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HIGH COURT OF CHHATTISGARH, BILASPUR

M. A. (C) No. 1059 of 2013

(Arising out of award dated 07.09.2013 passed in Motor Accident Claim Case No.33 of 2013 by the Motor Accident Claims Tribunal, Durg, District Durg, Chhattisgarh)

1. Smt. Geeta Bai wife of late Anuruddha Singh Dewangan, aged about 42 years,
2. Hament Dewangan son of late Anuruddha Singh Dewangan, aged about 26 years,
3. Chowaram Dewangan son of late Anuruddha Singh Dewangan, aged about 25 years,
4. Devvrat Dewangan son of late Anuruddha Singh Dewangan, aged about 21 years,
5. Smt. Rajvati Dewangan wife of late Shri Rain Singh Dewangan, aged about 65 years,

All are resident of Village Surpa, Police Station Ranitarai, Tahsil Patan, Civil & Revenue District Durg, Chhattisgarh.

---- Appellants

Versus

1. Surya Bahadur Yadav son of Shri Ganga Bahadur Yadav, aged about 40 years, resident of Labour Camp, A.C.C. Colony, Police Station Jamul, Tahsil & District Durg, Chhattisgarh.
2. Sandeep Sharma son of Shri Satyendra Sharma, aged about 26 years, resident of M.I.G.2/45, Housing Board Colony, Industrial Area, Bhilai, Tahsil & Police Station Bhilai, District Durg, Chhattisgarh.
3. Bajaj Allianz General Insurance Company Limited, through the Chief Manager, Chief Office G.E. Plaza, Airport Road, Airwada, Pune, Maharashtra.

---- Respondents

For Appellants	: Shri Prateek Sharma, Advocate
For Respondent No.1	: Shri Samir Singh, Advocate
For Respondent No.2	: None
For Respondent No.3	: Shri Abhishek Sinha, 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

22.07.2020

1. Appellants/claimants have questioned the legality and propriety of the impugned award dated 07.09.2013 passed by the Motor Accident Claims Tribunal, Durg, District Durg, Chhattisgarh (hereinafter referred to as 'Claims Tribunal') in Motor Accident Claim Case No.33 of 2013 whereby learned Claims Tribunal allowed the claim application in part and awarded a total sum of Rs.1,43,000/- as compensation in a death case.

2. Facts relevant for disposal of this appeal, are that, on 17.01.2012 at about 2.00 PM, Anuruddha Singh Dewangan was travelling on his bicycle and going to Dhamtari from his village Surpa, while so, when he reached near the house of one Mordhwaj at village Arkar, one Haiwa Truck bearing registration No.WB-37/B/0049 (hereinafter referred to as 'offending vehicle') dashed the bicycle of Anuruddha Singh Dewangan from its back side and caused the accident. In the aforementioned accident, Anuruddha Singh Dewangan suffered grievous injuries over his head, waist and succumbed to the injuries suffered by him on spot. The matter was reported to concerned Police Station, based upon which, Crime No. 15 of 2012 for the

offence punishable under Section 304A was registered against respondent No.1/non-applicant No.1, driver of the offending vehicle.

3. Appellants/claimants who are widow, children and widow mother of the deceased have filed claim application under Sections 166 and 140 of the Motor Vehicles Act, 1988 (hereinafter referred to as 'M.V. Act') seeking compensation of Rs.65,05,000/- on account of untimely motor accidental death of Anuruddha Singh Dewangan mentioning therein that the deceased was earning Rs.400/- per day by doing the work of Mason.

4. Respondents No.1 and 2/Non-applicants No.1 and 2, who are driver and owner of the offending vehicle submitted reply to claim application pleading therein that the accident was on account of negligence on the part of deceased-bicycle rider and false and fabricated report/First Information Report was registered against non-applicant No.1. It was further pleaded that the amount claimed in the claim application is highly exaggerated and the offending vehicle was insured with non-applicant No.3/Insurance Company, liability for depositing the amount of compensation, if any, awarded would be on the Insurance Company.

