NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

MAC No. 487 of 2015

1. Smt. Sangeeta Gupta, W/o Late Shri Arun Gupta, aged about 48 years
2. Palak Gupta, D/o Late Shri Arun Gupta, aged about 18 years.
3. Parth Gupta (Minor), S/o Late Shri Arun Gupta, aged about 10 years, through natural guardian Mother Smt. Sangeeta Gupta W/o Late Arun Gupta (appellant No.1)

   All are R/o HIG-59, Maharana Pratap Nagar, Korba, Tehsil And Distt. Korba (CG)

---- Appellants

Versus

1. The New India Insurance Company Limited, through Branch Manager, Divisional Office, Transport Nagar, Korba, Tehsil & District Korba (CG)
2. United India Insurance Company Limited, through Branch Manager, Branch Office, Transport Nagar, Tehsil & District Korba (CG)
3. Shri Mohan Lal Gupta, S/o Late Badri Prasad Gupta, aged about 75 years.
4. Smt. Dropadi Gupta, W/o Mohan Lal Gupta, aged about 68 years.

   No.3 & 4 are R/o Qtr. No.397, Gali No.26, Smiriti Nagar Bhilai, Distt. Durg (CG)

---- Respondents

For Appellants	:	Mr. Sanjay Patel, Advocate
For Respondent No.1	:	Mr. Raj Awasthi, Advocate
For Respondent No.2	:	Mr. Dashrath Gupta, Advocate.

SB: Hon'ble Shri Justice Parth Prateem Sahu

Order On Board

04/11/2020

1. Appellants-claimants have preferred this appeal under Section 173 of the Motor Vehicles Act, 1988 (for short 'the Act of 1988') challenging the award dated 4.2.2015 passed by the learned 2nd Additional Motor Accident Claims Tribunal, Korba (for short

'the Claims Tribunal') in Claim Case No.88/2014 dismissing application filed by claimants/appellants under Section 166 of the Act of 1988.

2. Facts of the case, in brief, are that on 24.9.2006 at about 2.30 p.m. Arun Kumar Gupta while driving Maruti Swift Car bearing registration number CG12-D-6409 was coming to Bilaspur from Korba. When said Arun Kumar reached near village Mungadih Pali, on account of failure of brakes, his car dashed against the platform constructed on the side of road as a result he suffered grievous injuries on various parts of body. He was immediately taken to the Primary Health Centre, Pali where he died.

3. Claimants, who are widow and children of deceased, have filed an application under Section 166 of the Act of 1988 before the Claims Tribunal seeking compensation of Rs.82,50,450/- under various heads. It was pleaded in the application that on the date of accident deceased was working as Senior Divisional Manager with non-applicant No.1 Insurance Company and getting salary of Rs.45,502=50 paise per month. It was also pleaded that while he was travelling from Korba to Bilaspur on offending vehicle, due to failure of brakes the offending vehicle dashed against platform constructed on the side of road. Offending vehicle was owned by non-applicant No.1/respondent No.1-Insurance Company and it was insured with non-applicant No.2/respondent No.2 Insurance Company.

4. Non-applicant No.1 Insurance Company, employer of deceased, submitted reply to claim application denying the pleadings made therein. It was pleaded that there was no mechanical fault in the offending vehicle. Claim application filed under the Act of 1988 (initially filed by claimants/ appellants) is not maintainable. Accident was result of self-negligence of deceased, therefore, claimants cannot be permitted to take benefit of wrong committed by deceased.

5. Non-applicant No.2-Insurer of offending vehicle, submitted reply to claim application, while denying the pleadings made therein it was further pleaded that the deceased, who himself was driving offending vehicle, does not come within the category of 'third party'. No amount of premium was paid covering risk of persons like deceased, who was neither owner cum driver nor paid driver of offending vehicle. Risk of owner-cum-driver and three passengers was covered for Rs.2,00,000/- each only. It was further pleaded that accident was result of rash and negligent driving of deceased himself. Hence, the claimants are not entitled for any amount of compensation for the wrong committed by deceased himself.

6. Upon appreciation of pleadings and evidence placed on record by the respective parties, Claims Tribunal dismissed claim application vide award dated 5.2.2010 while recording finding that claimants are not entitled for any amount of compensation under Section 166 of the Act of 1988 as the deceased himself was driving offending vehicle. Claims

Tribunal also recorded that vehicle mechanical examination report, which was placed on record as Ex.P-8, has not been proved in accordance with law; no premium was paid for covering risk of an employee, driver of offending vehicle, but the risk has been found to be covered for unnamed passengers and owner-cum-driver of offending vehicle.

