AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

MAC No. 873 of 2013

Reserved on 20.12.2019
Pronounced on 07.01.2020

- Rajesh Sakuja, S/o Anant Ram Sakuja, Aged About 43 Years R/o Hirapur Murgi Farm, Raipur, G.E. Road, Tantibandh, P.O. And Chowki-Tantibandh, Raipur, Tah. And Distt. Raipur C.G., **---- Appellant**

Versus

1. Smt.Asha Devi Chouhan, W/o Late Vijay Kumar Chouhan, Aged About 45 Years R/o Qtr. No. 443/5 A, Balco Nagar, P.O. And P.S. Balco Nagar, Tah. And Distt. Korba C.G.,

2. Ku. Chandrakiran Singh, D/o Late Vijay Kumar Chouhan, Aged About 19 Years, R/o Qtr. No. 443/5 A, Balco Nagar, P.O. And P.S. Balco Nagar, Tah. And Distt. Korba C.G.,

3. Devendra Pratap Singh, S/o Late Vijay Kumar Chouhan, Aged About 16 Years, Minor, Thru- Mother Smt. Asha Devi Chouhan, R/o Qtr. No. 443/5 A, Balco Nagar, P.O. And P.S. Balco Nagar, Tah. And Distt. Korba C.G., (Claimants)

4. Rahman Khan, S/o Nathuni Miyan, R/o C/o Alam Shah, Behind Anjali Hotel, Sahid Veer Nagar, Khurshipar, Bhilai, P.O. And P.S. Bhilai Nagar, Tah. And Distt. Durg C.G., (Driver)

5. The New India Insu.Co.Ltd. Thru- Divisional Manager, Division Office, T.P. Nagar, P.O. Korba, P.S. Kotwali, Tah. And Distt. Korba C.G., (Insurance Company)

---- Respondents

MAC No. 874 of 2013

- Rajesh Sakuja, S/o Anant Ram Sakuja, Aged About 43 Years, R/o Hirapur Murgi Farm, Raipur, G.E. Road, Tantibandh, P.O. And Chowki-Tantibandh, Raipur, Tah. And Distt. Raipur C.G., **---- Appellant**

Versus

1. Smt.Asha Devi Chouhan, W/o Late Vijay Kumar Chouhan, Aged About 45 Years, R/o Qtr. No. 443/5 A, Balco Nagar, P.O. And P.S. Balco Nagar, Tah. And Distt. Korba C.G.,

2. Ku. Chandrakiran Singh D/o Late Vijay Kumar Chouhan Aged About 19 Years R/o Qtr. No. 443/5 A, Balco Nagar, P.O. And P.S. Balco Nagar, Tah. And Distt. Korba C.G.,

3. Devendra Pratap Singh S/o Late Vijay Kumar Chouhan Aged About 16

Years Minor, Thru- Mother Smt. Asha Devi Chouhan, R/o Qtr. No. 443/5 A, Balco Nagar, P.O. And P.S. Balco Nagar, Tah. And Distt. Korba C.G.,

4. Rahman Khan, S/o Nathuni Miyan, R/o C/o Alam Shah, Behind Anjali Hotel, Sahid Veer Nagar, Khurshipar, Bhilai, P.O. And P.S. Bhilai Nagar, Tah. And Distt. Durg C.G.,

5. The New India Insu.Co.Ltd., Thru- Divisional Manager, Division Office, T.P. Nagar, P.O. Korba, P.S. Kotwali, Tah. And Distt. Korba C.G.,

---- Respondents

MAC No. 1056 of 2013

1. Smt. Aasha Devi Chauhan, W/o Late Vijay Kumar Chauhan, Aged About 45 Years R/o Quarter No. 443/5 A, Balco Nagar, Korba, P.S. Korba, Distt. Korba C.G.,

2. Ku. Chandrakiran Singh D/o Late Vijay Kumar Chauhan Aged About 19 Years R/o Quarter No. 443/5 A, Balco Nagar, Korba, P.S. Korba, Distt. Korba C.G.,

3. Devendra Pratap Singh, S/o Late Vijay Kumar Chauhan, Aged About 16 Years Minor, Through Mother Smt. Aasha Devi Chauhan, R/o Quarter No. 443/5 A, Balco Nagar, Korba, P.S. Korba, Distt. Korba C.G.,

---- Appellants

Versus

1. Rahman Khan, S/o Nathuni Miyan R/o C/o Aalam Shah, Behind Anjali Hotel, Shahid Veer Nagar, Khursipar, Bhilai, P.S. Bhilai, Distt. Durg C.G.,

