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HIGH COURT OF CHHATTISGARH, BILASPUR

MAC No. 736 of 2014

- Sri Ram General Insurance Company Limited E.B.E.P.I.P. Riico Industrial Area, Sitapura, Jaipur, 302022 Rajasthan, Rajasthan **---- Appellant**

Versus

1. Smt.Poonam Singh, W/o Late Bhagwan Singh Aged About 28 Years
2. Himansu, S/o Late Bhagwan Singh, Aged About 10 Years
3. Prianshu, S/o Late Bhagwan Singh, Aged About 7 Years
4. Dipanshu, S/o Late Bhagwan Singh, Aged About 4 Years

   Appellants 2 to 4 through Poonam Singh, Natural guardian, mother, w/o late Bhagwan Singh
5. Kamlabai W/o Dham Singh Aged About 62 Years

   All are R/o Kodwagondan, Thana- Kukadur, Tah. Pandaria, Distt. Kabirdham C.G., District : Kawardha (Kabirdham), Chhattisgarh
6. Mohit Patel S/o Banshi Patel Aged About 22 Years R/o Kodwagondan, Thana- Kukadur, Tah. Pandaria, Distt. Kabirdham Chhattisgarh (Driver of Tractor No.CG-04-D-8731 and Trolley CG-04-D-8732)
7. Sunil Maravi S/o Nain Singh Aged About 45 Years R/o Kodwagondan, Thana- Kukadur, Tah. Pandaria, Distt. Kabirdham Chhattisgarh (Owner of Tractor No.CG-04-D-8731 and Trolley CG-04-D-8732)

---- Respondents

For Appellant	:	Shri Deepak Gupta, Advocate
For Respondents-1 to 5	:	Shri CB Kesharwani, Advocate
For Respondents- 6 & 7	:	Shri Sandeep Shrivastava, Advocate

Hon'ble Shri Justice Parth Prateem Sahu

Order on Board

13.03.2020

1. Appellant /Insurance Company has challenged the legality and validity of the impugned award dated 08.01.2014 passed in Claim Case No.107 of 2012 by Motor Accident Claims Tribunal, Kabirdham (Kawardha), Chhattisgarh (for short, 'Claims Tribunal'), wherein learned Claims Tribunal allowed the Claim application in part and awarded a total sum of Rs.3,47,000/- as compensation along with interest @ 7.5% from the date of filing of claim application till its realisation.

2. Facts of the case, in a nutshell, are that on 02.10.2010 at about 1 am (midnight) Bhagwan Singh (since deceased) was travelling on Tractor bearing No.CG-04-B-8731 & Trolley bearing No.CG-04-B-8732 (for short, "offending vehicle") for bringing electricity poles along with Bihari, Shyamlal, Rambaros, Mithan Das and driver of the tractor i.e. non-applicant-1 to village Piparmati. While they were returning to village Kodwakodan after loading the electricity poles on the offending vehicle, on the way offending vehicle turned turtle. In the said accident, Bhagwan Singh came under the electricity poles loaded on the tractor-trolley, suffered grievous injury on his head and succumbed to injuries on the spot. The accident was reported to concerned police station, based on which Crime No.242/2010 was registered against Non-Applicant-1, driver of offending vehicle.

3. Claimants / Respondents 1 to 4 filed claim application under Section 166 of Motor Vehicle Act 1988, claiming total compensation of Rs.32,14,000/- on account of motor accidental death of late Bhagwan Singh (Husband of Respondent No.1 and Father of Respondents 2 to 4). In the claim application, they have pleaded that on the date of accident deceased was working as labour and earning Rs.200/- per day and also doing agricultural activities after taking the land on lease from agriculture land owners. They have further pleaded that they were dependent on the deceased.

4. Non-applicants 1 and 2 who are driver and owner of offending vehicle submitted reply to the claim application and pleaded that on the date of accident, driver of offending vehicle was driving the vehicle

carefully but due to sudden arrival of animal over the road he turned his vehicle from road to road side and the wheels of the tractor trolley stuck deeper into the soil. Due to the aforementioned fact, offending vehicle turned turtle and deceased "Bhagwan Singh" came under electricity pole loaded in the vehicle, there was no negligence on the part of the driver. It was also pleaded that on the date of accident offending vehicle was insured with non-applicant 3, Insurance Company.

5. Non-application 3 Insurance company even after accepting notices (as recorded by the learned Claims Tribunal), did not submit its reply and its right to file reply has been closed.

6. Learned Claims Tribunal, on appreciation of pleadings and evidence placed on record by the respective parties, allowed the claim application in part and awarded a total sum of Rs.3,47,000/- towards compensation. Learned Claims Tribunal, while calculating the amount of compensation, has taken income of the deceased as Rs.100/- per day and Rs.2,500/- per month by taking working days as 25 and applied multiplier of 17. Learned Claims Tribunal, apart from loss of dependency, awarded Rs.7,000/- on other conventional heads.

