NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

MAC No. 549 of 2013

- Shri Ram General Insurance Company Limited, through Incharge Officer, Shriram General Insurance Company Ltd., Lal Ganga Shopping Mall, G.E. Road, Raipur, Tahsil & District Raipur C.G.

---- Appellant

Versus

1. Smt.Reeta Pandey, W/o Late Akhilesh Pandey, aged about 34 years.
2. Abhishek Pandey S/o Late Akhilesh Pandey, aged about 14 years.
3. Manmohan Pandey S/o Jagdev Pandey, aged about 75 years.

   No.2 is minor through natural guardian mother Smt. Reeta Pandey.

   All R/o Priyadarshini Nagar, Raipur, District Raipur (CG)
4. Rajesh Kumar, S/o Parmanand Pandey, R/o 1-Tarwara, P.S. Tarwara, Distt. Sivan Bihar, No.2- Bhanpuri, Durga Nagar Chowk, Raipur, P.S. Khamtarai, Raipur C.G.

   (driver of truck No.CG04-ZC-5313)
5. Ram Kumar Singh S/o Amarbahadur Singh R/o Durga Nagar (Swati Transport), Bhanpuri, P.S. Khamtarai, Distt. Raipur C.G.

   (Owner of truck No.CG04-ZC-5313)
6. Sukhvinder Singh, S/o Sardar Ajit Singh, R/o Flat No. 401, 4th Floor, Classic Residency, Near Bharat Mata School, Tatibandh, Raipur, P.S. Amanaka, Raipur C.G.

   (owner & driver of car No.CG04-B-9789)
7. Reliance General Insurance Company Ltd., through Incharge Officer, Reliance General Insurance Co. Ltd., Ravi Bhavan, Jaistambh Chowk, Raipur, Tahsil Raipur, District Raipur C.G.

---- Respondents

For Appellant : Mr. Pankaj Agrawal, Advocate
For Respondent No.1 to 3 : Mr. Amiyakant Tiwari, Advocate
For Respondent No.4 & 5 : Mr. SP Sahu, Advocate.
For Respondent No.7 : Mr. Saurabh Sharma, Advocate.

Hon'ble Shri P. R. Ramachandra Menon, CJ
Hon'ble Shri Parth Prateem Sahu, J

Order On Board

Per Parth Prateem Sahu, J

10/06/2020

1. Insurer of truck bearing No.CG04-ZC-5313 (for short 'offending vehicle') has filed this appeal under Section 173 of the Motor Vehicles Act, 1988 (henceforth 'the Act of 1988') challenging award dated 7.3.2013 passed by learned 7th Additional Motor Accident Claims Tribunal, Raipur (for short 'the Claims Tribunal') in Claim Case No.177/11 whereby the Claims Tribunal allowed claim application in part, awarded a total sum of Rs.25,35,911/- as compensation, along with interest at the rate of 6% p.a., in a death case, and fastened liability upon appellant insurance company to make payment of compensation to claimants.

2. Facts of the case, in brief, are that on 13.8.2010 at about 10 p.m. in the night, Akhilesh Kumar Pandey was going from Bilaspur to Raipur in Car bearing No.CG04-B-9789, being driven by one Sukhvinder Singh. When they reached village Temri, the driver of offending vehicle, which was ahead of car in which Akhilesh Kumar Pandey was an occupant, suddenly stopped the truck in the middle of the road, without giving any signal or indication, therefore, driver of car could not stop his vehicle in time and hit offending vehicle from rear side which

has resulted in instantaneous death of Akhilesh Kumar Pandey on the spot due to fatal injuries sustained by him.

3. Claimants/respondents No.1 to 3, who are wife, son & father of deceased, filed a claim application before the Claims Tribunal seeking total compensation of Rs.48,00,000/- under different heads on the grounds mentioned in claim application.

4. Despite service of summons through paper publication, non-applicant No.1/respondent No.4 herein did not appear before the Claims Tribunal to contest the case.

