NAFR

HIGH COURT OF CHHATTISGARH BILASPUR

M. A. (C) No. 120 of 2014

The Oriental Insurance Company Limited, Regular and Registered office 'Oriental House' P.P. No.7037-A-25/27, Asaf Ali Road, New Delhi-110002
Permanent address Divisional Office, Permanand Bhavan, Rajendra Park Chowk, Durg (C.G.).

---- Appellant

Versus

1. Hemant Kumar S/o Jhaduram Dhiwar, aged about 31 years, permanent R/o Village Basa, P.S. Berla, District Durg (C.G.) at presently resident C/o Fulchand Dhiwar, Village & Post Kodiya, P.S. Nandini, Tahsil Dhamdha, District Durg (C.G.).
2. Rajendra Singh S/o Bahadur Singh Rajput, aged about 52 years, R/o C.S.E.B. Office, Bemetara, District Bemetara (C.G.).
3. E.E. (O & M) D.N. C.S.P.D.C.L. Bemetara, P.S. Bemetara, Tahsil Bemetara, District Bemetara (C.G.).

---- Respondents

M. A. (C) No. 137 of 2014

Hemant Kumar S/o Shri Jhaduram Dhiwar, aged about 31 years, R/o permanently residing at Village Basa, P.S. Berla, District Durg, Civil and Revenue District Durg (C.G.) Presently residing through Foolchand Dhiwar, Gram Post Koudiya, Police Station Nandni, Tahsil Dhamdha, District Durg, Civil and Revenue District Durg (C.G.).

---- Appellant

Versus

1. Rajendra Singh S/o Bahadur Singh Rajput, aged about 52 years, R/o CSEB Office, Bemetara, District Bemetara (C.G.).
2. E.E. (O & M) D.N. C.S.P.D.C.L. Bemetara, Police Station Bemetara, Tahsil Bemetara, District Bemetara (C.G.).
3. The Oriental Insurance Company Limited regular & registered Office Oriental House, P.P. No.7037-A-25/27 Aasaf Ali Road, New Delhi 110002.
   Permanent address Divisional Office, Permanand Bhavan, Rajendra Park Chowk, Durg (C.G.).

---- Respondents

MAC No.120 of 2014

For Appellant	: Shri Pankaj Agrawal, Advocate
For Respondent No.1	: Shri Keshav Dewangan, Advocate
For Respondents 2 & 3	: None

MAC No.137 of 2014

For Appellant	: Shri Keshav Dewangan, Advocate
For Respondents 1 & 2	: None
For Respondent No.3	: Shri Pankaj Agrawal, 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

24.08.2020

1. As both the appeals are arising out of award dated 18.11.2013 passed by the 6th Additional Motor Accident Claims Tribunal, Durg, District Durg, Chhattisgarh (hereinafter referred to as 'Claims Tribunal') in Motor Accident Claim Case No.49 of 2012, therefore, they are being disposed of by this common judgment.

2. MAC No.120 of 2014 is filed by non-applicant No.3/Insurance Company/appellant challenging the fastening of liability upon Insurance Company along with apportionment of 50% contributory negligence on the part of drivers of both the vehicles and assessing 100% disability towards loss of income of the claimant, whereas MAC No.137 of 2014 is filed by the claimant challenging the finding of contributory negligence recorded against the claimant, non-awarding of future prospects and awarding meager amount of compensation towards other non-pecuniary damages.

3. Facts relevant for disposal of these appeals, are that, on 05.05.2010, Hemant Kumar Dhivar (claimant) while driving Bolero Jeep and going to Leemahi Square from Berla, at about 7.00 pm, when he reached near bridge, one Truck bearing registration No.CG-07/ZC/3350 (hereinafter referred to as 'offending vehicle') driven by non-applicant No.1, dashed Bolero Jeep and caused accident while driving his vehicle diagonally towards Bolero Jeep. In the aforesaid accident, claimant suffered grievous injuries over his hands, legs and other parts of body. Thereafter, he was taken to Chandulal Chandrakar Memorial Hospital, Bhilai where he took treatment as inpatient from 05.05.2010 to 15.05.2010. Claimant suffered permanent disability on account of injuries suffered by him on his right hand.