5. Respondent No.3/non-applicant No.3/Insurance Company submitted reply to claim application pleading therein that there is no document placed on record with regard to income and age of deceased as well as there is no certificate of training of Mason by the deceased to say

that the deceased was working as Mason. It was further pleaded that no information as required under Section 158(6) of the M.V. Act was forwarded to the Insurance Company; insurance of offending vehicle was denied; there was no valid and effective driving license with non-applicant No.1; no valid permit and fitness of the offending vehicle on the date of accident and thereby there was breach of conditions of insurance policy, Insurance Company is not liable to satisfy the amount of compensation.

6. Learned Claims Tribunal on appreciation of pleadings and evidence placed on record by the respective parties has formulated five issues for consideration including issues with regard to breach of conditions of insurance policy and contributory negligence on the part of deceased Anuruddha Singh Dewangan amongst others. To prove the claim application, claimants have examined claimant No.1-Smt. Geeta Bai as AW-1 as well as one Tiharuram as AW-2 and placed on record the documents of criminal case from Ex.P/1 to Ex.P/16. During the pendency of claim application, non-applicants No.1 and 2, driver and owner of the offending vehicle absented temselves and accordingly, they were proceeded *ex parte*. Non-applicant No.3/Insurance Company examined one Punit Rathore, Legal Officer as NAW(3)-1 in support of their pleadings.

7. Learned Claims Tribunal on appreciation of the pleadings, evidence and material placed on record by the respective parties, arrived at a finding that there was violation of conditions of insurance policy as on

the date of accident, offending vehicle was not having valid permit and fitness; there was contributory negligence on the part of deceased Anuruddha Singh Dewangan to the extent of 50% and after calculating the total amount of compensation as Rs.2,86,000/-, awarded Rs.1,43,000/- to the appellants/claimants.

8. Shri Prateek Sharma, learned counsel for the appellants/claimants submits that learned Claims Tribunal arrived at a finding that there was contributory negligence on the part of the deceased to the extent of 50% is without any admissible piece of evidence. He further submits that learned Claims Tribunal even after taking note of the fact that there is no mention of directions in the spot map (Ex.P/13) of traveling of truck and deceased, and without discussing any evidence in this regard, only on the basis of presumption and surmises, contributory negligence on the part of the deceased to the extent of 50% is recorded, which cannot be sustained; more so, when the driver of offending vehicle, who could be the best witness to prove the negligence on the part of the deceased, did not enter into witness box and became *ex parte*. It is further contended that learned Claims Tribunal erred in assessing the monthly income of deceased as Rs.3000/- per month and Rs.36,000/- per annum, whereas in the State of Chhattisgarh, from the period 01.10.2011 to 31.03.2012, the minimum wages fixed for skilled labours are Rs.4,271/-. He also points out that learned Claims Tribunal not awarded any amount towards future prospects and applied wrong deduction of 1/3rd in

place of 1/4th. He places reliance in the matters of **Sarla Verma (Smt.) and others v. Delhi Transport Corporation and another**[1] and **National Insurance Co. Ltd. v. Pranay Sethi**[2] to strengthen his submission. It is further contended that learned Claims Tribunal taking note of age of deceased mentioned in postmortem report (Ex.P/3) as 50 years, but even then, applied wrong multiplier of 11 instead of 13 and awarding meager amount of compensation towards other conventional heads. It is lastly contended that learned Claims Tribunal erroneously rejected the prayer for issuance of direction to Insurance Company to 'pay and recover' in case it is found that there was breach of conditions of insurance policy and prays that Hon'ble Court may kindly issue a direction to respondent No.3/Insurance Company to first pay the entire amount of compensation to be awarded to the claimants and thereafter, recover the same from respondents No.1 and 2 i.e. driver and owner of the offending vehicle.