5. Non-applicant No.2/respondent No.5, owner of offending vehicle, appeared before the Claims Tribunal and filed his written statement denying all the averments made in claim application, except the admitted facts. It was pleaded that on the date of accident, the offending vehicle was fully insured with non-applicant No.3, therefore, the insurance company is liable to indemnify the owner and to make payment of compensation.

6. Non-applicant No.3/appellant herein also filed its written statement denying all adverse pleadings made against it in claim application and taken a plea that accident was outcome of negligence on the part of car driver. In alternate, plea of contributory negligence was raised by non-applicant No.3. It was also pleaded that neither there was valid & effective driving license with the driver nor was there any valid permit for plying offending vehicle on road. Thus, there being breach of

conditions of insurance policy, the insurer is not liable to indemnify the insured.

7. Though non-applicant No.4/respondent No.6 herein was represented before the Claims Tribunal through counsel, he did not filed written statement.

8. Non-applicant No.5 / respondent No.7 herein filed its reply denying all the averments made in claim application and mentioning that cause of accident was rash and negligent driving of driver of offending vehicle, therefore, claim application is not maintainable against it. It was pleaded that as driver of car was not having valid & effective driving license on the date of accident. The insurance of car bearing No.CG04-B-9789 was also denied for want of copy of policy. In view of above grounds pleaded that non-applicant No.5-Insurance Company is not liable to make payment of amount of compensation.

9. Upon appreciation of pleadings and evidence brought on record by respective parties, the Claims Tribunal arrived at a conclusion that there is no element of contributory negligence on the part of driver of car; the accident was outcome of rash & negligent driving by driver of offending vehicle resulting into instantaneous death of Akhilesh Pandey; there was no violation of any of the conditions of insurance policy and thus awarded a total sum of Rs.25,35,911/- as compensation.

10. Mr. Pankaj Agrawal, learned counsel representing appellant Insurance Company submits that it is a case where driver of car

had dashed offending vehicle from rear side which establishes that there was an element of contributory negligence on the part of person driving the car, therefore, the Claims Tribunal should have given a finding of contributory negligence while deciding the case. He further submits that both the drivers of vehicles involved in the accident were not duly licensed to drive, therefore, the Claims Tribunal should not have fastened liability upon insurance company. He further submits that as the liability is a tortuous liability, burden was on the claimants to prove negligence on the part of driver of offending vehicle, but they failed to discharge their burden. Lastly, it was argued that the Claims Tribunal erred in calculating compensation by taking income of deceased as shown in the income tax return (Ex.P-15) of the Assessment Year 2010-11, which was filed after the date of accident.

11. Mr. Amiyakant Tiwari, learned counsel for claimants/ respondents No.1 to 3 would argue that the Claims Tribunal has not committed any mistake in fastening liability upon appellant herein to make payment of compensation as the deceased was an occupant and not driver of the car and as such, it was the case of composite negligence and not of contributory negligence. He also argued that appellant Insurance Company or respondent No.4 had not adduced any evidence before the Claims Tribunal to establish the fact of contributory negligence,

therefore, appellant is now estopped from raising this plea at the appellate stage.

12. Mr. S.P. Sahu, learned counsel for respondent Nos.4 & 5 adopts the arguments advanced by learned counsel appearing on behalf of respondents No.1 to 3.

13. Mr. Saurabh Sharma, learned counsel representing respondent No.7-Insurance Company, which is shown to be insurer of car, submits that a specific plea has been taken by respondent No.7 before the Claims Tribunal that neither respondent No.7 is the insurer of car in question nor the alleged cover note produced before the Claims Tribunal was ever issued by it. In support of aforesaid plea, respondent No.7 had produced proforma of cover note of insurance company and photocopy of cover note/policy issue register from 1.4.2010 to 30.4.2010 to show that no such cover note /policy was issued by respondent No.7 in favour of respondent No.6, owner of car. Though respondent No.6 was represented before the Claims Tribunal through counsel, but he did not chose to controvert the aforementioned facts by adducing admissible evidence in his favour. He submits that in the aforementioned facts & circumstances, no liability could be fastened upon respondent No.7 because there is no relationship of 'insurer and insured' between respondent No.6 & respondent No. 7.