4. The accident was reported to concerned Police Station, based on which, Crime No.140 of 2010 was registered against non-applicant No.1 for the offence punishable under Sections 279, 337 and 338 of IPC and after completion of investigation, charge-sheet was filed before the Court of Judicial Magistrate First Class, Bemetara, District Durg, Chhattisgarh. Non-applicant No.1/driver of offending vehicle admitted his guilt before the competent Court.

5. Claimant/injured filed an application under Section 166 of the Motor Vehicles Act, 1988 (hereinafter referred to as 'M.V. Act') before learned Claims Tribunal seeking compensation of Rs.21,20,000/- mentioning therein that on the date of accident, he was working as driver of motor vehicle and earning Rs.4,500/- per month (Rs.3,000/- salary and Rs.50/- per day as daily allowance); he suffered permanent disability on account of injuries sustained by him in the motor accident and unable to perform his work, which he was doing prior to the date of accident as driver of motor vehicle.

6. Non-applicant No.1 and 2/driver and owner of offending vehicle submitted reply to claim application and admitted the fact that they are driver and owner of offending vehicle. It was pleaded that amount claimed is highly exaggerated; non-applicant No.1 has not driven his vehicle rashly and negligently; offending vehicle was insured with non-applicant No.3/Insurance Company, the liability, if any, would be upon Insurance Company.

7. Non-applicant No.3/Insurance Company submitted its separate reply and denied all the adverse pleadings made in claim application. It was pleaded that claimant has pleaded the injuries suffered by him in an exaggerated manner; the accident was on account of head on collision between two vehicles; there was contributory negligence on the part of claimant and there was breach of the conditions of insurance policy. It was further pleaded that disability certificate filed by the claimant was not issued from District Medical Board.

8. Learned Claims Tribunal based on the pleadings of respective parties, formulated as many as seven issues for consideration. On appreciation of pleadings, evidence and material placed on record by the respective parties held that on 05.05.2010, offending vehicle was driven rashly and negligently by non-applicant No.1 and dashed the Bolero Jeep driven by claimant; claimant suffered 100% permanent disability; breach of conditions of insurance policy could not be proved; there was contributory negligence to the extent of 50% upon drivers of both the vehicles and awarded sum of Rs.3,30,620/- after deducting 50% of the calculated amount of compensation towards contributory negligence

9. Shri Pankaj Agrawal, learned cousnel for the appellant/Insurance Company in MAC No.120 of 2014 and respondent No.3 in MAC No.137 of 2014 submits that learned Claims Tribunal erred in fastening liability upon Insurance Company without considering the pleadings of Insurance Company in its reply to claim application in its entirety, wherein it has been very specifically pleaded that on the date of accident, offending vehicle was not having valid permit and fitness certificate. Offence was also registered under Sections 15/177 and 56/192 of the M.V. Act for not having valid permit and fitness certificate, which is clear breach of conditions of insurance policy, therefore, liability could not have been fastened upon Insurance Company. He further submits that learned Claims Tribunal erred in holding that claimant suffered permanent disability affecting 100% loss of income in the facts and circumstances of the case and further, contributory negligence assessed by learned Claims Tribunal to the extent of

50% each on the drivers of both the vehicles, whereas the ratio of contributory negligence would be 70% on the part of claimant and 30% on the part of driver of offending vehicle. It is contended that the appeal filed by the Insurance Company be allowed and impugned award be modified accordingly.