9. Per contra, learned counsel for respondent No.3/Insurance Company submits that impugned award passed by learned Claims Tribunal is just and proper, which does not for any interference. He further submits that not having valid permit has been held to be fundamental breach of conditions of insurance policy and in case of fundamental breach of conditions of insurance policy, direction for pay and recover cannot be issued except in exercise of jurisdiction under Article 142

1 **(2009) 6 SCC 121**
2 **(2017) 16 SCC 680**

of the Constitution of India. Referring to the judgment passed by Hon'ble Supreme Court in the matter of **Amrit Paul Singh and another v. Tata AIG General Insurance Company Limited and others**[3] submits that Hon'ble Supreme Court has held that breach of conditions of insurance policy on account of not having valid permit cannot be equated with case of no license or fake license, therefore, direction for pay and recover cannot be issued. It is further contended that learned Claims Tribunal after considering the entire material placed on record, arrived a finding that there was contributory negligence on the part of the deceased to the extent of 50%, which also does not call for any interference. It is lastly contended that the claimants have not placed on record any document or certificate to prove the occupation of deceased and his earning, therefore, learned Claims Tribunal justified in assessing the income of deceased on notional basis.

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

11. So far as the first ground raised by learned counsel for the appellants that the finding arrived by learned Claims Tribunal with regard to contributory negligence to be without evidence, we have gone through the records of the claim case. Respondents No.1 and 2, driver and owner of the offending vehicle though submitted their reply to claim application pleading therein that the accident occurred due to

3 **(2018) 7 SCC 558**

sole negligence of deceased-bicycle rider, they have not placed any admissible piece of evidence before learned Claims Tribunal instead, they became *ex parte* and did not enter into witness box to prove the pleadings made by them. The pleadings made by the parties to the case cannot be accepted as evidence, unless and until, it is proved by the parties by placing admissible materials and evidence by entering into witness box before the Court or Tribunal. The spot map (Ex.P/13) which is taken note of by learned Claims Tribunal that spot map does not show the direction, on which, the vehicle was travelling, is a correct observation, but merely on the basis of spot map, finding with regard to contributory negligence cannot be decided as held by Hon'ble Supreme Court in the matters of **Usha Rajkhowa and Others v. Paramount Industries and Others**[4], **Minu Rout & Anr. v. Satya Pradyumna Mohapatra & Ors.**[5] and **Jiju Kuruvila and others v. Kunjujamma Mohan and others**[6]**.**

12. In case of **Minu Rout** (supra), Hon'ble Supreme Court has held as to how the plea of contributory negligence is to be considered and decided and held thus :

> "17. The Tribunal, on appreciation of the oral and documentary evidence, has recorded the erroneous finding by placing strong reliance upon the charge-sheet- Exh.1 without considering the fact that the criminal case was abated against the deceased and further has

4 **(2009) 14 SCC 71**
5 **(2013) 10 SCC 695**
6 **(2013) 9 SCC 166**

made observation in the judgment that the appellants had not produced the FIR. Therefore, it has held that there was 50% contributory negligence on the part of the deceased driver in causing accident. The Tribunal ought to have seen that non production of FIR has no consequence for the reason that charge sheet was filed against the truck driver for the offences punishable under Sections 279 read with Section 302 of IPC read with the provisions of the M.V. Act. The Insurance Company, though claimed permission under Section 170(b) of the Motor Vehicles Act, 1988 from the Tribunal to contest the proceedings by availing the defence of the owner of the offending vehicle, it did not choose to examine either the driver of the truck or any other independent eye witness to prove the allegation of contributory negligence on the part of the deceased Susil Rout on account of which the accident took place as he was driving the car in a rash and negligent manner. In the absence of rebuttal evidence adduced on record by the Tribunal, the Tribunal should not have placed reliance on the charge-sheet-Exh.1 in which the deceased driver was mentioned as an accused and on his death; his name was deleted from the charge sheet. The Tribunal has referred to certain stray answers elicited from the evidence of P.W.2 and P.W.3 in their cross-examination and placed reliance on them to record the finding on issue no.1.

> 18. For the aforesaid reasons, the findings and reasons recorded by the Tribunal on the contentious Issue 1 holding that there is contributory negligence on the part of the deceased driver in the absence of legal evidence adduced by the Insurance Company to prove the plea taken by it that accident did not take place on account of rash and negligent driving of the truck driver is erroneous in law. The Tribunal has accepted the part of oral evidence of the eyewitnesses regarding the scene of accident and it has erroneously placed reliance upon the charge-sheet, Ext. 1, which was filed against the driver of the offending truck and the deceased to hold that there was contributory negligence on his part by ignoring the fact that the criminal case against the deceased was abated. Therefore, we have to hold that the finding of fact recorded on Issue 1 by the Tribunal and affirmed by the High Court in the impugned judgment, is erroneous for want of proper consideration of pleadings and legal evidence by both of them. Accordingly, we have answered Point 1 in favour of the appellants insofar as the finding recorded by the Tribunal on the question of contributory negligence of 50% on the part of the deceased is concerned."