14. We have heard learned counsel for the parties and perused the record.

15. As regards submission of learned counsel for appellant that the Claims Tribunal erred in holding that non-applicant No.1/respondent No.4 herein is alone responsible for accident, we have perused the evidence, oral & documentary, brought on record by respective parties. Claimants/ respondents No.1 to 3 herein have produced copies of documents of criminal case including copy of FIR, Final Report, Inquest & Post-mortem report. Claimants have examined Smt. Geeta Pandey, widow of deceased Akhilesh Pandey, as AW-1; Suresh Mishra, Income Tax Officer, as AW-2, and Rajesh Pandey, brother of deceased, as AW-3.

16. Perusal of statements of AW-1 would go to show that she is a formal witnesses and not an eyewitness to the accident. Likewise, AW-2 is an Income Tax Officer who has been examined to prove income tax return filed by claimants to prove income of deceased. In other words, both these witnesses have not stated as to how and in which manner accident took place. Perusal of statement of Rajesh Pandey (AW-3) reveals that on coming to know about accident, he went to the spot and found that body of his brother Akhilesh Pandey is lying inside the car and that the car had dashed against rear side of truck, which was standing in the middle of road without any signal and without switching on parking light. The said truck was not visible to passers-by as it was covered with tarpaulin. In the cross-examination, this witness has admitted that spot map has

not been produced by them before the Claims Tribunal. No other witness has been examined by the claimants in support of their case. Even non-applicant No.4, driver of car, who could be the best person to prove that there was no contributory negligence, did not appear before the Claims Tribunal and file his written statement stating that there was no negligence on his part in driving the car. Accident took place on a national highway road and the vehicle in which deceased was travelling was a four wheeler having two headlights, but even then the car dashed the truck from its rear side, which is suggestive of the fact that there was some negligence on the part of the driver of car. Even if without there being any evidence, accepting contents of FIR that the truck was suddenly stopped on the road within any signal or indicator, which has not been controverted by placing any other evidence either by non-applicant No.1 or 3, then also it cannot be held that it is the sole negligence of driver of offending vehicle only. Traffic Safety Code itself provides that vehicle running behind any vehicle has to maintain proper distance so that in case of sudden stoppage of any vehicle running on road, the vehicle following it cannot dash it. In the given facts & circumstances of case, even if version of claimants is accepted, based on the documents placed on record of criminal case, we are of the considered view that driver of car was also driving car in a rash and negligent manner. The Claims Tribunal has not looked into aforesaid aspect of case while considering the material and evidence placed before it.

17. In view of the above, finding recorded by the Claims Tribunal with respect to Issue No.2, which relates to contributory negligence, is hereby set aside. True it is that appellant has not led any evidence before the Claims Tribunal to establish the fact of negligence on the part of driver of car, even then by applying principle of *res ipsa locutor* and taking into consideration the facts pleaded in claim application, we hold that the driver of car i.e. non-applicant No.4/respondent No.5 herein was also negligent and contributed to the accident. There is no material on record based on which quantum of negligence can be fixed, except the documents of criminal case and oral statement of AW-3. In such a situation, looking to the nature of pleadings and evidence (oral & documentary both), we hold that there was contributory negligence to the extent of 50% on the part of driver of car of which deceased was an occupant.

18. Other submission of learned counsel for appellant Insurance Company is that the Claims Tribunal erred in taking income of deceased as Rs.3,08,400/- on the basis of Ex.P-15 (Income Tax return for the assessment year 2010-11) for the reason that said income tax return was filed before the Income Tax Department after the date of accident. Perusal of Ex.P-15 would show that it is an acknowledgement issued by the

Income Tax Department regarding filing of income tax return for the assessment year 2010-11. This acknowledgement not only contains seal of department but date of receipt is also mentioned therein as '06.8.2010'. Whereas, the date of accident is 13.8.2010.

