

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR
MAC No.1044 of 2013

1. Smt. Rukmani Bai Wd/o Late Tiku Ram Aged About 43 Years.
 2. Ku. Urwashi D/o Late Tiku Ram Aged About 19 Years.
- Both are Caste – Patel, R/o Sikola Basti Ward, P.S. Mohan Nagar,
Tah. Durg, Civil & Revenue Distt. Durg, District – Durg, C.G.

---- **Appellants**

Versus

1. Deepak Kumar S/o Annulal Aged About 28 Years R/o Sukhai, Post and P.S. Durgkondal, Tah. Uttar Bastar Kanker, Civil & Revenue Distt. Uttar Bastar Kanker, District Uttam Bastar Kanker, C.G.
2. Jeevan Lal S/o Mohan Lal, Caste- Ware, C/o Shyam Mohan, S.T.D./P.C.O. and Auto Parts Durgkandal, Tah. and Distt. Uttar Bastar Kanker C.G.
3. Branch Manager, The New India Insu. Co. Ltd., Thakkar Bhawan, G.E. Road, Bhilai, Tah & Distt. Bhilai, C.G.

---- **Respondents**

Appellant	: Shri Kunal Das, Advocate.
Respondent No.1 & 2	: None.
Respondent No.3	: Shri Qamrul Aziz, Advocate.

Hon'ble Shri Justice Parth Prateem Sahu
Judgment on Board

03.02.2020

1. Appellants/claimants have preferred this appeal under Section 173 of the Motor Vehicles Act, 1988 (for short 'the Act of 1988') for enhancement of compensation awarded by learned 5th Additional Motor Accident Claims Tribunal, Durg (for short 'the Tribunal') vide award dated 27.8.2013 passed in Claim Case No.77/2012.
2. As against the total compensation of Rs.22,00,000/- claimed by appellants/claimants by filing a claim petition under Section 166 of the Act of 1988 for the death of Shankar, son & brother of claimants respectively, in the motor accident dated 27.6.2010, the Tribunal awarded a total compensation of Rs.2,37,300/- along with interest @ 7% per annum from the date of filing of application till its realization,

after deducting 30% of the amount of compensation towards contributory negligence.

3. Brief facts, relevant for disposal of this appeal are that on 27.06.2010, Rakesh Patel (deceased) along with his friend Ramesh Netam was going towards Durg from Bhilai on Motorcycle bearing registration No.CG07/LJ/3316. Rakesh Patel was traveling as 'pillion rider', whereas Ramesh Netam was driving the motorcycle. When they were turning towards Malvia Nagar Chowk Durg Station, at that relevant time one Maruti Van bearing registration No.CG04-HB-5894, (hereinafter referred as "offending vehicle"), driven by Non-applicant No.1/Deepak Kumar, dashed against their motorcycle from back side, as a result Rakesh Patel suffered grievous injuries. He was taken to the District Hospital, where, during the course of treatment, he succumbed to his injuries. Accident was reported to PS- Mohan Nagar, Distt. Durg, based on which, crime bearing No.236/10 was registered against driver of offending vehicle.
4. Claimants, who are mother and sister of deceased, filed claim application under Section 166 of the Act of 1988 before the competent Claims Tribunal claiming an amount of Rs.22,00,000/- as compensation on account of death of the deceased.
5. Non-applicant Nos.1 & 2, driver & owner of offending vehicle, jointly submitted their reply to claim application and denied all adverse pleadings made against them. It was pleaded that on the date of accident, the offending vehicle was insured with non-applicant No.3/ Insurance Company and non-applicant No.1 (driver of offending

vehicle) was possessing valid & effective driving license to drive the offending vehicle, therefore, liability, if any, for payment of amount of compensation would be on Insurance Company and prayed that they may be exonerated from liability.

6. Non-applicant No.3/Insurance Company submitted reply to claim application, denied all adverse pleadings made therein and pleaded that information of accident was not given to the Insurance Company. It was further pleaded that on the date of accident, offending vehicle was being plied in breach of essential conditions of Insurance Policy as driver of offending vehicle was not having valid and effective driving license and there was no valid permit and fitness certificate with the said vehicle. It was also pleaded that accident took place due to head-on collusion between two vehicles and thus there was contributory negligence on the part of deceased also. In these circumstances, Insurance Company is not liable to indemnify insured.

7. On appreciation of pleadings and evidence placed on record by the respective parties, the learned Tribunal arrived at a conclusion that accident took place on account of rash and negligent driving of non-applicant No.1 (driver of offending vehicle), in which Rakesh Patel died. The Tribunal after recording a finding that there was contributory negligence on the part of occupants of motorcycle, deducted 30% of the amount of compensation. On the basis of above finding, the Tribunal allowed claim application in part, awarded total sum of Rs.2,37,300/- as compensation to claimants.