2. Rajesh Sakuja S/o Anantram R/o Hirapur, Murgi Form, Raipur, G.E. Road, Tatibandh, P.S. Raipur, Distt. Raipur C.G.,

3. The New India Insu.Co.Ltd. Korba, P.S. And Distt. Korba C.G.,

---- Respondents

MAC No. 1057 of 2013

1. Smt. Aasha Devi Chauhan, W/o Late Vijay Kumar Chauhan, Aged About 45 Years R/o Quarter No. 443/5 A, Balco Nagar, Korba, P.S. Korba, Distt. Korba C.G.,

2. Ku. Chandrakiran Singh, D/o Late Vijay Kumar Chauhan, Aged About 19 Years R/o Quarter No. 443/5 A, Balco Nagar, Korba, P.S. Korba, Distt. Korba C.G.,

3. Devendra Pratap Singh, S/o Late Vijay Kumar Chauhan, Aged About 16 Years Minor, Through Mother Smt. Aasha Devi Chauhan, R/o Quarter No. 443/5 A, Balco Nagar, Korba, P.S. Korba, Distt. Korba C.G.,

---- Appellants

Versus

1. Rahman Khan, S/o Nathuni Miyan R/o C/o Aalam Shah, Behind Anjali Hotel, Shahid Veer Nagar, Khursipar, Bhilai, P.S. Bhilai, Distt. Durg C.G.,

2. Rajesh Sakuja S/o Anantram R/o Hirapur, Murgi Form, Raipur, G.E. Road, Tatibandh, P.S. Raipur, Distt. Raipur C.G.,

3. The New India Insu.Co.Ltd. Korba, P.S. And Distt. Korba C.G.,

---- Respondents

For Appellant in MAC Nos.873 & 874/2013 & Respondent No.2 in MAC Nos.1056 & 1057/2013.	:Shri Sanjay Patel, Advocate.
For Respondents No.1 to 4 in MAC Nos. Nos.873 & 874/2013 and appellants in MAC Nos.1056 & 1057/2013	:Shri Goutam Khetrapal, Advocate
For Respondent/the New India Insurance Company Limited	:Smt. Chitra Shrivastava, Advocate.

Hon'ble Shri Justice Sanjay S. Agrawal

C.A.V. Order / Award

1. These appeals have been preferred by the owner as well as the claimants under Section 173 of the Motor Vehicles Act, 1988 (hereinafter referred to as the Act of 1988) questioning the legality and propriety of the common award dated 09.07.2013 passed by the Additional Motor Accident Claims Tribunal (FTC), Korba whereby the learned Claims Tribunal, while allowing the claim in part, has exonerated the insurance company from its liability. The parties to this Appeal shall be referred hereinafter as per their description in the Court below.

2. Briefly stated the facts of the case are that on 31.12.2003, deceased Vijay Kumar Chouhan and his daughter Neetu Singh @ Mamta Singh Chouhan were travelling along with the claimants in the Marshall Jeep bearing registration No. CG-12-ZD-0116. On the fateful day, it was dashed vehemently by the offending vehicle, i.e., 'Trailor' bearing registration No. CG-04-G-3216, owned and insured respectively by Non-Applicant No.2 Rajesh Sakuja and

Non-Applicant No.3 – the New India Insurance Company Limited. At the relevant time, it was being driven rashly and negligently by its driver Rahman Khan, owing to which, the alleged accident occurred and said Vijay Kumar Chouhan and his daughter Neetu Singh expired giving rise to the institution of the two separate Claim Petitions registered respectively as Claim Case No. 233/2007 and Claim Case No. 250/2007 wherein they claimed a sum of Rs.47,30,292/- and Rs.41,50,800/- respectively under various heads.

3. Non-Applicant No.1, the driver of the offending vehicle was proceeded ex parte while owner of it, i.e., Non-Applicant No.2 contested the Claim Petitions mainly on the ground that the vehicle in question was insured with the New India Insurance Company Limited, therefore, if any liability being fastened, the same could be indemnified by the insurance company.

4. Non-Applicant No.3, the insurer of the vehicle in question, refuted the claim by submitting, inter alia, that neither the cover note nor the insurance policy has been issued by the insurance company in the name of the owner of the vehicle in question, therefore, the company cannot be held liable to pay any amount of compensation in relation to the accident occurred on 31.12.2003.