7. The aforementioned award is put to challenge in this appeal on the ground that learned Claims Tribunal committed error in passing the impugned award and fastening the liability upon Appellant / Respondent No.3, Insurance Company, ignoring the fact that deceased was travelling on offending vehicle, which is a goods carrying vehicle. It is also contended by learned counsel for the appellant that learned Claims

Tribunal erred in holding that deceased was sitting on offending vehicle as labour. It is argued that the ground raised can be decided from the pleading and evidence placed by the other parties.

8. Per contra, learned counsel for the owner of the offending vehicle submitted that appellant insurance company neither submitted reply to the claim application nor examined any witness, therefore, it cannot challenge the finding of Claims Tribunal in the appeal on the grounds raised by it, without there being any pleading. It is also contended that the offending vehicle was insured with appellant insurance company and it failed to prove that there is breach of any condition of insurance policy by placing pleading and evidence before learned claims tribunal.

9. Learned Counsel for Respondents 1 to 4/claimants submitted that learned Claims Tribunal not committed any error in fastening liability upon Insurance Company. Appellant is estopped to raise any ground before this court challenging impugned award when they chose not to appear before learned claims tribunal. Learned counsel also contended that learned claims tribunal erred in awarding meagre amount as compensation and aggrieved by it they have preferred cross appeal under Order 41 Rule 22 of CPC for enhancement of compensation. It is submitted that learned claims tribunal erred in assessing income of the deceased only as Rs.2,500/- per month by taking daily wage of the deceased as Rs.100/- per day. He also submitted that learned claims tribunal erred in awarding only Rs.7,000/- towards other conventional heads which is on lower side.

10. I have heard learned counsel appearing for the appellant insurance company, learned counsel for the owner of offending vehicle as well as learned counsel for Respondents 1 to 4 and also perused the record.

11. Perusal of the pleadings made in claim application would show that claimants have specifically pleaded that offending vehicle was being used for bringing electricity poles from village Piparmati to village Kodwakodan and deceased Bhagwan Singh was travelling in the vehicle along with other persons. It was also pleaded that head of the deceased Bhagwan Singh came under the electricity pole due to which he succumbed to the injury suffered by him on the spot. Same thing was also mentioned in the affidavit submitted by the Respondents / Claimants before Learned Claims Tribunal under order 18 Rules 4 of the CPC. Evidence of other witnesses namely, AW-4 Pusruram, placed on record in the affidavit is also on same lines. No other witness has been examined either by the claimants or by the appellant /Insurance Company.

12. From perusal of pleadings and evidence placed on record by the claimants, one thing remains undisputed that on the date of accident offending vehicle is being used for carrying electricity poles and other persons were also travelling with deceasedon trolley Copy of the Registration Certificate of offending vehicle has been filed as Ex.NA-1C, in which sitting capacity is mentioned as only one.

13. From the aforementioned facts, it is very clear that offending vehicle tractor-trolley was goods vehicle but on the date of accident along with goods, persons were also travelling on it. Copy of the cover note issued

by the Appellant / Insurance Company is available on record as Ex.D3-C wherein premium has been paid for the third party, PA to Owner-Driver and for paid driver. Ex.D3c is the document placed on record by respondent/owner of offending vehicle to say that his vehicle was insured.

14. Aforementioned documents do not show that any premium was paid for labourers. Now question arises before this court is whether in the facts and circumstances of the case when insurance company did not submit its reply, raising the plea breach of condition of insurance policy can it raise the same ground before the Appellate Court or whether the Tribunal can look into the documents available to see whether deceased was covered under the policy.

15. The Tribunal in the above circumstances, is required to decide the claim on the basis of pleadings and evidence available on record, brought by claimants and owner and driver of offending vehicle. In the case at hand, it is the case of claimants that deceased on the date of accident was travelling on tractor-trolley with electric poles along with other persons. It was admitted in reply by the owner of the offending vehicle that the electric poles were carried on tractor-trolley for the social work in which deceased was also travelling with others..

16. From the pleading of claimants and respondent/owner of vehicle it is apt clear that the vehicle involved is tractor-trolley which was carrying electric poles at the time of accident (carrying goods) and deceased along with others were sitting over the electric poles. Copy of RC Book is produced as ExD1 and copy of Policy as ExD2. Perusal of ExD1 would

show that the vehicle was tractor and seating capacity was one. It does not say that 1 + 1 but mentions only one that means, only driver. ExD2C is a cover note of Policy covering period from 01.12.2010 to 30.11.2011. Premium showing paid for Basic own damage, third party, PA to Owner-Driver and for paid driver.