From the above it is evident that income tax return showing annual income of deceased as Rs.3,08,400/- was filed before the Income Tax Department much prior to the date of accident / death of assessee (deceased herein). No one can foresee any misfortune. In the given fact of case, submission made by learned counsel for appellant Insurance Company that since acknowledgement receipt (Ex.P-15) regarding filing of income tax return is subsequent to the date of accident, the Claims Tribunal ought not to have taken the income shown therein for the purpose of calculating amount of compensation, is not sustainable and the same is hereby repelled.

19. Coming to cross-appeal filed on behalf of respondents No.1 to 3 seeking enhancement in the compensation awarded to them by the Claims Tribunal.

20. Mr. Amiyakant Tiwari, learned counsel for respondents No.1 to 3 would submit that the Claims Tribunal has not awarded any amount towards future prospects, whereas Hon'ble Supreme Court in the matter of **National Insurance Company Ltd. vs. Pranay Sethi** reported in **(2017) 16 SCC 680** has held that in case deceased, victim of motor accident, was between the age

of 40 to 50 years and not in permanent employment, an addition of 25% of established income of deceased towards future prospects should be made. He further submits that the amount awarded under other conventional heads are also on lower side. Thus, it is apparent that the amount awarded by the Claims Tribunal is grossly inadequate and deserves to be suitably enhanced.

21. Per contra, learned counsel representing Insurance Company submits that the Claims Tribunal after considering overall facts, circumstances and evidence available on record, has rightly assessed compensation and the same does not call for any interference.

22. Perusal of the impugned award reveals that on the basis of income of deceased as mentioned in income tax return for the assessment year 2010-11 (Ex.P-15, the Claims Tribunal has taken annual income of deceased as Rs.2,89,720/- (after deducting Rs.18,680/- paid as income tax) and after deducting one-third towards personal & living expenses of deceased and applying multiplier of 13, awarded a total sum of Rs.25,35,911/- as compensation. Thus, it is clear that nothing has been awarded towards the future prospects, whereas in view of law laid down in Pranay Sethi's case (supra), respondents No.1 to 3 are entitled to get 25% increase of the established income of deceased for loss of future aspects because there is no dispute

that on the date of accident, deceased was aged about 45 years.

23. We have also noticed that the Claims Tribunal while computing compensation has wrongly applied multiplier of 13 instead of 14. In the matter of **Sarla Verma & ors Vs. Delhi Transport Corporation & another** reported in **(2009) 6 SCC 121** Hon'ble Supreme Court has held that multiplier of 14 is to be taken when the age of deceased is between 41 to 45 years.

24. In view of above, this Court proposes to recalculate amount of compensation payable to claimants/respondents No.1 to 3.

25. Accordingly, income of deceased is taken as Rs.2,89,7200/- per annum, as taken by the Claims Tribunal, and since at the time of accident the deceased was between the age group of 40 to 50 years and was not on fixed salary, in view of law laid down in the matter of **Pranay Sethi's case** (supra), annual income of deceased is required to be increased by 25% towards future prospects, which comes to Rs.3,62,150/- (72,430+289720). Out of this amount, 1/3rd is to be deducted towards personal & living expenses of deceased and after deducting 1/3rd, annual loss of dependency would come to Rs.2,41,433/- (362150-120717). By applying multiplier of 14, as held above, to annual loss of dependency, total loss of dependency would come to Rs.33,80,062/-(241433x14). Besides this, respondent No.1, widow of deceased, will be entitled for a sum of Rs.40,000/- for spousal consortium, respondent No.2, son of deceased, will be

