NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

MAC No. 768 of 2014

- ICICI Lombard General insurance Company, Registered office: ICICI Bank Towers, Bandra-Kurla Complex, Mumbai, 400051, through its Legal Manager, ICICI Lombard General Insurance Company Limited, Ground Floor, Vanijaya Bhawan, Deandra Nagar Road, Raipur C.G.

-----Appellant

VERSUS

1. Smt. Rukhmani Kashyap W/o late Laxminarayan Kashyap, aged about 22 years
2. Ku. Purnima Kashyap D/o late Laxminarayan Kashyap, aged about 01 month
3. Smt. Jai Kunwar kashyap W/o Shri Radhelal @ Radheshyam Kashyap, aged about 45 years
4. Radhelal @ Radheshaym Kashyap, S/o late Motilal Kashyap, aged about 50 years, respondent 2 being represented through mother respondent 1 Rukhmani Kashyap W/o late Laxminarayan Kashyap

   All are R/o Nevsa (Jali), P.S. Ratanpur, District Bilaspur C.G.

--------Claimants

5. Shiv Shankar Sahu, S/o T.R. Sahu, R/o Nevsa (Jali), P.S. Ratanpur, District Bilaspur C.G. **–----owner-cum-driver**

----Respondents

WITH

MAC No. 883 of 2014

1. Smt. Rukhmani Kashyap W/o late Laxminarayan, aged about 22 years
2. Ku. Purnima Kashyap D/o late Laxminarayan, aged about 1 month
3. Smt. Jay Kunwar Kashyap W/o Radhelal @ Radheshyam Kashyap, aged about 45 years
4. Radhelal @ Radheshyam Kashyap, S/o late Motilal Kashyap, aged about 50 years

   Respondent No. 2 minor and represented through her mohter Smt. Rukhmani Kashyap

   All R/o Nevsa (Jali) P.S. Ratanpur District Bilaspur C.G.

---- Appellants

Versus

1. Shiv Shankar Sahu S/o T.R. Sahu R/o Nevsa (Jali) P.S. Ratanpur District Bilaspur C.G. **----owner**
2. I.C.I.C.I. Lombard General Insurance Company ltd. Bank Tower, Bandra Kurla Complex, Badra East Mumbai 400051. Local Office- V.R. Plaza, near Deep Hotel Link Road, Tahsil & District Bilaspur C.G.

---- Respondents

MAC 768/2014

For Appellant	:	Mr. Sourabh Sharma, Advocate
For Respondent 1 to 4	:	Mr. Rajesh Jain, Advocate.
For Respondent 5	:	Mr. Rajkumar Gupta, Advocate

MAC 883/2014

For Appellants	:	Mr. Rajesh Jain, Advocate
For Respondent 1	:	Mr. Rajkumar Gupta, Advocate
For Respondent 2	:	Mr. Sourabh Sharma, Advocate

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

Order on Board

Per Parth Prateem Sahu, J.

17/11/2020

1. Both these appeals are arising out of common award dated 31.03.2014 passed by Additional Motor Accident Claims Tribunal, Bilaspur in claim case no. 95/13, hence, both these appeals are being disposed of by this common order.

2. MAC No. 768/2014 is filed by Insurance Company Non-applicant 2 challenging the liability fastened upon it on the ground that non-applicant 1/Respondent 5 failed to produce copy of driving licence to prove that the offending vehicle was being driven by a person holding a valid and effective driving licence. MAC No. 883/2014 is filed by the claimants seeking enhancement of the amount of compensation awarded by the Claims Tribunal.

3. Facts of the case necessary for disposal of these appeals are that on 11.04.2011 Laxminarayan Kashyap was traveling on a motor cycle bearing registration no. CG 10 EK 9469 (offending vehicle) of non-applicant 1/ Respondent 5 as pillion rider and going to Ratanpur from village Nevsa. While they were returning from Ratanpur and reached near

village Jali on main road, one unknown truck dashed the motor cycle (offending vehicle) from its rear side and caused accident. In the said accident, Laxminarayan suffered grievous injuries over his person and died. Accident was reported to concerned police station based on which crime bearing no. 116/2011 was registered. Claimants have filed an application under Section 163-A of the Motor Vehicle Act, 1988 (for short "Act of 1988") seeking compensation of Rs. 13,45,000/- pleading therein that on the date of accident deceased was an able-bodied person aged about 24 years, earning Rs. 3,300/- per month as daily wage labourer.