17. There is no dispute that any disputed fact is required to be proved by placing pleading and evidence but then when from the pleading filed by the applicant himself if some fact is taken as it is, whether only for the reason that the non-applicant has not led any evidence can be decided against him. In case at hand, travelling on goods vehicle is pleaded (tractor-trolley). Owner of vehicle one of non-applicants admitted the fact pleaded in application, placed registration certificate on record showing seating capacity as one on tractor, cover note purchasing policy showing the heads under which amount of premium is paid, then it was the duty of the Tribunal to look into whether premium was paid for covering the risk of the person travelling with goods or for person other than the owner driver or paid driver.

18. The facts of the case are glaring supported by the evidence available on record that the deceased was not owner, driver or paid driver, but was a gratuitous passenger. The Insurance Company has decided the issue 'gratuitous' passenger travelling on goods vehicle by Hon'ble Supreme Court. In case of **Asha Rani Vs New India Assurance Company Limited Vs Asha Rani** reported in 2003 (2) SCC 223 it is held thus:

> “24. We have further noticed that Section 147 of 1988 Act prescribing the requirements of an insurance policy does not contain a provision similar to clause (ii) of the proviso appended to Section 95 of 1939 Act. The decisions of this Court in Mallawwa case2 must be held to have been rendered having regard to the aforementioned provisions.”

19. In other case **National Insurance Company Limited Vs Baljeet Kaur** reported in 2004 (2) SCC 1, it is held thus:

> It is, therefore, manifest that in spite of the amendment of 1994, the effect of the provision contained in Section 147 with respect to persons other than the owner of the goods or his authorized representative remains the same. Although the owner of the goods or his authorized representative would now be covered by the policy of insurance in respect of a goods vehicle, it was not the intention of the legislature to provide for the liability of the insurer with respect to passengers, especially gratuitous passengers, who were neither contemplated at the time the contract of insurance was entered into, nor was any premium paid to the extent of the benefit of insurance to such category of people.

20. True it is that Insurance company has not led any evidence but the documents placed on record by NAW1 in his evidence has to be read in its entirety.

21. The manner in which the violation of conditions of Insurance Policy is required to be proved depends upon the fact of each case and the pleadings made in claim application and reply. Even if the Insurance Company has not pleaded or led any witness but then the Tribunal is required to pass award on the basis of facts and evidence available.

22. Initial burden to show that risk is covered under Policy is on the owner of the offending vehicle that the accident is covered under the

policy. Hon'ble Supreme Court in the matter of **NIC Vs Swarn Singh** 2004 (3) SCC 297 has held thus:

> "69.The proposition of law is no longer res integra that the person who alleges breach must prove the same. The insurance company is, thus, required to establish the said breach by cogent evidence. In the event, the insurance company fails to prove that there has been breach of conditions of policy on the part of the insured, the insurance company cannot be absolved of its liability. (See Sohan Lal Passi (supra)
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> 70. Apart from the above, we do not intend to lay down anything further i.e. degree of proof which would satisfy the aforementioned requirement inasmuch as the same would indisputably depend upon the facts and circumstances of each case. It will also depend upon the terms of contract of insurance . Each case may pose different problem which must be resolved having to a large number of factors governing the case including conduct of parties as regard duty to inform, correct disclosure, suppression, fraud on the insurer etc. It will also depend upon the fact as to who is the owner of the vehicle and the circumstances in which the vehicle was being driven by a person having no valid and effective licence. No hard and fast rule can therefore be laid down. If in a given case there exists sufficient material to draw an adverse inference against either the insurer or the insured, the Tribunal may do so. The parties alleging breach must be held to have succeeded in establishing the breach of conditions of contract of insurance on the part of the insurer by discharging its burden of proof. The Tribunal, there cannot be any doubt, must arrive at a finding on the basis of the materials available on records."

23. Now, in the light of the dictum of Hon'ble Supreme Court, if facts of the case are considered, in pleadings of claim application it was pleaded that deceased was travelling on trolley attached to tractor loaded with electric poles along with other persons. In written statement,

respondent/owner admitted the fact narrated in claim application that deceased was travelling with other persons on trolley along with electrical poles NAW2 Mithan Das admits that they went with tractor as labourers.

24. For the foregoing reasons as discussed, there is sufficient material and evidence that the deceased was not covered under the Insurance Policy purchased by the owner of the offending vehicle, he is a gratuitous passenger and in the light of the judgments passed by Hon'ble Supreme Court , the part of the award passed by the Tribunal fastening liability upon Insurance Company is not sustainable and is hereby set aside. The liability to satisfy the award will be of the owner of the vehicle ie respondent- 7.

