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HIGH COURT OF CHHATTISGARH BILASPUR

M. A. (C) No. 1202 of 2013

(Arising out of award dated 28.10.2013 passed in Claim Case No.10 of 2013 by the Additional Motor Accident Claims Tribunal North Bastar, Kanker, Chhattisgarh)

1. Smt. Manju Kunjam Wd/o Late Homan Singh Kunjam, aged about 36 years.
2. Ku. Garima Kunjam D/o Late Homan Singh Kunjam, aged about 1½ years.
3. Charan Singh Kunjam S/o Late Jagmohan Singh Kunjam, aged about 59 years.
4. Ku. Chandrapriya Kunjam D/o Late Homan Singh Kunjam, aged about 10 months.

   Appellant No.2 & 4 are minor, through their natural guardian mother namely Smt. Manju Kunjam

   All are R/o Khartha, Post Charama, Tahsil Charama, District North Bastar Kanker (C.G.).

---- Appellants

Versus

1. Maan Singh Dhruv S/o Kunjal Singh Dhruv, aged about 42 years, R/o Village Adiya Colony Boriya (Santoshi Nagar Raipur) Tahsil and District Raipur (C.G.).

   (Driver of alleged vehicle bearing registration No.C.G.-17-H-2393).
2. Jagbandhu Sajan S/o Kali Prasad Sajan, R/o Guru Govind Singh Ward, Geedam Road, Parpa Naka Chowk, Jagdalpur, Tahsil and District Jagdalpur (C.G.).

   (Owner of alleged vehicle bearing registration No.C.G.-17-H-2393).
3. Bhartiya Axa General Insurance Company Limited, Branch Office 3rd Floor, Khichriya Complex, Nehru Parisar, Bhilai Nagar, Tahsil Bhilai, District Durg (C.G.).

   (Insurer of alleged vehicle bearing registration No.C.G.-17-H-2393).

---- Respondents

For Appellants	: Shri Anil Gulati, Advocate
For Respondent No.1 & 2	: None
For Respondent No.3	: Shri Bhavesh Acharya, Advocate

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

Judgment on Board

Per Parth Prateem Sahu, Judge

15.07.2020

1. Appellants/claimants have filed this appeal under Section 173 of the Motor Vehicles Act, 1988 (hereinafter referred to as 'M.V. Act') challenging the award dated 28.10.2013 passed by the Additional Motor Accident Claims Tribunal North Bastar, Kanker, Chhattisgarh (hereinafter referred to as 'Claims Tribunal') in Claim Case No.10 of 2013 whereby learned Claims Tribunal allowed the claim application in part and awarded a total sum of Rs.8,71,000/- as compensation after deducting 50% of the calculated amount of compensation towards contributory negligence.

2. Brief facts relevant for disposal of this appeal, are that, the on 23.01.2011, at about 3.00 P.M., Homan Singh Kunjam was travelling on his motorcycle bearing registration No.CG07/LL/3258 to his village Charama on National Highway Road No.43, on the way, when he parked his motorcycle on the side of the road to answer natures' call, at that relevant time, one truck bearing registration No.CG17/H/2393 (hereinafter referred to as 'offending truck') driven by respondent No.1 dashed his motorcycle. In the

aforementioned accident, Homan Singh Kunjam suffered grievous injuries over his person and succumbed to those injuries on the spot. The accident was reported to the concerned Police Station, based on which, Crime No.20 of 2011 for the offence punishable under Section 304A of IPC was registered.

3. Appellants/claimants, who are widow, children and father of the deceased Homan Singh Kunjam filed an application under Section 166 (1) of M.V. Act seeking compensation of Rs.66,25,000/- on account of untimely motor accidental death of Homan Singh Kunjam.

4. Non-applicants No.1 and 2, who are driver and owner of the offending truck filed reply to claim application mentioning therein that on the date of accident, deceased Homan Singh Kunjam has consumed liquor and driving his motorcycle at a high speed negligently and dashed the offending truck, driven by non-applicant No.1. It was pleaded that deceased Homan Singh Kunjam himself was negligent and liable for the accident; on the date of accident, non-applicant No.1, driver of the offending truck was possessing valid and effective driving licence to drive the vehicle and offending truck was insured with respondent No.3/Insurance Company, the liability, if any, to pay the amount of compensation would be on the Insurance Company.

5. Non-applicant No.3/Insurance Company submitted separate reply to claim application pleaded therein that the First Information Report was lodged on false and frivolous facts and the claimants are not the legal representative of the deceased Homan Singh Kunjam. It was further pleaded that the claimants were compensated by the Department of the deceased and appellant No.1/claimant No.1 has got compassionate appointment, from it, she is maintaining her family. It was further pleaded that the accident took place on account of negligence on the part of the deceased himself and principle of contributory negligence is attracted in the facts and circumstances of the case and there was breach of conditions of the insurance policy as non-applicant No.1, driver of the offending truck was not possessing valid and effective driving licence.