10. Per contra, Shri Keshav Dewangan, learned counsel representing respondent No.1/claimant in MAC No.120 of 2014 and appellant/claimant in MAC No.137 of 2014 submits that learned Claims Tribunal erred in arriving at a finding that claimant was contributory negligent to the extent of 50% in the accident without there being any cogent and clinching piece of evidence. He further submits that as per evidence and materials available on record, it is the offending vehicle who came from wrong side and dashed the Bolero Jeep driven by the claimant. Claims Tribunal erred in holding the claimant to be contributory negligent to the extent of 50%. It is contended that learned Claims Tribunal assessed the income of claimant as Rs.3,000/- per month only contrary to the pleadings and evidence placed on record by the claimant with regard to his income as Rs.4,500/- per month in total being driver of four-wheeler, to which, he was driving on the date of accident. It is further contended that learned Claims Tribunal though assessed 100% loss of earning capacity, but failed to award any amount towards future prospects. He lastly contended that learned Claims Tribunal has not awarded appropriate amount of compensation on other non-pecuniary damages and prays for suitable enhancement of the amount of compensation.

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

12. So far as the appeal filed by Insurance Company and the grounds raised with regard to fastening of liability upon Insurance Company without there being valid permit and fitness certificate of the offending vehicle, Insurance Company in their reply has very specifically pleaded that on the date of accident, there was no valid permit and fitness certificate of offending vehicle.

13. We have perused the documents placed on record by the respective parties. Claimant has filed documents of criminal case from Ex.P/1 to Ex.P/10. Non-applicants No.1 and 2, driver and owner of offending vehicle have not placed on record copies of permit and fitness certificate before learned Claims Tribunal even they have not placed on record the copy of driving licence of non-applicant No.1. Learned Claims Tribunal while deciding the issue with regard to breach of conditions of insurance policy, has held that Insurance Company failed to prove that there was breach of policy conditions. Learned Claims Tribunal further recorded that the witness examined on behalf of non-applicant No.3 Shri S.R. Sahu (Administrative Officer) (NAW-3(1)) has stated that permit and fitness certificate are necessary under the terms and conditions of insurance policy as the vehicle insured is 'Commercial Vehicle'. This witness very categorcially submitted that there was no valid permit and fitness of the vehicle on the date of accident.

14. Insurance Company has produced the copy of insurance policy as Ex.D/1. If the documents is accepted as evidence then all the contents available in the document are to be read as part of evidence. The finding recorded by the Tribunal that requirement of permit and fitness is one of the essential condition is not clear, is perverse in view of the clause “Limitation as to use”, which is extracted below :

> “**Limitations as to Use**
> The policy covers use only under a permit within the meaning of the Motor Vehicles Act 1988 or such a carriage falling under Sub-section 3 of Section 66 of the Motor Vehicles Act 1988.
>
> 1. Use only for carriage of goods within the meaning of the Motor Vehicles Act. The policy does not cover : 1) Use for organised racing, pace-making, reliability trial or speed testing. (2) Use whilst drawing a trailer except the towing (other than for reward) of any one disabled mechanically propelled vehicle. (3) Use for carrying passengers in the vehicles; except employees (other than the driver) not exceeding the number permitted in the registration document and coming under the purview of Workmen's Compensation Act 1923.”

15. Learned Claims Tribunal failed to consider the clause "limitations as to use", wherein it is specifically mentioned that "the policy covers use only under a permit within the meaning of the Motor Vehicles Act, 1988 or such a carriage falling under sub-section (3) of Section 66 of the Motor Vehicles Act, 1988 and further in driver's clause it is mentioned that "provided that a person driving holds an effective driving licence at the time of accident and is not disqualified from holding or obtaining such a licence". Learned Claims Tribunal failed to take note of these two clauses of insurance policy (Ex.D/1) and arrived at an erroneous finding that there was no breach of conditions of insurance policy. After filing of reply, non-applicants No.1 and 2 did not appear and they were proceeded *ex parte*. They have not filed any document to show that offending vehicle was having valid permit, fitness and driver of offending vehicle valid and effective driving licence. The burden to prove that the vehicle was plied on public road with valid permit and fitness by the driver holding valid and effective driving licence is upon the owner and driver of offending vehicle. Once the copies of aforementioned documents are placed on record, then the burden shifts upon the Insurance Company to prove that the documents are concocted or forged.

