC 785)* has been disposed of by keeping the questions of law open to be decided in an

> appropriate case, presently the decision in *Swarn Singh case (National Insurance Co. Ltd. v. Swarn Singh, (2004) 3 SCC 297)* followed in *Laxmi Narain Dhut (National Insurance Co. Ltd. v. Laxmi Narain Dhut, (2007) 3 SCC 700* and other cases hold the field. The award passed by the Tribunal directing the insurance company to pay the compensation amount awarded to the claimants and thereafter, recover the same from the owner of the vehicle in question, is in accordance with the judgment passed by this Court in *Swarn Singh (supra)* and *Laxmi Narain Dhut (supra)* cases. While so, in our view, the High Court ought not to have interfered with the award passed by the Tribunal directing the first respondent to pay and recover from the owner of the vehicle. The impugned judgment (Shamanna v. Laxman, 2016 SCC OnLine Kar 6928) of the High Court exonerating the insurance company from its liability and directing the claimants to recover the compensation from the owner of the vehicle is set aside and the award passed by the Tribunal is restored."

18. Taking into consideration, the aforementioned facts and circumstances of the case where the appellant has not disputed the policy but the grounds raised by the appellant are only with regard to fastening of entire liability upon it. In view of the facts of the case where there was no licence with the driver of the offending Jeep, we find it appropriate to direct the Insurance Company to first pay the entire amount of compensation and thereafter to recover the same from the owner/insured of the vehicle.

19. We will now deal with the cross objection filed by the Respondent-claimant. Learned counsel for Respondent 1/ claimant in cross objection has raised the ground with regard to assessing income of the deceased on lower side, non-awarding of any amount towards future prospects and awarding meagre amount on other conventional heads. Learned counsel for Respondent 1 claimant argued that the deceased was engaged in the business of fishery by taking pond on contract, but to prove the income of the deceased, no specific document has been produced in evidence, rather the claimant in her evidence had admitted that when her husband was alive, they were getting Rice grain for Rs. 2 per kilogram, which is being provided under the Government scheme to the families who are identified as living Below Poverty Line (BPL). In her evidence, she also admitted that her husband was getting daily wages from the work of catching fishes from

pond and selling them in the market. From the aforementioned evidence available on record, case of the claimant that the deceased was taking pond on contract for doing business of fishery and income of the deceased from it, as pleaded in the application is not sustainable.

20. In view of the fact and evidence available on record, the learned Claims Tribunal has not committed any error in holding that the claimant failed to prove the income of the deceased. In such a situation, the income is to be calculated on the basis of notional income which can be assessed taking into consideration the nature of engagement of person (deceased), price index and also the minimum wage rate prevailing. The document placed on record by the cross objector showing that minimum wage in Chhattisgarh State w.e.f. 01-10-2010 to 31-03-2011 is for the labours working with the manufacturing industries. Looking to the nature of work pleaded and stated by the claimant in her evidence as labout, the wage rate mentioned in the document Annexure A-1 filed along with the cross appeal cannot be accepted for calculating the income of the deceased. But then income of the deceased has to be fixed notionally, which this Court finds it appropriate to fix the income of the deceased as Rs. 4,000/- per month i.e. Rs. 48,000/- per annum taking into consideration the date of accident i.e. 21-10-2010. Other grounds raised by the learned counsel for the Respondent 1/ Claimant that the future prospects has not been awarded and also, awarding inadequate amount on other conventional heads are concerned, these issues have been considered and decided by the Hon'ble Supreme Court in the matters of *Sarla Verma & others v. Delhi Transport Corp. & Anr* reported in (2009) 6 SCC 121, *National Insurance Company Ltd. vs. Pranay Sethi* reported in (2017) 16 SCC 680, and further in the case of *Magma General Insurance Company vs. Nanu Ram alias Chuhuru Ram and others* reported in (2018) 18 SCC 130.

21. In absence of documentary proof with regard to age of any person, it will be appropriate to record or accept the age of a person which is mentioned in the post mortem report of the deceased. For the aforementioned reason, recording age of the deceased as 36 years and applying multiplier of 14 is erroneous and

are hereby set aside. The contention of the learned counsel for Respondent 1/ claimant that the learned Claims Tribunal erred in applying wrong multiplier of 14, overlooking that the deceased was shown to be 35 years of age in the post mortem report appears to have same force. Perusal of the award would show that though the learned Claims Tribunal in paragraph 12 of its award has taken note of the age mentioned in the post mortem report to be 35 years but taken the age of the deceased as 36 years, taking into consideration the age mentioned in the merg intimation. When there is no specific proof of age then the age mentioned in the post mortem report is to be accepted being the opinion of the Doctor. We hold the age of the deceased as 35 years as mentioned in the post mortem report and as per the law laid down by the Supreme Court in the case of *Sarla Verma* (supra), the appropriate multiplier will be of 16.

22. In view of the above, the amount of compensation to be awarded requires reconsideration and recalculation which is worked out as under.

23. The income of the deceased as taken by this Court as Rs. 4,000/- per month i.e. Rs. 48,000/- per annum. There will be an addition of 40% of the established income in view of the law laid down by the Supreme Court in *Pranay Sethi* (supra) as the deceased was aged less than 40 years. By adding 40% of the established income towards future prospects, the yearly income of the deceased will come to Rs. 67,200/- [Rs.48000+40% of Rs.48000]. Deceased was survived by his widow only, therefore, there will be a deduction of 1/3rd towards personal and living expenses. After deducting 1/3rd, the yearly loss of dependency comes to Rs. 44,800/-; by applying multiplier of 16, the total loss of dependency comes to Rs. 7,16,800/-. Apart from the above amount of compensation, the claimant will further be entitled for Rs. 40,000/- towards loss of spousal consortium, Rs. 15,000/- towards funeral expenses and Rs. 15,000/- towards loss of estate. Even if the death of deceased was instantaneous, we feel it appropriate to award Rs. 10,000/- towards pain and sufferings. Now the claimant will be entitled for a total sum

as compensation of **Rs.7,96,800/-** [Rs.7,16,800 +Rs.40,000+ Rs.15,000 + Rs.15,000 + Rs.10,000], instead of Rs. 4,40,500/- as awarded by the learned Claims Tribunal. The amount of compensation will carry interest @ 6% p.a. from the date of filing claim application till its realization. As the claimant has challenged the award by filing cross objection with a delay of 1295 days, she will not be entitled for any interest for this period on enhanced amount of compensation.

24. The Insurance Company will deposit the entire amount of compensation first and thereafter recover the amount of compensation so deposited, from Respondent 3-owner of the offending vehicle. For recovering the amount of compensation deposited by the appellant from the insured, appellant will be at liberty to file application for execution in the very same proceedings.

25. The appeal of the Insurance Company is allowed in part and the cross objection filed by the claimant is also allowed in part. The impugned award is modified to the extent as indicated hereinabove.

Sd/-
(P.R. Ramachandra Menon)
Chief Justice

Sd/-
(Parth Prateem Sahu)
Judge

Pawan