

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR**MAC No. 843 of 2013**

1. Smt. Shabnam Kausar Bano, wd/o late Mohammad Riyaju, aged about 32 years, (widow and legal representative of deceased)
2. Mohammad Suhel son of late Mohammad Riyaju, aged about 13 years, minor through mother Smt. Shabnam Kausar Bano wd/o late Mohammad Riyaju (son and legal representative of deceased)
3. Mohammad Arshad son of late Mohammad Riyaju, aged about 10 years, minor through mother Smt. Shabnam Kausar Bano wd/o late Mohammad Riyaju (son and legal representative of deceased)
4. Mohammad Aman son of late Mohammad Riyaj, aged about 8 years, minor through mother Smt. Shabnam Kausar Bano wd/o late Mohammad Riyaju (son and legal representative of deceased)

All are resident of Luchki Para, Durg, P.S. Durg, Civil & Revenue District Durg C.G.

----Appellants/claimants**VERSUS**

1. T.Agrajan @ Thiyagrajan son of Patedhar (Pataiyadhar), aged about 31 years, resident of C/o Manish Chandrakar son of Shri Ganesh Prasad Chandrakar, aged about 29 years, resident of Sai Borwells, Behind Babulal Rice Mill, Milpara, Diprapara, Durg, P.S. Durg, Civil and Revenue District Durg C.G. **-----Driver**
2. Smt. K.Sumthi w/o K.S. Sarvan (wrongly mentioned as Sarvanan) aged about 35 years, resident of C/o Manish Chandrakar son of Shri Ganesh Prasad Chandrakar, aged about 29 years, resident of Sai Borwells, Behind Babulal Rice Mill, Milpara, Diprapara, Durg, P.S. Durg, Civil and Revenue District Durg C.G. **-----Owner**
3. National Insurance Company limited, Second Floor, 81-D, Chetti Street, in front of Bus Stand (Tiruchengarh), Nanakkal Tamilnadu, through the Branch Office, National Insurance Company Limited, Akashganga Supela, Bhilai District Durg, C.G.

-----Respondents/Non-applicants

For Appellants	: Mr. Saifullah Qureshi, Advocate with Mr. Syed Mazid Ali, Advocate
For respondent No. 3	: Mr. Qamrul Aziz, Advocate

Hon'ble Shri Justice Parth Prateem Sahu**Judgement on Board****03/02/2020**

1. The appellants-claimants have challenged the impugned award dated 10-05-2013 passed by Sixth Additional Motor Accident Claims Tribunal, Durg, C.G. in Claim

Case No. 42/2013, wherein learned Claims Tribunal allowed the claim application in part and awarded a total sum of Rs. 8,71,250/- as compensation in a death case along with interest @ 6% p.a. from the date of filing of claim application till its realization after deducting 50% of the amount towards contributory negligence.

2. Facts of the case relevant for disposal of this appeal are that on 11-02-2011 when Mohammad Riyaju (now deceased) was traveling on his motor cycle bearing registration No. CG.07.F.3329 and going towards Jama Masjid, Durg. When he was going across the Railway over-bridge of Dhamdha, at that relevant time, one Truck (boring machine truck) bearing registration No. KA.07 8727 (hereinafter referred to as "offending truck") driven by respondent No. 1/ non-applicant No. 1 dashed the motor cycle of deceased due to which, he suffered grievous injuries over his person and succumbed to those accidental injuries. The accident was reported to concerned police station, based on which crime bearing No. 92/11 was registered against respondent No. 1/ non-applicant No. 1 for offences punishable under Section 304A of IPC. Appellants-claimants who are widow and children of the deceased filed claim application before the competent Claims Tribunal claiming Rs. 94,00,000/- as total compensation on the ground that on the date of accident, the deceased was doing business of sale of vegetable and other business and thereby earning Rs. 3,00,000/- per annum and after the death of Mohammad Riyaju, they were dependent on the income of the deceased.
3. Non-applicant No. 1 & 2/ respondent No. 1 & 2 submitted their reply to the claim application and denied all the adverse pleadings made in the claim application and pleaded that the report has been lodged by mentioning wrong number of the vehicle, they have been falsely implicated in the criminal case and no accident as pleaded in the claim application took place from the offending truck, in addition to that, they have also pleaded that on the date of accident offending truck was insured with respondent No. 3/ non-applicant No. 3-Insurance Company and if any amount of compensation is awarded to the claimants then the liability will be upon

respondent No. 3/ non-applicant No. 3-Insurance Company.