13. Again, in case of **Jiju Kuruvila** (supra), Hon'ble Supreme Court held thus :

> “20.5 The mere position of the vehicles after accident, as shown in a Scene Mahazar, cannot give a substantial proof as to the rash and negligent driving on the part of one or the other. When two vehicles coming from opposite directions collide, the position of the vehicles and its direction, etc. depends on a number of factors like the speed of vehicles, intensity of collision, reason for collision, place at which one vehicle hit the other, etc. From the scene of the accident, one may suggest or presume the manner in which the accident was caused, but in the absence of any direct or corroborative evidence, no conclusion can be drawn as to whether there was negligence on the part of the driver. In absence of such direct or corroborative evidence, the Court cannot give any specific finding about negligence on the part of any individual.”

14. In the light of aforementioned law laid down by Hon'ble Supreme Court, if the facts of present case are taken into consideration except the pleading made in reply to claim application by respondents No.1 and 2/non-applicants No.1 and 2, driver and owner of the offending vehicle, no evidence is brought on record by them as they did not enter into the witness box. Even the Insurance Company has not made any effort to bring evidence in this regard. The contributory negligence is a fact, which is required to be proved by placing cogent and reliable piece of evidence, to which, non-applicants No.1 to 3

failed. Charge-sheet is filed against driver of truck for offence punishalbe under Section 304A of IPC.

15. In view of above, we are of the considered view that the finding of contributory negligence on the part of the deceased to the extent of 50% recorded by learned Claims Tribunal is without any evidence, which is not sustainable in the eyes of law and is hereby set aside.

16. So far as the second ground raised by learned counsel for the appellants with regard to assessment of income of the deceased as Rs.3,000/- per month only on notional basis to be on lower side is concerned, notional income is to be fixed after taking into consideration several factors including date of accident, nature of occupation, employment of deceased, price index and wage rate prevailing in the district at that relevant time. In the case at hand, the date of accident is 17.01.2012, the occupation of deceased has been pleaded in claim application to be 'Mason' as also stated by witnesses examined on behalf of the claimants in their evidence before learned Claims Tribunal, which remained uncontroverted by placing any other material on record. The nature of occupation pleaded in claim application and stated by claimants' witness that of 'Mason' is not an occupation, for which, any technical knowledge from any recognized school is required. The work of Mason can be learnt while working. It is only a skill and comes within the category of skilled labour. It these facts of the case, it cannot be accepted as the claimants have failed to produce any documentary evidence with

regard to nature of occupation and income of the deceased. But, pleadings and evidence of the claimants can be taken into consideration for the purpose of arriving at a conclusion with regard to nature of occupation of the deceased.

17. In the above facts and circumstances of the case, we find it appropriate to hold that deceased Anuruddha Singh Dewangan was working as 'Mason'. In absence of any proof with regard to income of the deceased as pleaded and stated by the claimants cannot be accepted, but it is required to be ascertained only on notional basis as discussed in preceding paragraphs by considering the different factors. Looking to the date of accident, we find it appropriate to fix the income of deceased as Rs.4,300/- per month (by rounding it off) in view of the submission made by learned counsel for the appellants that minimum wages of the skilled labour was Rs.4,271/- from the period 01.10.2011 to 31.03.2012.

18. So far as other ground raised by learned counsel for the appellants that no future prospects is awarded by learned Claims Tribunal is concerned, the law in this regard is well settled by Hon'ble Supreme Court in the matter of **Pranay Sethi** (supra) that even if the person is not in permanent employment or in self employment or temporary employment, there will be an addition of the amount of 10% to the established income if the deceased is aged about 50 years or above upto 60 years. In the case at hand, as per postmortem report (Ex.P/3), age of the deceased has been shown to be 50 years,

therefore, taking the age of deceased as mentioned in the postmortem report, we award 10% of the additional amount to the established income towards future prospects for the purpose of calculating the total income of deceased on the date of accident.