25. Now I will consider the cross-appeal filed by the claimants for enhancement of award.

26. Learned Claims Tribunal by taking working days as 25 in a month and assessing the wage as Rs.100/-per day calculated monthly income of deceased as Rs.2,500/-. Looking to the date of accident i.e. 02.10.2010, in the opinion of this court income of the deceased taken by learned Claims Tribunal is on lower side. Deceased has not been said to have employed in any government office or any shop, but he is doing the work of labour and therefore, working days cannot be reduced from 30 days to 25 days when there being no evidence that there was a weekly off. The working days for a labour can be taken as the days in a month because it depends upon need of a person. Deceased has been shown to be employed or engaged as labour and therefore, looking to the price index at

that time, it will be appropriate to take income of the deceased as Rs.3,500/- per month though claimants pleaded in their application and also stated in evidence that deceased was getting Rs.200/- per day by doing labour work but the same has not been substituted by producing cogent and reliable piece of evidence.

27. For the foregoing reasons, in the opinion of this court, income of the deceased can be taken as Rs.3,500/- per month. Learned Claims Tribunal deducted $1/3^{rd}$ of income of the deceased to his personal and living expenses. Learned Claims Tribunal failed to consider that the issue of deduction towards personal and living expenses of the deceased has been considered by Hon'ble Supreme Court in case of **Sarla Verma (Smt) and Others Vs Delhi Transport Corporation and Another** reported in **(2009) 6 Supreme Court Cases 121**, in which Hon'ble Court in categorical terms stated that deduction towards personal and living expenses can vary from case to case, looking to the number of dependants of the deceased in his family. In claim application, number of claimants are five. Therefore, in view of law laid down by Hon'ble Supreme Court in the matter of **Sarala Verma** (supra), appropriate deduction for personal and living expenses of deceased in this case would be $1/4^{th}$ instead of $1/3^{rd}$. Learned Claims Tribunal considering age of the deceased as 28 years on the date of accident rightly applied multiplier of 17 which does not call for interference of this court.

28. Learned Claims Tribunal awarded only Rs.7,000/- towards other conventional heads which is also on lower side, in view of the law laid down in the matter of **Pranay Sethi (supra)**, wherein Hon'ble Supreme

Court has held that in a case where claimants are widow and children of the deceased they are entitled for additional sum of Rs.70,000/- toward other conventional heads, instead Rs.7,000/-.

29. The learned Claims Tribunal not awarded any amount towards future prospects as held by Honble Supreme Court in case of Pranay Sethi (supra) . In case where age of deceased is less than 40 years, then there should be addition of 40% for established income where the deceased was not in permanent employment on self employment. In this case, deceased was a labour or not in permanent employment. On this count, there will be addition of 40% of the established income in the monthly income of deceased to assess total monthly income.

30. In view of the above the award passed by the learned claims tribunal requires re-calculation as below:

31. Income of the deceased as assessed is Rs.3,500/- per month. By adding 40% of monthly income, the total monthly income will be Rs.4,900/- {3500 + (3500x40/100)} and Rs.58,800/- (4900 x 12) per year. After deducting 1/4th of yearly income of the deceased towards personal living expenses, loss of yearly dependency would come to Rs.44,100/- {58800-(58800 x ¼)}. As on the date of accident deceased was 28 years, multiplier of 17 would be applied. Now total loss of dependency would come to Rs. 7,49,700/- (44100 x 17). Apart from aforementioned amount of total loss of dependency claimants are also entitled for a sum of Rs.70,000/- towards other conventional heads.

32. Now respondents 1 to 4 / claimants will be entitled for Rs.8,19,700/- (749700 + 70000) as compensation.

33. In view of the above, appeal and cross-appeal are allowed in part, in following terms:

(a) The appeal filed by the Insurance Company is allowed the part of the award fastening liability upon Insurance Company is set aside. Now respondent-7/non-applicant-2, owner of offending vehicle is liable to satisfy the award.

(b) The appellants will be entitled for total amount of Rs.8,19,700/- as compensation. The amount of compensation will carry interest @ 7.5% from the date of filing of claim application till its realisation.

(c) Though the Insurance Company is not having any liability to satisfy award under law, but taking note of the law laid down by Hon'ble Supreme Court in **Asha Rani's case** (supra), **Baljeet Kaur case** (supra), **Manuara Khatun & others; Mamoni Saikia Mohanty & others Vs Rajesh Kumar Singh and others with Mamoni Saikia Mohanty and others Vs Rajesh Kumar Singh and others** reported in 2017 (4) SCC 796 and **Shivraj Vs Rajendra and another** reported in 2018 (10) SCC 432, it is directed that the Insurance Company to deposit the entire amount of compensation first and thereafter, it can recover the same from the owner of the offending vehicle in the very same proceedings by filing application for execution.

34. Other conditions imposed by the learned Claims Tribunal will remain intact.

35. No order as to costs.

Sd/-
(Parth Prateem Sahu)
JUDGE

padma