4. Respondent No. 3/ non-applicant No. 3-Insurance Company submitted its separate reply to the claim application and denied the fact of insurance of offending truck for want of insurance policy, the amount of compensation claimed is on higher side, they have not submitted income tax return of last three years and there is contributory negligence on the part of the deceased as there was head-on-collision between the two vehicles. It was also pleaded that there was violation of conditions of insurance policy as on the date of accident, respondent No. 1/ non-applicant No. 1-driver of the offending vehicle was not possessing valid and effective driving licence, there was no valid permit and fitness of the vehicle.
5. On appreciation of pleadings and evidence placed on record by the respective parties, the learned Claims Tribunal arrived at a finding that the accident took place between the offending truck and motor cycle in which Mohammad Riyaju suffered accidental injuries and succumbed to those injuries. There was no violation of conditions of insurance policy issued in favour of the offending truck, there was contributory negligence to the extent of 50% on the part of the deceased and awarded a total sum of Rs. 8,71,250/- as compensation to the appellants-claimants.
6. Learned counsel for the appellant submits that the learned Claims Tribunal committed error in holding that there was contributory negligence on the part of the deceased also, learned Claims Tribunal also erred in not awarding any amount towards future prospects and further that learned Claims Tribunal assessed income of the deceased on the lower side contrary to the documentary evidence placed on record by the appellants-claimants. On the basis of the aforementioned submissions, learned counsel for the appellant submits that the amount of compensation awarded by the learned Claims Tribunal requires to be suitably enhanced. The learned counsel in support of his submission places reliance on

ruling rendered by the Hon'ble Supreme Court in the matters of **Jiju Kuruvila and others v. Kunjuamma Mohan and others** reported in (2013) 9 SCC 166, **Yerramma and others v. G.Krishnamurthy and another** reported in AIR 2015 SC 1145, **Archit Saini and another v. Oriental Insurance Company Ltd. and others** reported in AIR 2018 SC 1143, **Pramodkumar Rasikbhai Jhaveri v. Karmasey Kunvargi Tak and others** reported in AIR 2002 SC 2864 and **National Insurance Company Ltd. vs. Pranay Sethi** reported in (2017) 16 SCC 680 to buttress his submission.

7. Per contra learned counsel appearing for respondent No. 3-Insurance Company submits that the learned Claims Tribunal has taken note of the spot map (Ext. D-1) and also the fact that the accident occurred due to head-on-collision between two vehicles, therefore the Claims Tribunal has rightly arrived at finding that there was contributory negligence on the part of the deceased also, in the accident. He further submits that the learned Claims Tribunal considered the income tax return submitted by the witness of the appellants-claimants for the last two years which were submitted after the date of accident, therefore, learned Claims Tribunal has rightly not considered the said document as a proof of income of the deceased. He submits that the learned Claims Tribunal has taken into consideration the yearly income tax return placed on record as Ex. P-3, P-4 and P-5 with reference to the average increase of income of the deceased. He submits that the learned Claims Tribunal after taking overall aspects of the case and considering the reliability of evidence placed on record by the respective parties has rightly passed the impugned award and the amount of compensation awarded to the appellants-claimants is just and proper which does not call for any interference.
8. I have heard learned counsel for the parties and perused the record at length.
9. Three main grounds for enhancement of amount of compensation is raised by the learned counsel for the appellant-

- a) wrongly held contributory negligence on the part of the deceased;
- b) assessing the income of the deceased on lower side; and
- c) not awarding any amount of compensation towards future prospects.