19. The Hon'ble Supreme Court in the matter of **Sarla Verma (Smt.)** (supra) has settled the deduction as well as the multiplier to be applied taking into consideration number of dependents and age-slab of the deceased. As per the law laid down by Hon'ble Supreme Court in the matter of **Sarla Verma (Smt.)** (supra), the application of multiplier for the deceased person who was between the age group of 46 to 50, is prescribed as '13' and for the age group between 51 to 55 years, prescribed as '11'. Admittedly, the deceased has been shown to be 50 years of age, therefore, there will be application of multiplier of '13'.

20. In **Sarla Verma (Smt.)** (supra), Hon'ble Supreme Court has further held that deduction towards personal and living expenses where claimants/dependents are 3 in number to be '1/3rd' and in case where claimants/dependents are 4 to 6 in number, the deduction should be '1/4th'. In the present case, there were total 5 claimants including widow, children and widow mother of the deceased, therefore, there will be a deduction of '1/4th' instead of 1/3rd.

21. Learned Claims Tribunal has awarded only Rs.22,000/- towards other conventional heads, which is on lower side in view of dictum of

Hon'ble Supreme Court in the matters of **Pranay Sethi** (supra) and **Magma General Insurance Company Limited v. Nanu Ram Alias Chuhru Ram and Others**[7]**.**

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

As discussed above, the income of deceased is assessed by this Court as Rs.4,300/- per month i.e. Rs.51,600/- per annum. On the date of accident, deceased Anuruddha Singh Dewangan was 50 years of age as mentioned in postmortem report (Ex.P/3) and not in a permanent employment, therefore, in view of law laid down by Hon'ble Supreme Court in **Pranay Sethi** (supra), there will be an addition of 10% of the income towards future prospects. By adding 10% of the income towards future prospects, the total annual income of deceased will come to Rs. 56,760/- (51,600 x 10% = 5,160 and 51,600 + 5,160). After deducting 1/4th towards his personal and living expenses, yearly loss of dependency of the claimants will come to Rs.42,570/- (56,760 / 4 and 56,760 – 14,190). As it is held the age of the deceased to be 50 years, the appropriate multiplier would be 13. By applying the multiplier of 13, the amount of compensation will come to Rs.5,53,410/- (42,570 x 13). Apart from above, the claimants will be further entitled for a sum of Rs.40,000/- towards spousal

7 **(2018) 18 SCC 130**

consortium to the wife (payable to the spouse because of the death of partner), Rs.40,000/- towards parental consortium to the children (payable to children because of the death of parents), Rs.40,000/- towards filial consortium to the widowed mother (payable to the parents because of the death of children), Rs.15,000/- towards loss of estate and Rs.15,000/- towards funeral expenses.

23. Now, the appellants/claimants are entitled for total compensation of Rs.7,03,410/- (5,53,410 + 40,000 + 40,000 + 40,000 + 15,000 + 15,000) instead of Rs.1,43,000/- as awarded by learned Claims Tribunal. This amount of compensation shall carry interest at the rate of 6% per annum from the date of filing of claim application till its realization. The other conditions imposed by learned Claims Tribunal shall remain intact.

24. So far as the other ground raised by learned counsel for the appellants that as the learned Claims Tribunal has recorded a finding that there was breach of conditions of insurance policy, a direction may be issued to respondent No.3/Insurance Company to first pay the amount of compensation and thereafter, recover the same from the driver and owner of the offending vehicle is concerned, the doctrine of pay and recover in cases of no valid permit has been considered by Hon'ble Supreme Court in the matter of **National Insurance Co. Ltd. v. Challa Bharathamma and others**[8], in which, Hon'ble Supreme Court has held thus :

