NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR
MAC No. 526 of 2014

1. Lata Yadav, W/o Late Parmeshwar Yadav, aged about 29 years.
2. Kshitiz Yadav, S/o Late Parmeshwar Yadav, aged about 9 years Minor
3. Meenakshi Yadav, D/o Late Parmeshwar Yadav, aged about 5 years
   Appellant No.2 & 3 are minor, through natural guardian mother Smt. Lata Yadav, wife of Late Parmeshwar Yadav,
   All resident of Lalkhadan, Bilaspur, P.S. Torwa, Tahsil and Civil and Revenue District Bilaspur (CG)

---- Appellants

Versus

1. Dinesh, S/o Shivprasad Satnami, aged about 28 years, R/o Mohtara (Saaja), P.S. Saaja, Civil and Revenue District Durg (CG) [Driver of offending vehicle truck no.CG04-DA-66606]
2. Ajmer Singh Bal, S/o Bisahan Singh Bal, aged about 58 years, R/o House No.MIG-1182, Veer Savarkar Nagar, Heerapur, Raipur C.G., Aarakshi Kendra Amanaka, Raipur, Civil and Revenue District : Raipur (CG) [Owner of offending vehicle truck no.CG04-DA-66606]
3. Shriram General Insurance Company, Through Branch Manager, E/8 E.P.I.P.R.I.I.C.O. Industrial Area, Seetapur, Jaipur, Civil and Revenue District : Jaipur, Rajasthan. [Insurer of offending vehicle truck no.CG04-DA-66606]

---- Respondents

For Appellants	:	Mr. Atul Pandey, Advocate
For Respondent No.2	:	None
For Respondent No.3	:	Mr. Dipak Gupta, Advocate

Hon'ble Shri P. R. Ramachandra Menon, CJ
Hon'ble Shri Parth Prateem Sahu, J

Order On Board

Per Parth Prateem Sahu, J

14/09/2020

1. Claimants/appellants have preferred this appeal under Section 173 of the Motor Vehicles Act, 1988 (for short 'the Act of 1988') seeking enhancement in the compensation awarded by the learned 3rd Additional Member to the Court of the learned 1st Additional Motor Accident Claims Tribunal, Bilaspur (for short 'the Claims Tribunal') vide award dated 10.2.2014 passed in Claim Case No.14/2012 by which the Claims Tribunal partly

allowed application of claimants and awarded a total amount of Rs.4,31,100/- as compensation in a death case.

2. Facts of the case, in brief, are that on 2.11.2011 at about 7.30 a.m. Parmeshwar Yadav was going by his motorcycle with children namely Ritik alias Krishna, Kshitiz alias Kishan & Isha Kumar alias Kritika, to drop them at their school Gayatri Vidhya Mandir. When he reached in front of S.K. Motor Garage, Lal Khadaan Road, Sant Nagar, Bilaspur, upon seeing one truck bearing registration number CG04-DA-6606, coming from the side of Bilaspur, driven in a rash and negligent manner by its driver, stopped his motorcycle by side of road. However, the driver of said truck came on its wrong side, dashed motorcycle of Parmeshwar and then ran over them. As a result, Parmeshwar, Ritik alias Krishna & Isha alias Kritia died on spot, whereas Kshitiz alias Kishan suffered grievous injuries. Report of the accident was lodged in Police Station Torwa, Bilaspur based on which crime under Sections 279, 337, 304A of IPC was registered against non-applicant No.1. On completion of investigation, charge sheet was filed against him before the competent jurisdictional Magistrate.

3. Claimants, who are widow and minor daughters of deceased, have filed an application under Section 166 of the Act of 1988 before the Claims Tribunal seeking compensation of Rs.18,45,000/- under various heads. It was pleaded in the application that on the date of accident, the deceased was working in dairy as also bakery shop and getting Rs.5,000/- per

month from each work and thereby total monthly earning of deceased was Rs.10,000/-. The deceased was the only breadwinner in the family and on account of his untimely death in a motor vehicular accident, loss of income has occasioned to them.