4. Non-applicant 1/ Owner-cum-driver of the motor cycle submitted reply to the claim application denying the entire pleading made in the application filed under Section 163A of the Act of 1988. It was further pleaded that on the date of accident offending vehicle was being driven by deceased, accident was a result of rash and negligent driving of the truck by its driver. Late Laxminarayan, on account of the dashing of motor cycle by unknown truck, came under the wheels of the truck and died. Offending vehicle was insured with non-applicant 2-Insurance Company with a valid insurance policy for a period from 15.12.2010 to 14.12.2011. Amount claimed is highly exaggerated. Non-applicant 1 is not liable to pay any compensation.

5. Non-applicant 2-Insurance Company submitted reply to the claim application pleading therein that on the date of accident, non-applicant 1 was not possessed with valid and effective driving licence. Accident was with unknown truck. Applicants were not dependent upon the deceased. There was breach of policy conditions, hence, non-applicant 2-Insurance Company is not liable to pay any compensation.

6. Learned Claims Tribunal, on appreciation of pleadings and evidence placed on record by the respective parties held that the Insurance Company failed to prove the breach of policy condition, assessed the

income of the deceased as Rs. 36,000/- per annum, awarded Rs. 4,17,500/- as total compensation.

7. Mr. Sourabh Sharma, learned counsel for the appellant-Insurance Company submits that the Claims Tribunal erred in arriving at a finding that the Insurance Company failed to prove breach of policy conditions. He submits that the Insurance company during the proceedings before the Claims Tribunal has moved an application for notice to produce document, application for calling non-applicant 1 as witness along with copy of driving licence, but even though, non-applicant 1 was represented by an advocate, neither placed on record copy of driving licence nor entered into witness box. He further submits that the Insurance Company is having the legal obligation to indemnify the insured subject to the owner of the offending vehicle and policy holder is able to prove that there was no breach of policy conditions on any of the count by placing cogent and reliable piece of evidence. Claims Tribunal has not considered the fact that the burden to prove that there was valid and effective driving licence with driver was initially upon the non-applicant 1/ owner of the offending vehicle in which he utterly failed. He pointed out that the Claims Tribunal even after allowing the application for calling non-applicant 1 along with document has issued notices more than once but without waiting for the report of the notice has closed the right of Insurance Company to lead further evidence and heard the case finally. Claims Tribunal has not conducted proper enquiry as envisaged under Section 168 of the Act of 1988 and Rule 226 of Chhattisgarh Motor Vehicles Rule, 1994, in the facts of the case.

8. Per contra, Mr. Rajkumar Gupta, learned counsel for Respondent 5 submits that the appellant-Insurance Company has not placed any material to prove that on the date of accident, he was not possessed with

valid and effective driving licence. Claims Tribunal has rightly taken into consideration that the Insurance Company has failed to discharge the burden of proving the fact that there was breach of policy conditions, hence, the findings recorded by the Claims Tribunal is just and proper which does not call for any interference. In alternate, he submits that an opportunity may be given to non-applicant 1 to prove that he was possessed with valid and effective driving licence.

9. Mr. Rajesh Jain, learned counsel for the claimants submits that he has also preferred an appeal for enhancement of the amount of compensation. He submits that the policy issued by the appellant-Insurance company is not in dispute, hence, the Claims Tribunal was justified in arriving at a finding that the Insurance Company failed to prove that there was breach of policy conditions. For enhancement of the impugned award, he submitted that the claimants in their claim application have very specifically pleaded the income of the deceased as Rs. 3,300/- per month but Tribunal erred in assessing the income of the deceased as Rs. 3,000/- per month only on the basis of conjecture and surmises. It is further contended that the Claims Tribunal has not awarded any amount on other conventional heads in accordance with the law laid down by the Supreme Court in the case of ***National Insurance Company Ltd. v. Pranay Sethi*** reported in ***(2017) 16 SCC 680*** and ***Magma General Insurance Company vs. Nanu Ram alias Chuhuru Ram and others*** reported in ***(2018) 18 SCC 130***. He submits that the amount of compensation be suitably enhanced.