16. For the aforementioned reasons, we are of the considered view that respondents No.1 and 2 failed to prove that offending vehicle was plied as per the terms and conditions of insurance policy. The finding recorded that there was no proof of breach of policy conditions for the foregoing reasons is not sustainable and is hereby set aside. We hold that there was breach of policy conditions as respondents No.1 and 2 failed to prove that the vehicle was having valid permit and fitness on the date of accident.

17. The Hon'ble Supreme Court while considering the issue of permit of transport vehicle/commercial vehicle has held that breach of permit/not having the permit of transport vehicle is a fundamental breach in case of **National Insurance Co. Ltd. v. Challa Bharathamma and others**[1] and **Amrit Paul Singh and another v. Tata AIG General Insurance Company Limited and others**[2]. Admittedly, insurance policy issued was for public carrier vehicle, the owner and driver failed to place on record the copy of permit, fitness and driving licence. As the owner of the vehicle failed to prove the vehicle was plied by a valid licence holder under the valid permit, there was a fundamental breach of conditions of insurance policy, hence, Insurance Company will not be having any liability to satisfy the amount of compensation.

18. So far as other ground raised by learned counsel for the Insurance Company that learned Claims Tribunal erred in holding that there was contributory negligence to the extent of 50% on the part of drivers of both the vehicles to be erroneous, we have perused the evidence of claimant - Hemant Kumar (AW-1), who in

1 **(2004) 8 SCC 517**
2 **(2018) 7 SCC 558**

his evidence has very specifically stated that while travelling from Berla to Leemahi Square, his Bolero Jeep met with an accident with offending vehicle; the accident took place on account of rash and negligent driving of non-applicant No.1, who came diagonally on wrong side and dashed his vehicle. In cross-examination, he denied the suggestion that at 7.00 pm, there was night as the accident took place in the month of May. We have also perused the spot map (Ex.P/4) prepared by the Policy, in which, it is mentioned that the accident took place when the offending vehicle was deviating to its right side and dashed Bolero Jeep.

19. The finding of contributory negligence is also challenged by the claimant in his appeal filed as MAC No.137 of 2014, therefore, we will deal with this issue along with the appeal filed by the claimant.

20. The other ground raised by learned counsel for the Insurance Company with regard to assessment of 100% loss of income due to permanent disability suffered by the claimant on the ground that disability certificate was not issued from the District Medical Board, this submission of learned counsel for the Insurance Company is baseless as he has made this submission without going through the records. Claimant in support of his case has filed disability certificate (Ex.P/30) issued by Dr. Akhilesh Yadav, who is posted as Medical Officer, District Hospital, Durg showing the percentage of permanent disability to the extent of 40%. The claimant has also filed disability certificate (Ex.P-33C) issued by the team of three doctors and counter-signed by Chief Medical Officer, which is a certificate issued for the 'persons with disabilities', it mentions injury of right elbow and shoulder. To support permanent disability, claimant has examined Dr. Akhilesh Yadav as AW-2, who proved the disability certificate (Ex.P/30) to the extent of 40% on his hand. Dr. Akhilesh Yadav (AW-2) in his evidence stated that he has not treated the claimant/injured. He issued disability certificate (Ex.P/30) on 01.06.2011 after examining injured/claimant. The medical documents placed on record would show that claimant suffered compound fracture humerus on right hand. Upon diagnosis at Chandulal Chandrakar Memorial Hospital, Bhilai, as per discharge card (Ex.P/15), it is mentioned that compound fracture of humerus right with head injury and radial nerve injury; he was also referred for treatment to neuro surgery and ortho department. Along with medical documents, claimant has placed on record OPD Card of Chandulal Chandrakar Memorial Hospital, Bhilai as Ex.P/27 dated 28.05.2010, wherein it has been mentioned that old operated compound fracture shaft humerus with radial nerve palsy. The documents placed on record would also show that claimant thereafter examined himself on 12.06.2010 in OPD at Chandulal Chandrakar Memorial Hospital, Bhilai, thereafter on 12.07.2010 for his same injuries. He was again examined on 30.07.2010 wherein X-ray of right arm with shoulder was taken. The claimant again approached the Hospital on 27.08.2010 and on that day again it was mentioned, old operated case of compound fracture of right humerus as well as X-ray of right arm was taken. In view of above documents, the submission of appellant got strengthen that claimant suffered nerve palsy, for which, he continously visited to the hospital for taking treatment.