5. The Claims Tribunal, in an earlier occasion, upon considering the evidence led by the parties, had allowed the Claim Petitions in part and the liability was fastened upon the insurance company vide its common award dated 16.07.2009.

6. The aforesaid award was, however, set aside by this Court on 06.01.2011 in appeals being MAC No. 1335/2009 and MAC No. 1336/2009 preferred by the insurance company and remanded the matter while directing at paragraph 12 as under:-

> "12. Accordingly, we allow the appeal in part, set aside the impugned award and remit the matter back to the Tribunal concerned for taking decision afresh in light of observations made in this order. Needless to mention that the claim cases shall be decided by the Tribunal after providing opportunity to the parties to adduce further evidence, if any, amend the pleadings, file documents or verify the documents already filed. It is also directed that the amount, which has already been deposited by the appellant-Insurance Company and yet not disbursed to the claimants, shall not be either refunded to the appellant-Insurance Company or disbursed to the claimants till the disposal of the claim petition."

7. Upon remand, the Claims Tribunal, has passed the impugned common award in Claim Case Nos. 168/2013 and 169/2013 while exonerating the insurance company from its liability.

8. Being aggrieved, the instant appeals have been preferred by the owner of the vehicle in question as well as the Claimants, registered respectively as MAC No.823/2013, MAC No. 874/2013, MAC No. 1056/13 and MAC No.1057/13.

9. Shri Sanjay Patel, learned counsel appearing on behalf of the owner of the vehicle in question in MAC Nos.873 & 874 of 2013, submits that the award impugned as passed by the Claims Tribunal without following the directions contained in the remand order dated 06.01.2011 is apparently contrary to law. While inviting attention to the order sheet dated 28.06.2013, it is contended that on the said date when the matter was posted for evidence, the wife of the original counsel Mr. Anish Kumar Saxena was admitted into ICU of MMI Hospital at Raipur and the said counsel was, therefore, unable to attend the Court. An application under Order 17 Rule 1 read with Section 151 of CPC was, therefore, made seeking an adjournment to cross-examine the witness adduced by the insurer. It was, however, refused irrespective of the fact that the contents made therein were not controverted by the Non-Applicants. The

appellant/owner was, therefore, deprived in cross-examining the witness adduced by the insurer and thus the valuable right of the owner has been taken away. The award impugned is, therefore, liable to be set aside. In support, he placed his reliance upon the decision rendered in the matter of "***Pyarelal Sakseria*** vs. ***Devishankar Parashar*** and ***Rajendra Nagrath*** vs. ***COL.V.L.Vohra & Ors***" reported respectively in **AIR 1994 MP 115** and **AIR 2009 MP 131.**

10. Shri Goutam Khetrapal, learned counsel appearing on behalf of the Claimants in MAC Nos. 1056 and 1057 of 2013 while questioning the finding of the Claims Tribunal regarding the exoneration of the insurance company, submits that the award impugned as passed is on lower side and just and proper compensation payable to the Claimants has not been awarded.

11. On the other hand, Smt. Chitra Shrivastava, learned counsel appearing for Non-Applicant No.3, the insurance company, has supported the award impugned.

12. I have heard learned counsel for the parties and perused the entire record carefully.

13. Perusal of the record would reveal the fact that when the matter was listed for recording evidence of the Non-Applicants, an application seeking an adjournment to cross-examine the witness adduced by the insurer was made by Non-Applicant No.2/owner submitting therein that the major lung operation to the wife of the original counsel Mr. Anish Kumar Saxena has been done on 26.06.2013 and she was in ICU of MMI Hospital at Raipur, and his counsel was, therefore, not in a position to come to the Court. The application was, therefore, made on 28.06.2013 for its adjournment. It was, however, rejected by the Claims Tribunal vide its order dated 28.06.2013 by observing that the