6. Learned Claims Tribunal based on the pleadings of respective parties, formulated as many as six issues for consideration. On appreciation of the pleadings, evidence and material placed on record by the respective parties, learned Claims Tribunal held that the death of Homan Singh Kunjam was as a result of motor accidental injury suffered by him on account of rash and negligently driving of the offending truck by non-applicant No.1; there was no breach of conditions of insurance policy; there was contributory

negligence on the part of the deceased and awarded a total sum of Rs.8,71,000/- as compensation.

7. Shri Anil Gulati, learned counsel for the appellants/claimants submits that learned Claims Tribunal erred in assessing the income of deceased as Rs.13,800/- only ignoring the proved income of deceased as Rs.25,180/- by producing salary slip before the learned Claims Tribunal. He further submits that the reasons assigned for taking only the basic salary of deceased for computing the amount of compensation considering the compassionate appointment given to appellant No.1 to be erroneous in view of the dictum of Hon'ble Supreme Court in the matter of **Vimal Kanwar and others v. Kishore Dan and others** reported in **(2013) 7 SCC 476.** He further submits that learned Claims Tribunal further erred in not awarding any amount towards future prospects and that meager amount has been awarded towards other conventional heads. It is further contended that the findings arrived by learned Claims Tribunal of contributory negligence is without any evidence. Mere mention of detecting smell of alcohol in stomach will itself not sufficient to hold that the deceased was driving his vehicle rashly and negligently. He places his reliance on the case law of Hon'ble Supreme Court between **Jiju Kuruvila and Others v. Kunjujamma Mohan and Others** reported in **(2013) 9 SCC 166** in support of his submission.

8. Per contra, Shri Bhavesh Acharya, learned counsel for respondent No.3/Insurance Company submits that learned Claims Tribunal has rightly assessed the income of deceased as Rs.13,800/- per month i.e. basic salary because appellant No.1 has been given compassionate appointment against the death of deceased Homan Singh Kunjam. He further submits that award of amount on other conventional heads making the compensation of Rs.8,71,000/- is just and proper. It was further contended that there was contributory negligence on the part of the deceased Homan Singh Kunjam himself as in the postmortem report (Ex. P/6), there is specific mentioning about smell of alcohol coming out form the stomach of deceased. It is also pointed out that so-called eyewitness was the brother of appellant No.1, therefore, his evidence cannot be taken to be gospel truth and submits that learned Claims Tribunal justified in holding the deceased to be contributory negligent to the extent of 50%.

9. We have heard learned counsel appearing for the respective parties and perused the record carefully.

10. So far as the first ground taken by learned counsel for the appellant with regard to assessing the income of deceased as Rs.13,800/- per month only is concerned, to prove the income of deceased, the claimants have placed on record

the salary slips of the deceased as Exs. P/9 and P/10-C wherein the income of deceased is shown as Rs.25,180/- (gross salary) and showing basic pay as Rs.13,800/-. To prove Exs. P/9 and P/10-C, claimants have examined one Gopal Singh Thakur (AW-3) Teacher, who in his evidence has stated that gross salary of the deceased is Rs.25,180/- and after deductions, it will come to Rs.21,876/-. So far as deduction of salary of the Government servant is concerned, the income of the deceased shall be considered as gross salary minus income tax, therefore, the income of the deceased as gross salary is to be taken as Rs.25,180/- per month (income tax will be deducted later on total income). Learned Claims Tribunal has not disbelieved the salary slips and evidence of Gopal Singh Thakur (AW-3), but considering the compassionate appointment of appellant No.1 has taken the income of deceased for the purpose of calculating amount of compensation as Rs.13,800/- (basic pay).

11. The Hon'ble Supreme Court in the matter of **Vimal Kanwar** (supra) has considered the issue with regard to whether salary received by claimant on compassionate appointment comes within the periphery of 'pecuniary advantage' on account of motor accidental death and liable to be deducted and held thus :

> “20. The second issue is “whether the salary receivable by the claimant on compassionate

> appointment comes within the periphery of the Motor Vehicles Act to be termed as "Pecuniary Advantage" liable for deduction."
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> 21. "Compassionate appointment" can be one of the conditions of service of an employee, if a scheme to that effect is framed by the employer. In case, the employee dies in harness i.e. while in service leaving behind the dependents, one of the dependents may request for compassionate appointment to maintain the family of the deceased employee dies in harness. This cannot be stated to be an advantage receivable by the heirs on account of one's death and have no correlation with the amount receivable under a statute occasioned on account of accidental death. Compassionate appointment may have nexus with the death of an employee while in service but it is not necessary that it should have a correlation with the accidental death. An employee dies in harness even in normal course, due to illness and to maintain the family of the deceased one of the dependents may be entitled for compassionate appointment but that cannot be termed as "Pecuniary Advantage" that comes under the periphery of Motor Vehicles Act and any amount received on such appointment is not liable for deduction for determination of compensation under the Motor Vehicles Act."