8 **(2004) 8 SCC 517**

“13. The residual question is what would be the appropriate direction. Considering the beneficial object of the Act, it would be proper for the insurer to satisfy the award, though in law it has no liability. In some cases the insurer has been given the option and liberty to recover the amount from the insured. For the purpose of recovering the amount paid from the owner, the insurer shall not be required to file a suit. It may initiate a proceeding before the concerned Executing Court as if the dispute between the insurer and the owner was the subject matter of determination before the Tribunal and the issue is decided against the owner and in favour of the insurer. Before release of the amount to the claimants, owner of the offending vehicle shall furnish security for the entire amount which the insurer will pay to the claimants. The offending vehicle shall be attached, as a part of the security. If necessity arises the Executing Court shall take assistance of the concerned Regional Transport Authority. The Executing Court shall pass appropriate orders in accordance with law as to the manner in which the owner of the vehicle shall make payment to the insurer. In case there is any default it shall be open to the Executing Court to direct realization by disposal of the securities to be furnished or from any other property or properties of the owner of the vehicle i.e. the insured. In the instant case considering the quantum involved

> we leave it to the discretion of the insurer to decide whether it would take steps for recovery of the amount from the insured.”

25. Recently, in the matter of **Amrit Paul Singh** (supra), Hon'ble Supreme Court while dealing with the similar issue has held thus :

> “24..........We are disposed to think so in view of the series of exceptions carved out in Section 66. The said situations cannot be equated with absence of licence or a fake licence or a licence for different kind of vehicle, or, for that matter, violation of a condition of carrying more number of passengers. Therefore, the principles laid down in *National Insurance Co. Ltd. v. Swaran Singh, (2004) 3 SCC 297 and Lakhmi Chand v. Reliance General Insurance, (2016) 3 SCC 100* in that regard would not be applicable to the case at hand. That apart, the insurer had taken the plea that the vehicle in question had no permit. It does not require the wisdom of the "Tripitaka", that the existence of a permit of any nature is a matter of documentary evidence. Nothing has been brought on record by the insured to prove that he had a permit of the vehicle. In such a situation, the onus cannot be cast on the insurer. Therefore, the tribunal as well as the High Court had directed the insurer was required to pay the compensation amount to the claimants with interest with the stipulation that the insurer shall be entitled to recover the same from the owner and the driver. The said

directions are in consonance with the principles stated in Swaran Singh (supra) and other cases pertaining to pay and recover principle."

26. The Hon'ble Supreme Court in the matter of **Amrit Paul Singh** (supra) has very specifically held that in case of breach of conditions of insurance policy for want of valid permit, direction for pay and recover can be issued and the same will be in consonance with the judgment passed by Hon'ble Supreme Court in the matter of **National Insurance Co. Ltd. v. Swaran Singh and others**[9]**.**

27. In view of aforementioned judgments passed by Hon'ble Supreme Court, especially in **Amrit Paul Singh** (supra), submission made by learned counsel for respondent No.3/Insurance Company is not sustainable and is hereby rejected.

28. Though, the Insurance Company has been exonerated by learned Claims Tribunal from its liability on the ground of breach of conditions of insurance policy, but in the facts and circumstances of the case where insurance policy of the offending vehicle is not disputed and deceased to be a third party, we find it appropriate to direct the Insurance Company/respondent No.3 to first deposit the entire amount of compensation before learned Claims Tribunal and thereafter, to recover the amount so deposited by it from respondents No.1 and 2 i.e. driver and owner of the offending vehicle. It is made clear that for recovery of amount of compensation so deposited by the Insurance Company, there will be no need to file any separate

9 **(2004) 3 SCC 297**

proceeding, but the Insurance Company will be at liberty to file an application for execution in the very same proceeding for recovery of amount from respondents No.1 and 2 i.e. driver and owner of the offending vehicle.

29. In the result, appeal is allowed in part. Now appellants/claimants are entitled for a total compensation of Rs.7,03,410/-. The amount of compensation will carry interest @ 6% per annum from the date of filing of claim application till its realization. The liability to satisfy the amount of compensation will be of respondents No.1 and 2. The Insurance Company is directed to first deposit the entire amount of compensation with interest and then to recover the amount so deposited by it from respondents No.1 and 2 in the same proceedings. Impugned award is modified accordingly to the above extent.

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

Yogesh