8. Learned counsel appearing for the claimants/appellants submits that the Tribunal erred in holding Rakesh Patel (deceased) to be contributory negligent to the extent of 30% in the accident because on the date of accident, Ramesh Netam was driving motorcycle and Rakesh Patel (deceased) was traveling as "pillion rider", therefore, he cannot be held to be contributory negligent in the accident. He further submits that the Tribunal committed error in assessing income of deceased as Rs.3,000/- per month only without taking into consideration the price index of the relevant period in Bhilai, Distt. -Durg. The Tribunal has also committed error in not awarding any amount towards loss of future prospects. The amount awarded towards other conventional heads is also on lower side. On the aforesaid grounds, he prays that the amount of compensation awarded to claimants be enhanced suitably by modifying the impugned award.

9. Per contra, learned counsel for respondent No.3/Insurance Company submits that the Tribunal has recored a finding that at the time of accident, three persons were traveling on motorcycle, whereas seating capacity of the motorcycle is only two, therefore, the Tribunal has not committed any error in holding the deceased to be contributory negligent to the extent of 30%. He also submits that as the claimants have failed to produce any cogent and reliable piece of evidence in support of their claim with regard to income of deceased, therefore, the Tribunal has rightly assessed income on notional basis, which cannot said to be erroneous. He further submits that the Tribunal has rightly taken into consideration the evidence and

materials placed on record by appellants/claimants and awarded just and proper amount of compensation, which does not call for any interference.

10.I have heard learned counsel for the parties and perused the records.

11. So far as the first ground raised by learned counsel for appellants that since on the date of accident Ramesh Netam was driving motorcycle and Rakesh Patel (deceased) was traveling as “pillion rider”, the deceased cannot be held to be contributory negligent, is concerned, from the contents of Dehati Nalisi ie Ex.P/3, it is apparent that on the date of accident, Ramesh Netam was driving motorcycle and not the deceased. Smt. Rukmani Bai (mother of deceased) was examined as AW-1 and she has stated in her evidence that on the date of accident, his son (Rakesh Patel) was traveling with Ramesh Netam on his motorcycle. The Tribunal has not recorded any specific finding as to who was driving motorcycle at the relevant point of time, but considering the fact that three persons were traveling on motorcycle, has held that there was contributory negligence on the part of deceased to the extent of 30%. However, in the light of the contents of Dehati Nalisi as well as evidence of AW-1, it is clear that on the date accident, deceased was not driving the motorcycle and he was traveling as “pillion rider”.

12.No eye-witness of accident has been examined by the non-applicants.

13. Yogesh Dubey (AW-3) was examined on behalf of the claimants as an eyewitness to the accident. Although this witness has stated that he saw the accident and at the time of accident, indicators of motorcycle were on, but in his cross-examination he has stated that he reached the spot immediately after the accident. This witness has also admitted that he was coming behind the offending vehicle and that he saw the accident from the distance of about three meters.

14. Thus, it is apparent that no eye-witness was examined before the Tribunal regarding the accident in question. Even the Insurance company, who has taken the plea of contributory negligence on the part of the deceased, did not examine any independent witness nor driver of offending vehicle has been brought to the witness box before the Tribunal. The contributory negligence is a fact which is required to be proved by the party raising the plea of contributory negligence by placing cogent, reliable & legal piece of evidence before the Tribunal. In the instant case, Insurance Company utterly failed to examine any witness before the Tribunal to prove the plea of contributory negligence. Even considering the contents of Dehati Nalisi, it appears that on the date of accident, motorcycle was being driven by Ramesh Netam and not by deceased.

15. The issue of involvement of two vehicles in an accident where deceased was not driver of any of the vehicles was considered by the Hon'ble Supreme Court in the matter of **T. O. Anthony v. Karvarnan and others**¹ and held thus:-

¹ (2008) 3 SCC 748

“6. “Composite negligence” refers to the negligence on the part of two or more persons. Where a person is injured as a result of negligence on the part of two or more wrongdoers, it is said that the person was injured on account of the composite negligence of those wrongdoers. In such a case, each wrongdoer is jointly and severally liable to the injured for payment of the entire damages and the injured person has the choice of proceeding against all or any of them. In such a case, the injured need not establish the extent of responsibility of each wrongdoer separately, nor is it necessary for the court to determine the extent of liability of each wrongdoer separately. On the other hand where a person suffers injury, partly due to the negligence on the part of another person or persons, and partly as a result of his own negligence, then the negligence on the part of the injured which contributed to the accident is referred to as his contributory negligence. Where the injured is guilty of some negligence, his claim for damages is not defeated merely by reason of the negligence on his part but the damages recoverable by him in respect of the injuries stand reduced in proportion to his contributory negligence.