10. We have heard learned counsel for the respective parties and perused the record of the claim cases.

11. Sofar as, the grounds taken in the appeal by the Insurance Company with regard to the liability to satisfy the amount of compensation fastened upon

it, perusal of the proceedings would show that non-applicant 2 has filed an application under Order 11 Rule 16 CPC in Form-7, “Notice to Produce Documents” seeking production of driving licence on 5.9.2012, on that date, owner of the offending vehicle/ non-applicant 1 was represented by an advocate, thereafter an application under Section 151 of CPC was also filed for calling non-applicant 1 as witness along with relevant documents. Non-applicant 1/ owner driver of the offending vehicle could not able to place on record, copy of driving licence nor entered into the witness box for the reason best known to him.

12. It is not a case at hand that Respondent-Insurance company has not made efforts for production of documents on record but for any of the reason, non-applicant 1 failed to produce the copy of licence before the Claims Tribunal. Even before this court, non-appllicant 1 was represented by Mr. Rajkumar Gupta, but, has not placed on record the copy of driving licence before this Court more so when one of the grounds raised by the Insurance Company in the appeal is that the driver of the motor cycle/ non-applicant 1 was not possessed with valid and effective driving licence.

13. For the foregoing reasons, particularly, considering the fact that the Insurance Company has moved an application for notice to produce the copy of driving licence, filing an application under Section 151 of CPC calling non-applicant 1 as witness along with copy of driving licence. Non-applicant 1 owner of the offending vehicle even though appeared through advocate has failed to produce the copy of licence before the Claims Tribunal or before this Court to rebut the ground taken by the appellant -Insurance Company. The submission made by the learned counsel for the appellant that on the date of accident, non-applicant 1 was not driving the motor cycle is also not acceptable because non-applicant 1 except the barred pleadings has not brought on record any evidence to the effect that

the deceased himself was driving the motor cycle. Non-applicant 1 owner of the offending vehicle will not able to succeed in absence of any reliable and clinching piece of evidence brought on record to prove the facts pleaded. Submission of the learned counsel for Respondent 5/ owner of the offending vehicle that the case be remitted back to the Claims Tribunal is also not sustainable where multiple opportunities were given to non-applicant 1 to produce the copy of driving licence on record. Non-applicant 1 even being an Army person posted at high altitude at Laddakh could have sent copy of driving licence to concerned advocate and he could have placed it on record for consideration which was not done. In this appeal also, non-applicant 1 has not placed copy of driving licence on record.

14. For the foregoing reasons, the finding recorded by the Claims Tribunal that the Insurance Company failed to prove breach of policy conditions is not sustainable and it is hereby set aside. Appellant-Insurance Company is exonerated from its liability to satisfy the amount of compensation. But the issuance of insurance policy is not in dispute and the exoneration is only on the ground of not having valid driving licence on the date of accident. The Apex Court has considered the issue with regard to breach of policy conditions for want of valid and effective driving licence in the case of ***Shamanna v. Oriental Insurance Co. Ltd.*** reported in **(2018) 9 SCC 650**, and held thus:

> "6. As per the decision in *Swarn Singh case, (2004) 3 SCC 297*, onus is always upon the insurance company to prove that the driver had no valid driving licence and that there was breach of policy conditions. Where the driver did not possess the valid driving licence and there are breach of policy conditions, "pay and recover" can be ordered in case of third-party risks. The Tribunal is required to consider "as to whether the owner has taken reasonable care to find out as to whether the driving licence produced by the driver … does not fulfil the

> requirement of law or not will have to be determined in each case”.”

15. Taking support of the ruling of Apex Court in the case of ***Shamanna (supra),*** we find it appropriate to direct the Insurance Company to first pay the amount of compensation and thereafter to recover the amount of compensation so deposited by it from non-applicant 1/ owner.