alleged application appears to have been made for the purposes of delaying the matter, else the medical certificates would have been attached with the said application. The approach of the Tribunal rejecting the said application appears to be hyper-technical in nature and the application for adjournment ought not to have been rejected merely on the ground that it was not attached with the medical certificates, particularly, when its contents were not controverted by Non-Applicant No.3/insurance company in writing. That apart, perusal of the earlier order sheet dated 30.07.2012 would reveal the fact that on the said day, Non-Applicant No.2/owner had moved an application enumerated under Order 16 Rule 1 & 2 of CPC seeking to summon the driver of the offending vehicle for his examination and the Tribunal had directed to decide the same at the time of evidence. The said application was, however, not decided and appears to have been skipped over. Be that as it may, it appears that the applicants have closed their evidence on 25.02.2013 and the matter was thereafter directed to be listed for evidence on 03.04.2013 and on the said date, i.e., 03.04.2013, summon, which was issued to the driver of the offending vehicle was received unserved and the matter was directed to be listed on 27.04.2013 while providing a last opportunity to Non-Applicant No.2 for the examination of his witnesses. On 27.04.2013, Non-Applicant No.2 moved an application enumerated under Order 26 Rules 1 & 2 read with Section 151 of CPC praying for examination of the said driver on commission as he was the eye-witness to the occurrence of the alleged accident. It was rejected on the same day by the Tribunal by observing, inter alia, that since the matter was remanded vide order dated 06.01.2011 only for the verification of the alleged cover note, therefore, further opportunity to Non-Applicant No.2 for the examination of the said driver would not be appropriate. As a consequence, the matter was directed to be posted on 28.06.2013 for examination of the witness of Non-Applicant No.3.

14. What is, therefore, reflected from a bare perusal of the aforesaid order sheets that the application filed by Non-Applicant No.2 on 30.07.2012 under Order 16 Rule 1 & 2 of CPC was not only skipped over in deciding the same but the reasons assigned in the said application under Order 17 Rule 1 of CPC made on 28.06.2013 seeking an adjournment to cross-examine the witness of the insurer has been turned down despite the fact that the contents made therein, though opposed orally, have not been controverted specifically in writing. The appellant/owner was, therefore, deprived to exercise his valuable right to cross-examine the witness of the insurer.

15. According to the owner of the vehicle in question, a cover-note was issued by the insurance company after receiving the premium amount of Rs.16,718/- through its authorised agent, which was, however, denied by the insurance company. In order to question the genuineness of the alleged cover-note, the insurer has produced its witness, however, he could not have been cross-examined by the owner as his application for adjournment was turned down by the Tribunal vide order dated 28.06.2013. At this juncture, the provision prescribed under Section 137 of the Indian Evidence Act is to be seen which provides as under:-

> "**137. Examination in chief.---** The examination of a witness by the party who calls him shall be called his examination in-chief.
>
> **Cross-examination.---** The examination of a witness by the adverse party shall be called his cross-examination.
>
> **Re-examination.---** The examination of a witness, subsequent to the cross-examination by the party who called him, shall be called his re-examination. "

16. The aforesaid provision gives the right of cross-examination to the adverse party. The interest of owner as well as the insurer are adversaries with each other in so far as the genuineness of the alleged cover note is

concerned. The right of cross-examination was, therefore, the valuable right of the owner, however, refusal of it by the Tribunal on 28.06.2013 has certainly affected his valuable right to cross-examine the witness of the insurer. A right to cross-examine a witness is an integral part of the examination of a witness so much so that whenever a witness is examined, any failure to provide opportunity to the opposite party to exercise such right of cross-examination will render the examination incomplete and ineffective unless such party waives or abandons such right. The right of cross-examination could not be curtailed or circumscribed as shutting up of cross-examination would necessarily result in injustice to the cause and to the party against whom the statement is intended to be used. It is the right of every litigant unless he gives up the same, to be afforded an opportunity of cross-examining the witness whose testimony may be used against him. The owner who has neither waived or abandoned his right to cross-examine the witness of the insurer ought not to have been deprived to exercise such a right by the Tribunal while rejecting his alleged application dated 28.06.2013 by adopting such a hyper-technical view merely on the basis that the medical certificates were not attached with it. The Tribunal must give a fair chance to cross-examine the witness adduced by the insurer in order to ascertain the genuineness of the alleged cover note, alleged to have been issued by the insurance company through its authorised agent.

17. At this juncture, the principles laid down in the matter of **Pyarelal Sakseria** vs. **Devishankar Parashar** (supra) are to be seen where a right of tenant to cross-examine one Kasturibai, who had donated the suit property by way of a registered gift-deed to her son-in-law, the plaintiff/landlord, was refused by the trial Court as she was an old lady. It was observed therein that instead of depriving the tenant to exercise such a right could have afforded him an opportunity to cross-examine the said witness. Paragraphs 9 and 10 are

relevant, which read as under:-

> "**9.** Now, so far as the right of cross-examination is concerned, every party has to be given a fair deal in this matter though it is admitted that Smt. Kasturibai is an old lady, and comes from Bhopal and that was first date of recording evidence. The learned Rent Controlling Authority instead of depriving the tenant of the right of cross-examination could afford an opportunity to tenant by adjourning the case on payment of cost and expenses, which is sufficient for bringing Kasturibai by a car or in higher class compartment of a train. Instead of doing that, he deprived the tenant of the right of cross-examination.
>
> **10.** In the opinion of this Court, therefore, the learned Rent Controlling Authority has not exercised jurisdiction vested in him properly, and has wrongly deprived the tenant of his right of cross-examination of Kasturibai."