21. For the foregoing reasons and looking to the nature of injuries suffered by the claimant, disability certificate as also the nature of employment i.e. driver of four-wheeler and also taking into consideration the law laid down by Hon'ble Surpeme Court in case of **Raj Kumar v. Ajay Kumar and another**[3], **Jakir Hussein v. Sabir and Others**[4] and **Rajan v. Soly Sebastian and Another**[5], we do not find any error in finding recorded by the Claims Tribunal that the claimant suffered 100% loss of earning capacity.

22. Now, we will deal with the appeal filed by the claimant. The main submission of the learned counsel for the claimant is with regard to a finding recorded by learned Claims Tribunal holding the claimant to be contributory negligent to the extent of 50% is without any evidence but for taking into consideration that there was head on collision. Perusal of record would show that apart from the oral evidence of claimant, he has produced the spot map (Ex.P/4) prepared by the Police during the course of investigation of the crime, wherein they have prepared the spot map showing the place of accident and the manner, in which, offending vehicle

3 **(2011) 1 SCC 343**
4 **(2015) 7 SCC 252**
5 **(2015) 10 SCC 506**

dashed the Bolero Jeep driven by the claimant. From the spot map (Ex.P/4), it is clear that it is the offending vehicle, driven by non-applicant No.1 coming on wrong side i.e. towards his extreme right and dashed the Bolero Jeep. Neither non-applicants No.1 and 2/driver and owner of offending vehicle nor the Insurance Company placed on record any evidence to prove the fact of contributory negligence on the part of claimant. The spot map also shows the position of Bolero Jeep on its extreme left corner of the road.

23. The Hon'ble Supreme Court in cases of **Minu Rout & Anr. v. Satya Pradyumna Mohapatra & Ors.**[6] and **Jiju Kuruvila and others v. Kunjujamma Mohan and others**[7] held that the person/party taking a plea of contributory negligence is required to prove by placing cogent and reliable piece of evidence. Merely a fact that there was head on collision between two vehicle in itself will not be sufficient to hold that the driver of one vehicle/claimant also contributed to the accident.

24. In view of aforementioned documentary evidence available on record and in absence of any evidence led by driver of offending vehicle as well as Insurance Company in this regard, we are of the view that the finding recorded by learned Claims Tribunal that claimant i.e. driver of Bolero Jeep to be contributory negligent to the extent of 50% is not sustainable and it is set aside.

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6 **(2013) 10 SCC 695**
7 **(2013) 9 SCC 166**

25. So far as the other submission made by the learned counsel for the claimant that learned Claims Tribunal has erred in assessing the income of claimant only Rs.3,000/- per month on the ground that claimant failed to produce the copy of licence on record to be erroneous. We have perused the record, in which, we find that photocopy of licence of claimant is available, wherein the licensing authority authorize the claimant to drive 'Light Motor Vehicle'. On the date of accident, admittedly, claimant was driving a Bolero Jeep, which comes within the category of 'Light Motor Vehicle'. Learned Claims Tribunal has not accepted the income claimed by the claimant on account of non-production of driving licence does not stand. The date of accident is 05.05.2010, the occupation of claimant stated to be a driver of four-wheeler, which comes within the category of 'skilled labour'. The income as pleaded by the claimant cannot be said to be on higher side. The income pleaded by the claimant in his claim application can be taken as monthly income of the claimant for the purpose of calculating the amount of compensation as Rs.4,500/- in place of Rs.3,000/-.