12. The Hon'ble Supreme Court in **Vimal Kanwar** (supra) has held that the salary received from the compassionate appointment cannot be considered to be an advantage

receivable by heirs on account of employee's death in motor accident.

13. In view of aforementioned law laid down by Hon'ble Supreme Court, learned Claims Tribunal erred in taking only basic pay of deceased as him income and not considering the gross salary of the deceased as his income for the purpose of calculating the amount of compensation, in the considered opinion of this Court, gross income minus income tax of the deceased will be taken as his income for the purpose of calculating the amount of compensation.

14. So far as the next ground taken by learned counsel for the appellants that no amount was awarded towards future prospect is concerned, perusal of paragraph-14 of the impugned award would show that learned Claims Tribunal after assessing the income of deceased as Rs.13,800/- per month and Rs.1,65,600/- per annum, deducted 1/3rd amount towards personal and living expenses and after applying the multiplier of 15, calculated the total loss of earning as Rs.16,56,000/-. The appellant on the date of accident was aged about 40 years. As per the law laid down by Hon'ble Supreme Court in **National Insurance Company Limited v. Pranay Sethi and Others** reported in **(2017) 16 SCC 680** there will be addition of 30% towards future prospects.

15. Learned Claims Tribunal awarded a sum of Rs.40,000/- towards loss of estate and love and affection and Rs.3,000/- towards funeral expenses, which is on the lower side in view of the law laid down by Hon'ble Supreme Court in the matters of **National Insurance Co. Ltd. v. Pranay Sethi** reported in **(2017) 16 SCC 680** and **Magma General Insurance Company Limited v. Nanu Ram Alias Chuhru Ram and Others** reported in **(2018) 18 SCC 130**.

16. In view of above amount of compensation to be awarded to the appellants/claimants requires re-computation, which this Court is proposes in the following terms :

17. The income of deceased as per salary slip will be taken as Rs.25,180/- and yearly income will come to Rs.3,02,160/- (25,180 x 12). After adding 30% in gross salary towards future prospects, total yearly salary will be Rs.3,92,808/- (3,02,160 + 90,648). From the yearly income of deceased, there will be statutory deduction towards income tax. In the year 2011 according to income tax slab, income upto Rs.1,90,000/- is exempted and on the income exceeding between Rs.1,90,000/- to 5,00,000/-, 10% of the said income is required to be paid as income tax.

18. In view of above, from the yearly income of deceased, after deducting 1,90,000/- towards exemption, taxable income comes to Rs.2,02,808/-. There will be a tax @ 10% on the

taxable income. After deducting 10% towards income tax i.e. Rs.20,280.8, rounded off to Rs.20,281/- (2,02,808 x 10%), the net income of the deceased will come to Rs.3,72,527/- per annum (3,92,808 – 20,281). There will be a deduction of 1/3rd towards personal and living expenses of the deceased because father of the deceased cannot be treated to be dependant upon him and after deducting 1/3rd towards personal and living expenses i.e. Rs.1,24,175.6 rounded off to Rs.1,24,176/- (3,72,527 / 3), yearly loss of dependency of the claimants will come to Rs.2,48,351/- (3,75,527 – 1,24,176). On the date of accident, age of the deceased is shown to be 40 years, therefore, in view of law laid down by Hon'ble Surpeme Court in the matter of **Sarla Verma (Smt.) and others v. Delhi Transport Corporation and another** reported in **(2009) 6 SCC 121**, appropriate multiplier will be 15. By applying the multiplier of 15, the amount of compensation will come to Rs.37,25,265/- (2,48,351 x 15).

19. Apart from the above amount of compensation, the claimants are entitled for a sum of Rs.40,000/- towards parental consortium (payable to children because of the death of parents), Rs.40,000/- towards spousal consortium (payable to the spouse because of the death of the partner) and Rs.40,000/- towards filial consortium (payable to the parents because of the death of children) in view of law laid down by Hon'ble Supreme Court in the matter of **Magma**

General Insurance Company Limited (supra). The claimants are also entitled for a sum of Rs.15,000/- towards loss of estate and Rs.15,000/- towards loss of funeral expenses. Though the death was instantaneous, we award a further sum of Rs.10,000/- towards pain and suffering.

20. On the basis of above recalculation, now the appellants/ claimants will be entitled for a total compensation of Rs.38,85,265/- (37,25,265 + 40,000 + 40,000 + 40,000 + 15,000 + 15,000 + 10,000).