18. Yet, in the matter of **Rajendra Nagrath** vs. **Col. V.L. Vohra** (supra), the Division Bench of M.P High Court, while interpreting the aforesaid provision of Section 137 of the Indian Evidence Act, has observed at paragraphs 7 & 8 as under:-

> "**7.** …......... It is apparent from Section 137 of the Evidence Act that the examination of witness by adverse party shall be called his cross-examination. We see no rhyme or reason even on the strength of Section 137 to disallow cross-examination as the defendants are adverse party they have to be permitted to cross-examine the witnesses particularly when examination-in-chief has been filed in the shape of affidavits and plaintiff is not satisfied with the factual scenario of not filing consequential amendment in the written statement and want to prove the fact by examining the witnesses. The plaintiff has chosen the mode of examining the witnesses, in such circumstances, obviously right is available to the defendant particularly when denial of factum of Will has also been made in reply to the application. There is legal requirement to permit the defendants to cross-examine the witnesses. In Karumanchi Subba Rao V. Yarlagadda Venkatappaiah and others (supra) the Andhra Pradesh High Court has laid down that the adverse party has the right to cross-examine the witness. In the said case the plaintiff as well as defendants Nos. 3, 4 and 7 were sailing together, said defendants have prayed for a decree in favour of the plaintiff which is not the case here. In the aforesaid context, it was held by the Court that the defendants Nos. 3, 4 and 7 cannot be said to have any statutory right to cross-examine the plaintiff. The decision is distinguishable and cannot be said to be applicable. Reliance has also been placed on Hussens Hasanali Pulavwala v. Sabbirbhai Hasanali Pulavwala, AIR 1981 Gujarat 190. After examining the scheme of Sections 137 and 142 of the

> Evidence Act the Gujarat High Court laid down that it would appear from the scheme of the aforesaid provisions of the Evidence Act that in order to cross-examine a witness, it must be shown that the party seeking cross-examination is an 'adverse party'. Such party should be contesting party. In the instant case the defendants are not only adverse party, but, also the contesting one. Thus, they have the right to cross-examine the witnesses.
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> 8. Counsel has also referred to the decision in Sadhu Singh v. Sant Narain Singh Sewadar and Ors., AIR 1978 Punjab and Haryana 319, in which the High Court has laid down that Section 138 allows the right of cross-examination of a witness to an adverse party. Where the parties arrayed as defendants in a suit have taken contradictory stands on a relevant and material issue, they shall be adversary to each other and are entitled to exercise their right of cross-examination against each other. In the instant case, as the defendants respondents are contesting the claim and they are adverse party they have the right to cross-examine, it is a different matter what questions they are required to put, but, right to cross-examine cannot be denied to them. Consequently, in our considered opinion, the trial Court has rightly rejected the application filed by the plaintiff petitioner under Order 8 Rule 5 r/w Section 151 C.P.C."

19. Applying the aforesaid principles to the case in hand and considering further the valuable right of the owner to cross-examine the witness adduced by the insurer, I am of the view that the award impugned as passed by the Tribunal without affording sufficient and reasonable opportunity of hearing to the appellant/owner, as required to be given by virtue of the said remand order, has vitiated the entire proceedings.

20. Consequently, the appeals are allowed and the matters are remanded to the concerned Tribunal to decide the Claim Petitions afresh strictly in the light of the direction contained in the said remand order dated 06.01.2011 as soon as possible, preferably, within the period of 6 months from the date of receiving the certified copy of this order as the matter is pertaining to the accident occurred on 31.12.2003. All the parties are directed to remain present before the concerned Additional Motor Accidents Tribunal, Korba on 30.01.2020.

21. The Registry is directed to transmit the entire records forthwith to the concerned Tribunal/Additional Motor Accidents Claims Tribunal, Korba. No order as to costs.

Sd/-

(Sanjay S. Agrawal)
Judge

Anjani