4. Non-applicant Nos.1 & 2 did not appear before the Claims Tribunal even after service of notice by way of substituted mode of service i.e. paper publication, therefore, they were proceeded ex-parte by the Claims Tribunal.

5. Non-applicant No.3 Insurance Company submitted its reply to claimants' application denying the pleadings made therein including the age and income of the deceased. It was pleaded that accident occurred due to rash & negligent driving of motor cycle by the deceased himself and not due to rash & negligent driving of offending vehicle by its driver. It was also pleaded that amount of compensation claimed is highly exaggerated. There was no valid and effective driving license with non-applicant No.1 causing breach of conditions of insurance policy.

6. Upon appreciation of pleadings and evidence placed on record by the parties, the Claims Tribunal vide impugned award reached to the conclusion that non-applicant No.1 by driving the offending vehicle in a rash and negligent manner, caused the accident dashing motorcycle of deceased which has resulted into death of Pyarelal Yadav and Ritik alias Krishna & Isha alias Kritia, other occupants of motorcycle. Deceased Pyarelal Yadav was contributory negligent to the extent of 10%

for the accident. The offending vehicle was not plied in breach of any of the conditions of insurance policy. Application of claimants suffers from vice of misjoinder of necessary parties, awarded total sum of Rs.4,31,100/-, along with interest @ 8% p.a., after deducting 10% towards contributory negligence of deceased Pyarelal Yadav, driver of motorcycle.

7. Mr. Pandey, learned counsel representing claimants/ appellants submits that the Claims Tribunal erred in holding that there was contributory negligence on the part of deceased driver of motorcycle to the extent of 10%. Non-applicant No.3 Insurance Company has not adduced any clinching and concrete evidence in support of the plea of contributory negligence. Even the driver of offending vehicle, who could be a best witness to prove the fact of contributory negligence, did not enter into witness box to prove contributory negligence on the part of deceased driver of motorcycle. Hence, this finding of the Claims Tribunal is without any evidence and liable to be set aside for want of cogent and reliable piece of evidence in this regard. He also submits that the Claims Tribunal erred in fixing monthly income of deceased at Rs.3,000/- in respect of accident occurred on 2.11.2011, ignoring the evidence brought on record by the claimants/appellants with respect to monthly income of the deceased from dairy and bakery shops i.e. total Rs.10,000/- per month. The Claims Tribunal has not awarded any amount towards future prospects and the amount awarded under other conventional heads are also on lower side.

8. Mr. Dipak Gupta, learned counsel appearing on behalf of respondent No.3-Insurance Company has supported the impugned award and submitted that accident was outcome of head-on collusion between motorcycle of deceased and offending vehicle, hence, the Claims Tribunal was justified in holding the deceased driver to be contributory negligent to the extent of 10%. He further submitted that the claimants failed to prove the fact of monthly income of deceased by bringing cogent & clinching documentary evidence on record, therefore, the Claims Tribunal was justified in determining income of deceased on notional basis. The compensation awarded by the Claims Tribunal is just and proper and the same is not required to be enhanced at all.

9. We have heard learned counsel for both sides and perused the record of the Claims Tribunal.

10. So far as finding of the Claims Tribunal holding the deceased to be contributory negligent to the extent of 10% for the accident is concerned, perusal of record would show that FIR of accident was lodged against driver of offending vehicle by one Santosh Kumar Senapati. It has been specifically mentioned in FIR that truck came on the spot with high speed in rash & negligent manner and caused accident by dashing motorcycle on which deceased and children were travelling. On completion of investigation, final report was filed against non-applicant No.1, driver of offending vehicle, for commission of offence under Sections 279, 338 & 304A of IPC.

11. Claimants/appellants in support of their case have examined Claimant No.1 as AW-1, Kuldeep Yadav as AW-2 and Rajendra Agrawal as AW-3. Whereas, non-applicant Insurance Company has examined Shri Suryakant Mishra, Advocate & Investigator of Insurance Company, as NAW-3.