10. With respect to the first ground raised by the learned counsel for the appellant that learned Claims Tribunal committed error in holding the deceased to be contributory negligent to the extent of 50%, is concerned, I have perused the documents of criminal case which is copy of F.I.R.(Ex.P-24) lodged by AW-4 and spot map (Ex.D-1), appellants-claimants have examined AW-5- Firoz Rathore who is eye-witness to the accident who stated that he was also traveling from Dhamdha to Durg and deceased Mohammad Riyaju was traveling on motor cycle ahead of him and at that time the offending truck coming from opposite direction driven in rash and negligent manner, on seeing this, deceased stopped his motor cycle on his left side but even then the offending truck dashed him and caused the accident. In his cross examination, he stated that he also informed the accident to police station, Mohan Nagar on telephone and also given photographs of the spot. He also stated that the place of accident was a single road. Other witness examined on behalf of the claimants to prove the accident was AW-4- Mohammad Jawed, who in his cross-examination stated that he has not seen the accident and he himself lodged the F.I.R. on the basis of information received by him from AW-5-Firoz Rathore.

11. Respondent No. 3/ non-applicant No. 3- Insurance Company examined Fagnuram Sinha, Sub Inspector, police station Mohan Nagar, Durg in its support. He in his evidence has stated that Ex. D-3 statement of Firoz Rathore, recorded under Section 161 of Cr.P.C. has not made any statement regarding truck was coming with high speed rashly and negligently, he also stated that witness AW-4 Mohammad Jawed has also not given statement to the police regarding deceased stopped his motor cycle on left side when he saw offending truck oncoming and further stated that at the time of preparation of spot map/ mahazar, Mohammad Jawed was present in cross-examination, this witness stated that Ex. D-2 and D-3

which are statements of Mohd. Jawed and Firoz Rathore do not bear signature of both of them. He also stated that the deceased was on his own side but respondent No. 1/ non-applicant No. 1 driver of the offending truck drove the offending truck rashly and negligently and caused the accident.

12. Apart from this, respondent No. 3/ non-applicant No. 3-Insurance Company has not placed any evidence before the Claims Tribunal to prove the case of contributory negligence on the part of the deceased, the witness examined by Insurance Company as NAW-3(1) Fagnuram Sinha was not an eye-witness to the accident but he has made statement on the basis of the material available in the case diary and marked exhibits. So far as, even the respondent No. 1/ non-applicant No. 1-driver of the offending truck was not examined as witness on behalf of non-applicants/ respondents to prove the fact of contributory negligence, no other eye-witness to the accident was examined in this regard. Furthermore, proof of contributory negligence requires the evidence of high degree particularly the driver of the offending vehicle or any other independent eye-witness to the accident. The spot map solely cannot be taken as the evidence to arrive at a finding regarding contributory negligence on the part of the driver of other vehicle and merely on the basis of the head-on-collision between two vehicles, it cannot be arrived that there was contributory negligence. The issue of contributory negligence has been dealt with by the Hon'ble Supreme Court, particularly the evidence of the spot map before the learned Claims Tribunal for proving contributory negligence in the matter of **Jiju Kuruvila and others** (supra), where the Supreme Court has held thus:

“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.”

13. Another judgment of the Supreme Court while dealing with the issue of contributory negligence in the matter of **Minu Rout and another v. Satya Pradyumna Mohapatra and others** reported in **(2013) 10 SCC 695** and held thus:

“17. The Tribunal, on appreciation of the oral and documentary evidence, has recorded the erroneous finding by placing strong reliance upon the charge-sheet, Ext. 1 without considering the fact that the criminal case was abated against the deceased and further has made observation in the judgment that the appellants had not produced the FIR. Therefore, it has held that there was 50% contributory negligence on the part of the deceased driver in causing accident. 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 section 179 read with Section 302 IPC read with the provisions of the MV 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 eyewitness 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, Ext. 1 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 PW 3 in their cross-examination and placed reliance on them to record the finding on Issue 1.”

In the light of aforementioned law laid down by the Supreme Court, if the facts and circumstances of the present case is considered, it is evident that respondent No. 3/ non-applicant No. 3- Insurance Company has not produced the driver of the offending vehicle as witness nor any other independent eye-witness to the accident to prove the fact of contributory negligence but for placing its reliance on Ext. D-1 Spot map, the Hon'ble Supreme Court has held in the matter of **Jiju**

Kuruville and others (supra) that merely position of the vehicles will not itself sufficient to prove the fact of contributory negligence, but it can be an evidence only to suggest or presume in which manner the accident was caused, 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 of other vehicle.