26. Learned Claims Tribunal awarded only Rs.78,840/- towards medical expenditure, Rs.700/- towards attendant, Rs.1,000/- towards special diet and Rs.2,500/- towards conveyance expenses, Rs.2,000/- towards pain and suffering and not awarded any amount towards loss of amenities and enjoyment in life. The amount of compensation to be awarded requires to be enhanced in the facts and circumstances of the case.

27. Looking to the nature of injuries and period of treatment, we find it appropriate to award Rs.25,000/- towards pain and suffering and Rs.10,000/- towards loss of amenities and enjoyment in life.

28. The next argument raised by learned counsel for the claimant is that learned Claims Tribunal committed an error in not awarding any amount towards future prospects. In view of law laid down by the Hon'ble Supreme Court in the matter of **National Insurance Company Limited v. Pranay Sethi and others**[8]**,** the claimant is also entitled for the additional amount of 40% of the established income towards future prospects as the claimant is not in a permanent employment and was less than 40 years on the date of accident. In the instant case, on the date of accident, age of claimant is 31 years and therefore, 40% amount was added towards future prospects.

29. For the aforementioned reasons and discussions, the amount of compensation awarded by learned Claims Tribunal to the claimant requires re-consideration and re-computation, which is as under :

As discussed above, income of claimant is taken as Rs.4,500/- per month i.e. Rs.54,000/- per annum. By adding 40% of the income towards future prospects, the total annual income of claimant will come to Rs.75,600/- (54,000 x 40% = 21,600 and 54,000 + 21,600). On the date of accident, the claimant was shown to be 31 years of age, therefore, the appropriate multiplier would be 16. By applying the multiplier of 16, the amount of

8 **AIR 2017 SC 5157**

compensation will come to Rs.12,09,600/- (75,600 x 16). Apart from above, claimant will be entitled for a sum of Rs.25,000/- towards pain and suffering and Rs.10,000/- towards loss of amenities and enjoyment in life, Rs.78,840/- towards medical expenditure, Rs.700/- towards attendant, Rs.1,000/- towards special diet and Rs.2,500/- towards conveyance expenses.

30. Now, the claimant will be entitled for a total sum of Rs.13,27,640/- (12,09,600 + 25,000 + 10,000 + 78,840 + 700 + 1,000 + 2,500) instead of Rs.3,30,620/- awarded by learned Claims Tribunal. This amount of compensation shall carry interest at the rate of 7.5% per annum from the date of filing of claim application till its realization.

31. In the result, both the appeals i.e. MAC No.120 of 2014 filed by the Insurance Company and MAC No.137 of 2014 filed by the claimant, are allowed in part and the impugned award is modified to the extent indicated herein above. Other conditions imposed by learned Claims Tribunal shall remain intact.

32. As we have held in MAC No.120 of 2014 filed by the Insurance Company that Insurance Company is not liable to satisfy the amount of compensation as exoneration of Insurance Company was ordered only on the ground that there was no valid permit. In these circumstances, we find it appropriate to issue direction of pay and recover to Insurance Company. In view of above, the Insurance Company being insurer of vehicle is directed to first pay the amount of compensation and thereafter will be at liberty to recover the amount of compensation so deposited by it, from the driver and owner of the offending vehicle in the very same proceeding by filing an application for execution.

Sd/-	**Sd/-**
(P. R. Ramachandra Menon)	**(Parth Prateem Sahu)**
Chief Justice	**Judge**

Yogesh