12. In the Crime Details Form (Ex.P-3) filed by claimants along with record of criminal case, the place of accident has been shown. As per this document, body of Pyarelal Yadav and his two children, who also died in the same accident, were lying beside the road. On perusal of direction from which offending vehicle was coming and the direction in which deceased was proceeding, as shown in the document, it is apparent that driver of motorcycle was going on his extreme left; the offending truck came on wrong side of road i.e. towards extreme right, and dashed the motorcycle.

13. The Investigator of Insurance Company (NAW-3) has stated in his statement that accident was the result of negligence on the part of drivers of both vehicles, but this statement of the Investigator cannot be accepted as Gospel's truth because he is not an eyewitness of the accident and his statement is simply based on the investigation done by him. He has admitted in his evidence that place of accident as shown in Ex.P-3 is beside the road on its left side.

14. The Claims Tribunal while recording finding on the issue of contributory negligence, has taken into consideration the fact that at the time of accident, four persons were travelling on a

motorcycle as against seating capacity of two (Parmeshwar and three minor children). Burden to prove the plea of contributory negligence is upon the party who raises such a plea. He/she is required to adduce specific and unambiguous evidence in this regard, but in case at hand respondent No.3 failed to bring on record any evidence proving contributory negligence on the part of deceased, except the evidence of Investigator (NAW-3), which is based on the investigation conducted by him much later the date of accident. Merely because the persons beyond permitted seating capacity were travelling on a motorcycle at the time of accident, it cannot be said that there was contributory negligence on the part of driver of motorcycle. The driver of offending vehicle, who could be best witness to plead and prove negligence of the deceased driver of motorcycle, did not choose to appear before the Claims Tribunal, not filed reply to claim application nor entered into witness box. The plea of contributory negligence was taken by the Insurance Company in its reply, but Insurance Company has not made any effort to call the driver and owner of offending vehicle as a witness to prove the plea of contributory negligence. Under the law it is for the party taking plea of contributory negligence to prove the fact that injured/ deceased was contributory negligent to the accident, which, in case at hand, the Insurance Company failed. In case of **Minu Rout & anr v. Satya Pradyumna Mohapatra & ors** reported in **2013 AIR SCW 5375**, the Hon'ble Supreme Court has dealt with the issue of contributory negligence and held thus:-

> “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 Sushil 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 P.W.2 and P.W.3 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. ....”

15. In case at hand, the insurance company has examined one witness on its behalf, who is Investigator. This witness was not present on the spot at the time of accident, hence his statement cannot be accepted in evidence with regard to contributory negligence. More so, the witness of NAW3-1 in last paragraph of his evidence has stated that he has not placed on record any document along with report of Ex.NA-1 to prove that accident was on account of negligence of the deceased.

16. For the foregoing reasons and in view of law laid down by Hon'ble Supreme Court in Minu Rout's case (supra), the Claims Tribunal erred in holding the deceased to be contributory negligent to the extent of 10%, which is liable to be set aside and it is hereby set aside.

17. As regards the income of deceased, it is true that the claimants/ appellants have pleaded in their application and stated in their statements that the deceased used to earn total Rs.10,000/- per month i.e. Rs.5,000/- per month by working in Ankit Dairy and Rs.5,000/- per month by working in Paris Bakery. Claimant No.1, widow of deceased, has specifically stated in her evidence before the Claims Tribunal that her deceased husband was earning Rs.5,000/- each per month from Ankit Dairy & Paris Bakery. To prove monthly income of deceased, the claimants have filed a certificate issued by Shri Rajendra Kumar Agrawal, Proprietor of Ankit Dairy & Paris Bakery and also examined said Shri Rajendra Kumar Agrawal as AW-3. This witness (AW-3) has stated in his evidence that he is owner of Ankit Dairy and Paris Bakery. Deceased Pyarelal Yadav was working in both his shops and he used to pay Rs.5,000/- per month for working in each shop. This witness admitted to have issued certificates of Ex.P-9 & Ex.P-10, but in the cross-examination he has admitted that he has not brought attendance register of his employees with him. He has further stated that deceased Parmeshwar Yadav used to work from 8 a.m. to 10 a.m. in the dairy and from 3 to 6 p.m. in the bakery

shop.