14. Another ruling rendered by the Supreme Court in the matter of **Pramodkumar Rasikbhai Jhaveri (supra)** and held thus:

“7. The High Court found that there was contributory negligence on the part of the appellant for two reasons. Firstly, the appellant who was driving the car did not slow down his vehicle when he saw that the truck coming at a high speed from the opposite direction was trying to overtake another car ahead of the truck and, secondly, the High Court found that there was a three feet width of the road on the left side of the car of the appellant and on seeing the oncoming truck, the appellant could have swerved his vehicle to the left side.

8. We do not think that these two reasons given by the High Court fully justify the accepted principles of contributory negligence. The question of contributory negligence arises when there has been some act or omission on the claimant's part, which has materially contributed to the damage caused, and is of such a nature that it may properly be described as 'negligence.' Negligence ordinarily means breach of a legal duty to care, but when used in the expression “contributory negligence” it does not mean breach of any duty. It only means the failure by a person to use reasonable care for the safety of either himself or his property, so that he becomes blameworthy in part as an “author of his own wrong”.”

15. The Supreme Court in the matter of **Yerramma and others (supra)** has taken note of its earlier judgment of **Jiju Kuruville and others (supra)** and held that merely on the ground of head-on-collision between two vehicles, it cannot be proved that there is contributory negligence on the part of the driver of other vehicle i.e. deceased and held as under:

“7. Mr. C.B. Gururaj, the learned counsel for the appellants contended that the judgment of this court in *Jiju Kuruville & Ors. v. Kunjamma Mohan & Ors.* [(2013)9 SCC 166] is applicable to the facts of the present case. In the above case, Joy Kuruville(the

deceased) had a head-on collision with a bus approaching from the opposite side. Joy Kuruvila sustained serious injuries and died on the way to the hospital. The Tribunal found that the accident occurred due to the rash and negligent driving of the bus driver. It apportioned the contributory negligence between the driver and the deceased in the ratio of 75:25%. On the basis of the pleadings & evidence on record, in the above said case this Court has held thus on the negligence of the driver of the bus:

'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.

20.6. The post mortem report, Ext. A-5 shows the condition of the deceased at the time of death. The said report reflects that the deceased had already taken meal and his stomach was half-full and contained rice, vegetables and meat pieces in a fluid with strong smell of spirit. The aforesaid evidence, Ext.A-5 clearly suggests that the deceased had taken liquor but on the basis of the same, no definite finding can be given that the deceased was driving the car rashly and negligently at the time of the accident. The mere suspicion based on Ext. B-2 'scene mahazar' and Ext. A-5 post-mortem report cannot take the place of evidence, particularly, when the direct evidence like PW3 (independent eyewitness), Ext. B-1 (FI statement) are on record'

Thus in our view, the contributory negligence apportioned by the Tribunal, which is affirmed by the High Court at 75% on the respondent-Corporation bus driver and 25% on the part of the deceased is erroneous not only with reference to the plea urged by the respondents before the Tribunal and the High Court but also keeping in view the legal principles laid down by this Court on this aspect in the above referred case.

8. The observations made by this Court in the case of Juju Kuruvila (supra) certainly apply to the fact situation on hand. Based on the evidence recorded in the present case, we are of the opinion that there is no contributory

negligence on the part of the deceased but on the other hand the negligence is on the part of the driver of the respondent-Corporation bus.

9. After thorough consideration of the facts and legal evidence on record in the present case, we are of the view that the collision between the motor vehicles occurred when the respondent-Corporation bus was turning to its right side without showing the turn indicator to enter the bus depot. The driver of the offending vehicle of the respondent-Corporation bus was negligent by not giving the right turn indicator and causing the accident. The driver of the respondent-Corporation bus should have been aware of the fact that he was driving the heavy passenger motor vehicle, and that it was necessary for him to take extra care & caution of the other vehicles on the road while taking the turn to enter the depot. Had the driver of the offending vehicle taken sufficient caution and care, slowed down and allowed reasonable provision for other vehicles on the left side of the road to pass smoothly, the accident could have been averted."

16. If in the light of the aforementioned judgments rendered by the Supreme Court, the facts of the present case and the finding recorded by learned Claims Tribunal are taken into consideration. The learned Claims Tribunal after taking the fact of head-on-collision has arrived at a finding that there was contributory negligence to the extent of 50% on the part of the deceased also which cannot be sustainable and it is hereby set aside.