7. Award dated 5.2.2010 was put to challenge by claimants/ appellants herein by filing MAC No.597/2010 which came up for hearing before a Division Bench of this Court on 11.1.2012. Taking into consideration the plea that accident occurred due to mechanical failure of offending vehicle i.e. failure of brakes, which was specifically pleaded in application, was not found to be proved as author of report Ex.P-8 has not been examined and further observing that whether under the provisions of Section 147 of the Act of 1988 deceased employee of the owner of offending vehicle who was working as Senior Divisional Manager was covered under the policy or not is not considered, allowed the appeal in part and remitted back the case to Claims Tribunal for taking decision afresh after considering aforementioned two issues.

8. After remand of the case, the Claims Tribunal initiated proceedings and issued notice to respective parties. Thereafter opportunity to amend pleadings or to produce documents in evidence, if any, was granted, but the parties to claim application expressed not to amend pleadings or to file additional documents, as is discernible from the order sheet of

the Claims Tribunal dated 7.2.2014. Thereafter the case was fixed for recording of evidence. Claimants-appellants examined one Vilas Giri Goswami to prove report Ex.P-8. Non-applicants have not produced any witness nor filed any application for amending pleadings. The case was finally heard and impugned award was passed by the Claims Tribunal dismissing claim application. The Claims Tribunal recorded a finding based on evidence of Vilas Giri Goswami (AW-4) that report Ex.P-8 was not issued from his garage or by him and it was a fabricated document. It is also recorded that the witness AW-4 Vilas Giri Goswami, owner of Ambe Auto-mobile, has only accepted mobile number in the letter head and denied all other entire facts mentioned therein. The Claims Tribunal further recorded that the claimants/appellants are not entitled for any amount of compensation as application filed by them is under Section 166 of the Act of 1988, the deceased himself was driving offending vehicle and motor accidental injuries suffered by him was on account of his own rash and negligent act. The Claims Tribunal also recorded a finding that no amount of premium was paid by the owner of offending vehicle for covering risk of employee-cum-driver of offending vehicle. Deceased was not covered under risk of owner-cum-driver.

9. Mr. Sanjay Patel, learned counsel for appellants submits that the Claims Tribunal erred in dismissing entire claim application. The offending vehicle was owned by respondent

No.1 of whom deceased was employee. The offending vehicle was given to deceased by employer/non-applicant No.1 to discharge official duty. Offending vehicle was sent for mechanical examination by the Investigating Officer. After denying the fact of issuance of report (Ex.P-8) by Vilas Giri Goswami (AW-4) in his evidence, application for calling Investigating Officer as witness was filed, which was rejected by the Claims Tribunal thereby the claimants were deprived from proper opportunity to prove their case. Risk of deceased, who was driving offending vehicle, was covered under the provisions of Section 147 of the Act of 1988 as the deceased would come within the category of owner-cum-driver.

10. Mr. Raj Awasthy, learned counsel appearing on behalf of respondent No.1 supported the impugned award.

11. Mr. Dashrath Gupta, learned counsel representing respondent No.2-Insurance Company submits that initially claimants/ appellants have filed application under Section 163A of the Act of 1988, but looking to the income of deceased it was amended and converted it to application under Section 166 of the Act of 1988. Claim under Section 166 of the Act of 1988 is negligence based claim and it is for the claimant to prove that deceased/injured suffered grievous injuries on account of negligence on the part of some other person. In case at hand, deceased himself was driving offending vehicle owned by respondent No.1 Insurance Company. No premium was paid by respondent No.1 for covering risk of any other person than

mentioned in the policy. Deceased will not fall within the purview of owner-cum-driver. Deceased neither comes within the definition of 'owner' nor was 'paid driver' of offending vehicle, hence his risk was not covered under insurance policy. In support of his submission, learned counsel places his reliance on the decision of Hon'ble Supreme Court in the matter of **Oriental Insurance Company Ltd. vs. Meena Variyal** reported in **(2007) 5 SCC 428**.