18. Shri Suryakant Mishra (NAW-3), Investigator of insurance company, has submitted his investigation report and in the said it has mentioned that deceased was employed in Manoj Dairy. Instead of mentioning the income of deceased from Manoj Dairy, the Investigator has mentioned the estimated monthly income of deceased as Rs.3,000/-.

19. From the above evidence, one thing is clear that the deceased was working in a dairy. The Investigator in his report has mentioned that deceased was travelling on his motorcycle bearing registration number CG10-EK-6780 and going to drop his children to their school.

20. Taking into consideration the facts pleaded in claim application, nature of evidence produced by claimants including statement of Rajendra Kumar Agrawal, Proprietor of dairy & bakery shop, regarding income of the deceased, we are of the considered view that income of the deceased, as stated, cannot be accepted in view of working hours shown of the deceased. In absence of proved income, notional income is required to be taken, which can be fixed at Rs.5,000/- per month, instead of Rs.3,000/- as fixed by the Claims Tribunal.

21. As far as non-grant of future prospects is concerned, in the matter of **National Insurance Company Ltd. Vs. Pranay Sethi** reported in **(2017) 16 SCC 680**, Hon'ble Supreme Court while dealing with the issue of grant of future prospects has 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 case hand, there is no dispute that on the date of accident, the deceased was 30 years of age, as mentioned in post-mortem report Ex.P-7, he was not in permanent employment, therefore, in view of law laid down by the Apex Court in Pranay Sethi's case (supra), the claimants/appellants are entitled for an additional amount of 40% of the monthly income of the deceased as future prospects.

22. As regards the amount awarded under other conventional head i.e. Rs.5,000/- for funeral expenses, Rs.10,000/- for loss of consortium and Rs.10,000/- for loss of estate. In the opinion of this Court, the amount awarded under other conventional heads are on lower side and deserve to be enhanced as per decision of Hon'ble Supreme Court in Pranay Sethi's case (supra) and **Magma General Insurance Company Limited vs. Nanu Ram alias Chuhru Ram & ors** reported in **(2018) 18 SCC 130**.

23. For the foregoing reasons, we propose to recompute the amount of compensation payable to claimants/appellants to award just compensation.

24. The income of deceased is taken as Rs.5,000/- per month and since at the time of accident the deceased was below the age of 40 years and was not in permanent employment, in view of law laid down in the matter of **Pranay Sethi** (supra), the income of deceased is required to be increased by 40% towards future prospects, which comes to Rs.7,000/- (5000+2000). Accordingly, annual income of deceased for the purpose of calculating compensation comes to Rs.84,000/- (7000x12). Out of this amount, one-third is to be deducted towards personal & living expenses of the deceased and after deducting one-third, annual loss of dependency would come to Rs.56,000/- (84000 - 28000). By applying multiplier of 17, as applied by the Claims Tribunal, to annual loss of dependency, total loss of dependency would come to Rs.9,52,000/- (56000x17). Besides this, appellant No.1, widow of deceased, is entitled for a sum of Rs.40,000/- towards spousal consortium and appellant Nos.2 & 3, minor children of deceased, are entitled for a sum of Rs.40,000/- towards parental consortium, as held by Hon'ble Supreme Court in the matters of Pranay Sethi (supra) and Magma General Insurance Company Limited (supra). In addition to aforesaid amount, the appellants are also entitled to get a sum of Rs.15,000/- for funeral expenses; Rs.15,000/- for loss of estate. Thus, claimants/appellants are entitled for a total sum of Rs.10,62,000/-, instead of Rs.4,31,100/- as awarded by the Claims Tribunal. This amount of compensation shall carry simple 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. Any amount already paid to claimants/appellants as compensation shall be adjusted from the total amount of compensation as calculated above.

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

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

Sd/-
(Parth Prateem Sahu)
Judge

roshan/-