16. Sofar as, the appeal filed by claimants ie. MAC 883/2014 seeking enhancement of amount of compensation is concerned. Mr. Rajesh Jain has raised two grounds for consideration ie. the income of the deceased has been assessed on lower side and further the amount of compensation awarded on other conventional heads is not in consonance with by the law laid down by the Supreme Court in the case of ***National Insurance Company Ltd. v. Pranay Sethi*** reported in ***(2017) 16 SCC 680***. Sofar as the first ground raised by the learned counsel for the appellants-claimants in MAC 883/2014 with regard to income, perusal of the record would show that the claimants have very specifically pleaded in their claim application that on the date of accident deceased was earning Rs. 125/- to Rs. 150/- per day i.e. Rs. 3,300/- per month. Applicant 1 was examined as witness as AW-1. In her evidence she has very categorically stated that the income of the deceased as Rs. 3,300/- per month. In cross examination she stated that her husband was called by non-applicant 1 and took him. She stated that her husband was earning Rs. 125/- to Rs. 150/- per day. Upon going through the pleadings available on record, it is apparent that the claimants have pleaded that the income of the deceased as Rs. 3,300/- per month from the work of labourer. Though the claimants have failed to prove the actual income of the deceased by placing any admissible and documentary evidence on record but then it is the duty of the Court to assess the income of the deceased on notional basis considering the pleadings, evidence, date of accident and other facts of the case available

on record.

17. In the instant case, claimants have filed an application under Section 163A of the Act of 1988 claimed the earning of the deceased as Rs. 3300/- per month, date of accident is 11.04.2011, hence we find it appropriate to accept the submission made by the learned counsel for the appellants/ claimants that the Claims tribunal erred in awarding meagre amount of compensation. We reckon the income of the deceased as Rs. 3,300/- per month taking note of the fact the date of accident ie. 11.04.2011.

18. Sofar as, the second ground raised by the learned counsel for the appellants-claimants of non-awarding of the amount on the head of loss of consortium to the extent of 40,000/-. Application is filed under Section 163A of the Act of 1988. Amount of compensation is to be calculated as per the second schedule appended to Act of 1988. Claims Tribunal has awarded Rs. 2,000/- towards funeral expenses, Rs. 2,500/- towards loss of estate and Rs. 5,000/- towards loss of consortium. The amount of compensation awarded on other conventional heads is strictly in accordance with the second schedule attached along with the Act of 1988. The amount of compensation awarded on other conventional heads also does not require any consideration of this Court. The award of compensation on other conventional heads is perfectly in accordance with the second schedule of the Act of 1988. The income of the deceased is enhanced from Rs. 3,000/- to Rs. 3,300/- per month, the amount of compensation to be awarded to the claimants requires re-computation and recalculation which is as under.

19. The income of the deceased is taken as Rs. 3,300/- per month i.e. Rs. Rs. 39,600/- p.a., there will be deduction of 1/3rd towards personal and living expenses. After deduction of 1/3rd, yearly loss of dependency will come to Rs. 26,400/- [Rs.39,600 - 1/3rd of Rs.39,600/-]. On the date of accident,

deceased was aged between 21-25 years, hence multiplier of 17 would be applicable. Upon applying the multiplier of 17 to yearly loss of dependency, total loss of dependency will come to Rs.4,48,800/- [Rs.26,400x17]. Apart from the aforementioned amount of loss of dependency, claimants are further entitled for Rs. 2,000/- towards funeral expenses, Rs. 2,500/- towards loss of estate, Rs. 5000/- towards loss of consortium. Claimants will now be entitled for total **Rs.4,58,300/-** [Rs.448800 +Rs.2000 +Rs.2500 +Rs.5000] instead of Rs. 4,17,500/- as awarded by the Claims Tribunal. Amount of compensation shall carry interest @ 6% p.a. from the date of filing of claim application till its realization.

20. In the result, both the appeals are allowed in part. Liability to satisfy the amount of compensation upon Insurance Company is hereby set aside. Now the liability to satisfy the amount of compensation would be upon Non-applicant 1/ Owner. It is directed that the Insurance Company shall first deposit the entire amount of compensation along with interest and thereafter to recover the amount so deposited by it from the owner -driver of the motor cycle in accordance with law.

21. Impugned award is modified to the extent as indicated herein-above.

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

Pawan