12. I have heard learned counsel for appellant and perused the record of Claims Tribunal.

13. There is no dispute of fact that offending vehicle was owned and registered in the name of non-applicant No.1 Insurance Company; deceased was working as Senior Divisional Manager with non-applicant No.1, who met with accident while driving offending vehicle and there was no involvement of any other vehicle in the accident. However, in claim application it has been pleaded that suddenly animals came on road and to save them, the deceased turned his vehicle and met with accident on account of mechanical failure i.e. failure of brakes of offending vehicle. In earlier round of hearing by a Division Bench of this Court, the learned Judges have taken note of the fact that vehicle mechanical examination report has been placed on record as Ex.P-8, but author of document was not examined, allowed the appeal of claimants and remitted back the matter to the Claims Tribunal for fresh adjudication. The Claims Tribunal examined the person whose name is

mentioned in the report as its author who denied to have prepared report of Ex.P-8. Vilas Giri Goswami (AW-4) is the person who was examined by appellants to prove report Ex.P-8, but this witness has categorically stated in his statement that report appears to be fabricated as the same has not been issued by him under his signature. Claimants-appellants even after remand of the case has not produced any other evidence except examining Vilas Giri Goswami (AW-4) to prove report of Ex.P-8.

14. In view of specific statement made by AW-4 that he has not issued report Ex.P-8, he is the sole owner of garage, he is not aware of any person in the name of Rajesh, he never issued vehicle examination report on letter head, I am of the considered view that claimants-appellants failed to prove report Ex.P-8 on which they have placed reliance to say that accident occurred due to mechanical failure in the offending vehicle i.e. failure of brakes.

15. Submission made by learned counsel for appellants that proper opportunity of hearing was not granted to them is also not sustainable in view of proceedings drawn by Claims Tribunal after remand of the case from 3.2.2012 to 24.1.2015. After remand of the case of which proceeding started on 3.2.2012, the appellants have examined one witness namely Vilas Giri Goswami on 24.1.2015. Taking into consideration number of dates given to appellants for producing their witnesses in support of their case, I am of the view that the

Claims Tribunal has granted ample opportunities to claimants-appellants to prove their case. Hence, this submission of learned counsel for appellants that proper opportunity of hearing was not granted to them is not sustainable and it is hereby repelled.

16. So far as submission of learned counsel for appellants with regard to Section 147 of the Act of 1988 stating that risk of appellant being driver-cum-owner of offending vehicle is covered under the policy is concerned, proviso to Section 147 (1) of the Act of 1988 provides for coverage of risk of an employee suffered injuries arising out of and in the course of his employment. It further provides for liability arising under the Workmen's Compensation Act i.e. driver, conductor or to cover any contractual liability. Admittedly, the deceased was not the workman employed for driving offending vehicle, rather he was working on the post of Senior Divisional Manager with respondent No.1. Submission of learned counsel for appellant that risk of deceased being an employee of respondent No.1, is automatically covered under the provisions of Section 147 of the Act of 1988 is not sustainable and it is hereby repelled. There is no involvement of any other vehicle in the accident, appellants failed to prove negligence on the part of the owner of offending vehicle for not maintaining it properly as appellants have failed to prove plea of mechanical failure in the offending vehicle i.e. failures of brakes. Deceased met with accident when he himself was driving offending vehicle and

travelling from Korba to Bilaspur. In case of **Meena Variyal (supra)** Hon'ble Supreme Court while considering claim of an employee of a company who met with an accident has held that negligence of person is not required to be proved if application is filed under Section 163A of the Act of 1988, whereas in respect of application filed under Section 166 of the Act of 1988 the claimants are required to prove negligence on the part of owner of vehicle or driver, if any, of vehicle. Relevant paragraphs of **Meena Variyal's case (supra)** are extracted below;-

> "26. Learned counsel for the respondent contended that there was no obligation on the claimant to prove negligence on the part of the driver. Learned counsel relied on Gujarat State Road Transport Corporation, Ahmedabad vs. Ramanbhai Prabhatbhai[10] in support. In that decision, this Court clarified that the observations in Minu B. Mehta's case[10] are in the nature of obiter dicta. But, this Court only proceeded to notice that departures had been made from the law of strict liability and the Fatal Accidents Act by introduction of Chapter VIIA of the 1939 Act and the introduction of Section 92A 92A providing for compensation and the expansion of the provision as to who could make a claim, noticing that the application under Section 110A of the Act had to be made on behalf of or for the benefit of all the legal representatives of the deceased. This Court has not stated that on a claim based on negligence there is no obligation to establish negligence. This Court was dealing with no-fault liability and the departure made from the Fatal Accidents Act and the theory of strict liability in the scheme of the Act of 1939 as amended. This Court did not have the occasion to construe a provision like Section 163A of the Act of 1988 providing for compensation without proof of negligence in contradistinction to Section 166 of the Act. We may notice that Minu B. Mehta's case was decided by three learned Judges and the Gujarat State Road Transport Corporation case was decided only by two learned Judges. An obiter dictum of this Court may be binding only on the