17. So far as the second ground raised by the learned counsel for the appellant that learned Claims Tribunal committed error in assessing income of the deceased on lower side is concerned; I have perused the evidence of AW-3 Shabnam Kausar Bano, who in her evidence stated that before the date of accident, the income of the deceased was Rs. 2,98,218/- per annum. She has also produced copies of the income tax return from 1999-2011. Appellants-claimants have also examined AW-2 Manoj Kumar Tamrakar, who is an Advocate and practicing as Consultant and Advocate of Income Tax and Commercial Tax Department, AW-3 submitted that in Ext. P-1 and P-2 which are income tax return of 2009-10 and 2010-11 are not signed by the deceased and that has been deposited after his death, though he has stated that the documents given by the deceased to him were prior to the date

of accident, but he could not submitted the income tax return prior to his death. He admitted that the income as mentioned in Ext. P-2 has been shown nearly double the income as shown in Ext. P-3 and further that there was difference in the income of different years. Income tax returns of the year 2009-10 and 2010-11, Ext. P-13 and P-14 have been submitted after the death of Mohammad Riyaju. Other important aspect of the case is that the claim application has been filed before the Claims Tribunal on 17-03-2011, the date of submission of income tax return was thereafter.

18. In view of the aforementioned facts and circumstances of the case, particularly, taking note of the fact that the income tax return of the year 2009-10 and 2010-11, Ext. P-13 and P-14 were deposited only after the death of Mohd. Riyaju and that too after filing the claim application before the Claims Tribunal, the submission made by the learned counsel for the appellant that the income as mentioned in the income tax return of the year 2010-11 submitted on 23-03-2011 (Ext. P-13) to be taken into consideration is not sustainable and hereby repelled. For assessing just and proper income of the deceased, income tax return deposited prior to the death the Mohd. Riyaju is required to be taken into consideration which is of the year 2008-09 and 2007-08 Ext. P-15 and P-16 respectively. The total income shown in Ext. P-16 is Rs. 91,255/- and income shown in Ext. P-15 is Rs. 1,39,050/-. 20% of the total yearly income will be deducted towards business expenses, therefore, the total income of the deceased can be taken into consideration as **Rs. 1,11,240/-** [Rs. 179050- 20%]. The appellants-claimants will also be entitled for additional 40% of the established income towards future prospects and on the date of accident as the deceased was below the age of 40 years i.e. 38 years assessed by the learned Claims Tribunal.

19. In view of the above discussion, the impugned award passed by learned Claims Tribunal requires re-consideration and re-calculation which this Court proposes as under.

20. The total yearly income of the deceased is taken as **Rs. 1,11,240/-**, by adding 40% of the established income, the total yearly loss of dependency will come to Rs. 1,55,736/- [Rs. 1,11,240 + 40% of Rs. 1,11,240/-], there will a deduction of 1/4th towards personal and living expenses of the deceased which makes the yearly loss of dependency to the extent of Rs. 1,16,802/-, on the date of accident, deceased was aged of 38 years, therefore, appropriate multiplier will be of 15. By applying appropriate multiplier of 15, total loss of dependency will come to Rs. 17,52,030/- [Rs. 1,16,802 x15]. It is to be seen that the appellants-claimants to be awarded just and proper compensation in the facts and circumstances of the case and the compensation to not be a bonanza to the claimants; in view of the ruling rendered by the Supreme Court in the matter of **Pranay Sethi (supra)**, the appellants-claimants will also be entitled for a sum of Rs. 70,000/- towards other conventional heads. Now the appellants-claimants will be entitled for total amount of compensation of **Rs. 18,22,030/-** [Rs. 17,52,030+Rs.70,000/-] instead of Rs. 8,71,250/-. The aforementioned amount of compensation will carry interest @ 6% per annum from the date of filing of claim application till its realization. Other conditions imposed by the learned Claims Tribunal will remain intact.

21. Consequently, the appeal is allowed in part and the impugned award is modified to the extent as indicated hereinabove.

Sd/-
(Parth Prateem Sahu)
Judge