21. So far as the other ground raised by learned counsel for the appellants that learned Claims Tribunal erred in deducting 50% of the amount towards contributory negligence without any evidence is concerned, the claimants in their claim application have pleaded that accident was on account of rash and negligent driving of the Truck by respondent No.1. Respondent No.1 in reply to claim application denied the time of accident at 3.00 PM and further pleaded that the deceased driver of motorcycle had consumed excess liquor and motorcycle was driven in high speed rashly and negligently. In evidence, the driver of the truck Maan Singh Dhruv (NAW-1) stated in-chief examination that he parked his vehicle on his own side and parking lights were on. The motorcycle coming from opposite direction dashed the truck. There is no such pleading in his reply to claim application.

22. Copy of First Information Report is filed as Ex. P/2, in which, time of accident is shown as 15.00 hours and the truck was travelling from Kanker towards Charama. Spot map is also available on record as Ex. P/4, in which, place of accident is shown as extreme right side of the truck. True it is that the spot map/scene mahazar will itself not sufficient to proof the place, but it can be taken into consideration to weigh the credibility of the witness. The statement of Maan Singh Dhruv (NAW-1) driver of truck appears to be false in view of the denial of time of accident contrary to the time mentioned in the First Information Report. His statement that the vehicle is parked on his own side with indicator lights because there is no such pleadings in the reply filed by him. The statement of consumption of liquor appears to be based on the postmortem report (Ex. P/5). From the above facts and evidence available on record, the evidence of Maan Singh Dhruv (NAW-1) do not appear to be trustworthy and acceptable.

23. In postmortem report (Ex. P/5), it is only mentioned that the 'alcoholic smell coming from stomach', there is no mention of the quantity or noting that deceased consumed excessive liquor. In these circumstances, looking to the pleading in claim application and contents of First Information Report about direction of movement of both the vehicles and the place of offending vehicle shown in spot map i.e. its extreme

right (right corner of road), the case of the appellants and their evidence cannot be ignored. More so, when the non-applicant if taken the plea of contributory negligence then it is their burden to prove it by placing cogent and reliable piece of evidence. In this case, except the statement and reply of Maan Singh Dhruv (NAW-1), there is no other material brought on record to show that the deceased was in any manner negligent except the alcoholic smell from stomach mentioned in the postmortem report (Ex. P/5).

24. The Hon'ble Supreme Court in the matter of **Jiju Kuruvila** (supra) has considered the issue of contributory negligence in a case where 'alcoholic smell from stomach' was found and held that merely postmortem report mentioning alcoholic smell and spot map/scene mahazar itself not be an evidence to prove the negligence of the deceased and held thus

> “20.3 Ext. A-1, FIR registered by Pampady Police against the bus driver P.C. Kurian under Sections 279, 337 and 304-A IPC shows that the accident occurred due to rash and negligent driving on the part of the bus driver. After investigation, the police submitted a charge-sheet (Ext. A-4) against the bus driver under Sections 279, 337 and 304-A IPC with specific allegation that the bus driver caused the death of Joy Kuruvila due to rash and negligent driving of the bus on 16-4-1990 at 4.50 p.m. In view of the direct evidence, the Tribunal and the

> High Court held that the accident occurred due to rash and negligent driving on the part of the bus driver.
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> 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 as 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 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 PW 3 (independent eyewitness), Ext. A-1 (FIR), Ext. A-4 (charge-sheet) and ext. B-1 (FI statement) are on record.
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> 21. In view of the aforesaid, we, therefore, hold that the tribunal and the High Court erred in concluding that the said accident occurred due to the negligence on the part of the deceased as well, as the said conclusion was not based on evidence but based on mere presumption and surmises.”

25. In this case, the evidence of Maan Singh Dhruv (NAW-1) driver of truck was held to be not reliable because of his improvement in evidence, from the pleading in reply, even not accepting the time of accident mentioned in the First

Information Report and making statement contrary to the spot map about the place of the truck found after accident. He has not stated that the spot map (Ex. P/4) is not correctly prepared.

26. In view of the above facts, evidence and dictum of Hon'ble Supreme Court in case of **Jiju Kuruvila** (supra), we are of the view that learned Claims Tribunal erred in recording a finding of contributory negligence, which is not sustainable and is hereby set aside.

27. For the foregoing reasons, the appeal is allowed in part. Now the appellants are entitled for the amount of compensation of Rs.38,85,265/- instead of Rs.8,71,000/-. The amount of compensation will carry interest at the rate of 6% per annum from the date of filing of the claim application till realization. Out of the enhanced amount of compensation, Rs.15,00,000/- be kept in fixed deposit for a period of five years and rest of the amount to be disbursed according to the ratio fixed by the learned Claims Tribunal. Other conditions imposed by the learned Claims Tribunal will remain intact. Impugned award is modified accordingly.

Sd/-

(P. R. Ramachandra Menon)
Chief Justice

Sd/-

(Parth Prateem Sahu)
Judge

Yogesh