High Courts in the absence of a direct pronouncement on that question elsewhere by this Court. But as far as this Court is concerned, though not binding, it does have clear persuasive authority. On a careful understanding of the decision in Gujarat State Road Transport Corporation (supra) we cannot understand it as having held that in all claims under the Act proof of negligence as the basis of a claim is jettisoned by the scheme of the Act. In the context of Sections 166 and 163A of the Act of 1988, we are persuaded to think that the so called obiter observations in Minu B. Mehta's case (supra) govern a claim under Section 166 of the Act and they are inapplicable only when a claim is made under Section 163A of the Act. Obviously, it is for the claimant to choose under which provision he should approach the Tribunal and if he chooses to approach the Tribunal under section 166 of the Act, we cannot see why the principle stated in Minu B. Mehta's case should not apply to him. We are, therefore, not in a position to accept the argument of learned counsel for the respondents that the observations in Minu B. Mehta's case deserve to be ignored.

27.We think that the law laid down in Minu B. Mehta & Anr. Vs. Balkrishna Ramchandra Nayan & Anr. (supra) was accepted by the legislature while enacting the Motor Vehicles Act, 1988 by introducing Section 163A of the Act providing for payment of compensation notwithstanding anything contained in the Act or in any other law for the time being in force that the owner of a motor vehicle or the authorised insurer shall be liable to pay in the case of death or permanent disablement due to accident arising out of the use of the motor vehicle, compensation, as indicated in the Second Schedule, to the legal heirs or the victim, as the case may be, and in a claim made under sub-section (1) of Section 163A of the Act, the claimant shall not be required to plead or establish that the death or permanent disablement in respect of which the claim has been made was due to any wrongful act or neglect or default of the owner of the vehicle concerned. Therefore, the victim of an accident or his dependants have an option either to proceed under Section 166 of the Act or under Section 163A of the Act. Once they approach the Tribunal under Section 166 of the Act, they have necessarily to take upon themselves the burden of establishing the negligence of the driver or owner of the vehicle concerned. But if they proceed under Section 163A of the Act, the compensation will be

> awarded in terms of the Schedule without calling upon the victim or his dependants to establish any negligence or default on the part of the owner of the vehicle or the driver of the vehicle."

17. If the facts of present case are looked in the light of aforementioned ruling of Hon'ble Supreme Court, it is a case where offending vehicle is owned by non-applicant No.1/respondent No.1 Insurance Company, it was given to the deceased for official use, who was posted as Senior Divisional Manager in respondent No.1 Insurance Company and not as a driver. Appellants failed to prove negligence on the part of owner of offending vehicle as they could not establish plea of mechanical failure in offending vehicle. There is no involvement of any other vehicle, hence I am of the considered view that application filed under Section 166 of the Act of 1988 was not maintainable in the given facts and circumstances of the case.

18. Last submission made by learned counsel for appellant is with regard to amount of compensation of Rs.2 Lakhs to be awarded under the coverage of risk of owner-cum-driver. Admittedly, the deceased was posted as Senior Divisional Manager in the respondent No.1 Insurance Company, therefore, he cannot be treated as driver of respondent No.1-Company. Offending vehicle is registered in the name of respondent No.1 Insurance Company. Owner of the Insurance Company is the Government. As such, the deceased cannot be termed as 'owner' of the offending vehicle and does not fall within the category of 'owner-cum-driver'. He

can be simply treated as an employee of respondent No.1. As the deceased was not the owner of company, his risk cannot be covered under the head of owner-cum-driver. Perusal of Ex.D2 would reveal that coverage of risk of owner-cum-driver has been mentioned in Section III- Personal accidental cover for owner-driver and relevant portion is extracted below for ready reference;-

> "2. This cover is subject to
>
> (a) the owner-driver is the registered owner of the vehicle insured therein.
>
> (b) the owner-driver is the insured name in this policy.
>
> (c) the owner-driver holds an effective driving license, in accordance with the provisions of Rule of the Central Motor Vehicles Rules, 1989, at the time of accident."

19. Insurance policy is a contract between insurer and insured. Insurer is liable for the risk which is covered under the agreement. Perusal of Section III (2) of the Policy (Ex.D-2) would make it clear that who will be covered under owner-cum-driver. Deceased does not fall within the category as mentioned under Section III (2), hence this submission of appellant is also not sustainable and it is hereby repelled.

20. In the result, I do not find any merit in this appeal, the same is liable to be dismissed and is hereby dismissed.

Sd/-
(Parth Prateem Sahu)
Judge

roshan/-