entitled for a sum of Rs.40,000/- for parental consortium and respondent No.3 is entitled to Rs.40,000/- for filial consortium, as held by Hon'ble Supreme Court in the matter of **Magma General Insurance Company Limited vs. Nanu Ram alias Chuhru Ram & ors** reported in **(2018) 18 SCC 130**. Respondents No.1 to 3 are further entitled to get a sum of Rs.15,000/- for funeral expenses; Rs.15,000/- for loss of estate & Rs.10,000/- for pains & sufferings though the death in this case is instantaneous. Thus, claimants / respondents No.1 to 3 are now entitled for a total compensation of Rs.35,40,062/- (3380062+ 40000+40000+40000+15000+15000+10000) instead of Rs.25,35,911/-. This amount of compensation shall carry interest @ 6% p.a. from the date of filing of claim application till its realization. Rest of conditions mentioned in the impugned award shall remain intact.

26. Any amount already paid to claimants/respondent Nos.1 to 3 as compensation shall be adjusted from the total amount of compensation as calculated above.

27. Now the question arises as to how interest of claimants can be protected so that they can reap fruits of award at the earliest. In the matter of **Khenyei v. New India Assurance Company Limited & ors** reported in **(2015) 9 SCC 273**, Hon'ble Supreme Court has held that where all the joint tort feasors are impleaded as party and evidence is sufficient, it is open for the Court or tribunal to determine *inter se* extent of composite

negligence of both drivers for their inter se liability so that one may recover the same from the other. Relevant portion of the said judgment is reproduced below for ready reference:-

> "22. What emerges from the aforesaid discussion is as follows :
>
> 22.1. In the case of composite negligence, plaintiff/claimant is entitled to sue both or any one of the joint tort feasors and to recover the entire compensation as liability of joint tort feasors is joint and several.
>
> 22.2. In the case of composite negligence, apportionment of compensation between two tort feasors vis a vis the plaintiff/claimant is not permissible. He can recover at his option whole damages from any of them.
>
> 22.3. In case all the joint tort feasors have been impleaded and evidence is sufficient, it is open to the court/tribunal to determine inter se extent of composite negligence of the drivers. However, determination of the extent of negligence between the joint tort feasors is only for the purpose of their inter se liability so that one may recover the sum from the other after making whole of payment to the plaintiff/claimant to the extent it has satisfied the liability of the other. In case both of them have been impleaded and the apportionment/ extent of their negligence has been determined by the court/tribunal, in main case one joint tort feasor can recover the amount from the other in the execution proceedings....."

28. In Para-25 of the impugned award, the Claims Tribunal has held that on the date of accident, the car in question was insured with non-applicant No.5/respondent No.7 herein and that there was no violation of any condition of insurance policy. Respondent No.7-Insurance Company did not challenge this finding of the Claims Tribunal by filing an appeal before the High Court. Not only this, on service of notice of appeal preferred by appellant, Insurance Company of offending

vehicle, seeking apportionment of liability to the extent of 50% on the ground that there was contributory negligence on the part of drivers of both the vehicles, respondent No.7 though caused appearance through its advocate, but it did not choose to file any appeal or cross-objection against the said finding recorded by the Claims Tribunal. Thus the aforementioned finding of the Claims Tribunal has attained its finality as it remained unchallenged.

In view of above, the submission made by learned counsel for respondent No.7 that on the date of accident, the car in question was not insured with it, cannot be considered in the appeal filed by insurance company of offending vehicle and cross-appeal filed by claimants.

29. Since we have held above that the driver of car was negligent to the extent of 50%, the *inter se* liability of composite negligence of drivers of both vehicles is determined to the extent of 50% each. In other words, appellant and respondent No.7 herein are liable to pay the amount of compensation equally out of the total amount of compensation awarded.

30. In the result, appeal filed by appellant Insurance Company and cross-appeal filed by claimants/respondents No.1 to 3 both are allowed in part to the extent indicated above.

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

roshan/-