7. Therefore, when two vehicles are involved in an accident, and one of the drivers claims compensation from the other driver alleging negligence, and the other driver denies negligence or claims that the injured claimant himself was negligent, then it becomes necessary to consider whether the injured claimant was negligent and if so, whether he was solely or partly responsible for the accident and the extent of his responsibility, that is, his contributory negligence. Therefore, where the injured is himself partly liable, the principle of “composite negligence”

will not apply nor can there be an automatic inference that the negligence was 50:50 as has been assumed in this case. The Tribunal ought to have examined the extent of contributory negligence of the appellant and thereby avoided confusion between composite negligence and contributory negligence. The High Court has failed to correct the said error.”

16. In the light of aforementioned law laid down by the Hon'ble supreme Court that contributory negligence would be applicable to driver of vehicle and not to its occupants and considering the facts of the case, where it has not been brought on record by Insurance company by placing cogent and reliable piece of evidence that on the date of accident, it was deceased who was driving the motorcycle, but contrary it is appearing from the Dehati Nalisi that on the date of accident, motorcycle was driven by Ramesh Netam not by deceased, therefore, the finding arrived by the Tribunal that the deceased was also contributory negligent to the extent of 30% is not sustainable and is hereby set aside.

17. Coming to second submission made by learned counsel for claimants/ appellants that the Tribunal committed error in fixing income of deceased as Rs.3,000/- per month ie Rs.36,000/- per year. It is true that the appellants have not placed any cogent and reliable piece of evidence on record to prove income of deceased. Though the claimants have called Dhamendra Lohda, said to be employer of deceased, who in his evidence stated that on the date of accident, he was paying Rs.6,000/- per month to the deceased towards salary, but the said witness also failed to produce any documentary evidence i.e. payment register or pay slip etc. before

the Tribunal. In such a situation, the evidence of claimants cannot be taken into consideration as proof of income of deceased.

18. When there is no documentary proof of earning/wages of any person, then income is to be assessed on notional basis. As accident took place in the year 2010, therefore, income of deceased is to be taken on the basis of minimum wages prevailing in the concerned District where deceased was residing and doing work for earning his livelihood. As engagement and income of deceased has not been proved, therefore, engagement of deceased is to be presumed as a 'Labour' and looking to the date of accident, it would be proper to assess monthly income of deceased at Rs.3,500/-.

19. On the date of accident, deceased was aged about 25 years, but the Tribunal has not awarded any amount towards future prospects. The issue with respect of award of future prospects has been dealt with and decided by Hon'ble Supreme Court in the matter of **National Insurance Co. Ltd. v. Pranay Sethi**², wherein it has been held that in case the deceased was below the age of 40 years and not in permanent employment, an addition of 40% of actual income of deceased towards future prospects should be made. Relevant paragraph of the said judgment reads 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

² (2017) 16 SCC 980

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.”

20. Indisputably, in case at hand, on the date of accident, deceased was aged about 25 years of age, hence, this Court is of the considered opinion that appellants/claimants are entitled for an addition of 40% of established income i.e. Rs.3,500/- in the income of deceased.

21. In view of above, this Court proposes to recalculate and reassess the amount of compensation.

22. For the purpose of calculating compensation, income of deceased is taken as Rs.3,500/- per month as above, and by adding 40% of the income towards future prospects, which comes to Rs.1,400/- (40% of 3500), total monthly income of deceased is assessed at Rs.4,900/- (3500 + 1400) and accordingly yearly income would come to Rs.58,800/- (4900X12). As on the date of accident, deceased was bachelor, 50% amount is to be deducted towards his personal and living expenses. After deducting 50%, annual loss of dependency comes to Rs.29,400/- (58800 – ½). As at the time of accident, deceased was aged about 25 years, therefore, in view of law laid down in the matter of **Sarla Verma (Smt.) and others v. Delhi Transport Corporation and Anr**³, multiplier of 18 would be applicable. By applying multiplier of 18 loss of dependency will come to Rs.5,29,200/- (29400 X18). Besides this, appellants will also be entitled for a sum of Rs.30,000/- towards other conventional heads.

23. Now appellants/claimants will be entitled for a total sum of **Rs.5,59,200/-** (529200+30000) instead of **Rs.2,37,300/-** as awarded by the Tribunal. This amount of compensation will carry interest @ 7% p.a. from the date of application till its realization. Rest of the conditions of impugned award shall remain intact.

24. In the result, appeal is allowed in part and the impugned award stands modified to the extent as indicated herein-above.

Sd/-

(Parth Prateem Sahu)
Judge