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HIGH COURT OF CHHATTISGARH, BILASPUR

MAC No. 459 of 2013

- Kamlesh Sahu S/o Dheerpal Sahu Aged About 40 Years R/o Nayapara, Ganesh Chowk, Balodabazar, Post, P.S. And Tah. Baloda Bazar, Revenue Distt. Baloda Bazar, Civil Distt. Raipur , Chhattisgarh (Registered owner of offending vehicle Mini Bus No.CG 04-E 0721)

---- Appellant

Versus

1. Smt. Sunita Bai, W/o Udayshankar Chelak Aged About 32 Years
2. Minor Jagesh Chelak S/o Udayshankar Chelak Aged About 13 Years
3. Minor Vilas Raj S/o Udayshankar Chelak Aged About 10 Years
4. Minor Lokesh Raj S/o Udayshankar Chelak Aged About 6 Years

   Appellants 2 to 4 are minors through Natural Guardian Mother-Smt Sunita Bai

5. Motiram S/o Sukhlal Chelak Aged About 65 Years
6. Jamuna Bai W/o Motiram Chelak Aged About 60 Years

   All R/o Ward No. 09, Baloda Bazar, Post, P.S. And Tah. Baloda Bazar, Revenue District : Raipur, Chhattisgarh

7. Ajruddin S/o H. Siddhique Aged About 45 Years Resident and Police Station Chandrapur, Civil and Revenue District Janjgir – Champa (CG) At Present R/o Monu Auto Centre, G.E. Road, Supela Bhilai, Civil And Revenue Distt Durg, Chhattisgarh (Driver of offending vehicle Mini Bus No.CG 04-E 0721)
8. Royal Sundaram Allianz Insu.Co.Ltd. S/o Mandal Office-Devendra Nagar, Raipur, Above Old H.D.F.C. Bank, Raipur, Civil And Revenue Distt. Raipur Chhattisgarh (Insurer of offending vehicle Mini Bus No.CG 04-E 0721)

---- Respondents

MAC No. 644 of 2013

1. Smt.Sunita Bai, Wd/o Uday Shanker Chelak Aged About 32 Years
2. Jagesh Chelak S/o Uday Shanker Chelak Aged About 13 Years Minor
3. Vilash Raj S/o Uday Shanker Chelak Aged About 10 Years Minor
4. Lokesh Raj S/o Uday Shanker Chelak Aged About 6 Years Minor

   Appellants 2 to 4 are minors through Natural Guardian Mother-Smt Sunita Bai, Wd/o Uday Shanker Chelak

5. Motiram S/o Sukhlal Chelak Aged About 65 Years
6. Jamuna Bai W/o Motiram Chelak Aged About 60 Years

   All R/o Ward No. 09, Baloda Bazar, Post, P.S. And Tah. Baloda Bazar, Revenue District : Raipur, Chhattisgarh

---- Appellants

Versus

1. Ajruddin, S/o H. Siddiqui Aged About 45 Years R/o Village And P.S. Chandrapur, Distt. Janjgir-Champa C.G., At Present R/o Monu Auto

Centre, G.E. Road, Supela Bhilai, Distt. Durg, Chhattisgarh (Driver of the alleged vehicle bearing registration No.CG 04-E 0721)

2. Kamlesh Sahu S/o Dheerpal Sahu Aged About 40 Years R/o Nayapara, Ganesh Chowk, Baloda Bazar, P.S. And Tah. Baloda Bazar District : Raipur, Chhattisgarh (Owner of the alleged vehicle bearing registration No.CG 04-E 0721)

3. Royal Sundaram Alliance Insurance Co.Ltd. S/o Division Office, Devendra Nagar, Raipur, Old H.D.F.C. Bank, Raipur, Distt. Raipur C.G., District : Raipur, Chhattisgarh (Insurer of offending vehicle Mini Bus No.CG 04-E 0721)

-----Respondents

<u>In MAC No.459 of 2013</u>

For Appellant / owner of offending vehicle	:	Ms Sareena Khan, Advocate
For Respondents-1 to 6/claimants	:	Shri AL Singraul, Advocate
For Respondent- 8/Insurance Company	:	Shri Rohitashwa Singh, Advocate
For Respondent- 7	:	None appears

<u>In MAC No.644 of 2013</u>

For Appellants/Claimants	:	Shri AL Singraul, Advocate
For Respondent- 2	:	Ms Sareena Khan, Advocate
For Respondent- 3	:	Shri Rohitashwa Singh, Advocate

<u>Hon'ble Shri PR Ramachandra Menon, Chief Justice &</u>
<u>Hon'ble Shri Justice Parth Prateem Sahu</u>
<u>Order on Board</u>

<u>Per Parth Prateem Sahu, J.</u>
<u>21.05.2020</u>

1. MAC-459 of 2013 filed by the owner of offending vehicle challenging the liability and other appeal MAC-644 of 2013 filed by the claimants for enhancement of impugned award. As both the appeals are arising out of the same accident, they are being finally heard and decided by a common order.

2. Appellant-owner of offending vehicle has filed MAC No.459/2013 challenging liability fastened upon him to pay amount of compensation awarded to claimants by the learned First Additional Motor Accident Claims Tribunal, Balodabazar, District Raipur (CG) (for short, 'Claims Tribunal') in Claim Case No.129/2011. Whereas, appellants-claimants have filed MAC No.644/2013 seeking enhancement of compensation awarded by the Claims Tribunal.

3. Brief facts relevant for disposal of this appeal are that on 19.10.2009 at about 9.15 am, Udayshankar (since deceased) was travelling in Minibus bearing registration No.CG04-E-0721 (for short, 'offending vehicle') as 'Conductor' under the instructions of its owner i.e. appellant in MAC No.459/2013, and going towards Gidhori from Balodabazar via Kasdol. Offending vehicle overturned on the main road near village Hasuwa due to rash and negligent driving of its driver as a result Udayshankar collapsed under offending vehicle and died on spot. Matter was reported to concerned Police Station based upon which crime bearing No.376/09 was registered against the driver of offending vehicle.

4. Claimants, who are widow, children & parents of deceased Udayshankar respectively, filed application under Section 166 of Motor Vehicle Act, claiming total compensation of Rs.15,24,000/- on the ground that at the time of accident, deceased was only 32 years old and he was earning Rs.9,000/- per month by working as 'Conductor'.

5. Non-applicant 1, driver of bus, was proceeded *ex-parte.*

6. Non-applicant 2, owner of offending vehicle, submitted his reply denying engagement of deceased as 'Conductor' in any of his buses. It was pleaded that on the date of accident, there was valid permit to ply offending vehicle on road; offending vehicle was fully insured with non-applicant 3/ Insurance Company; driver, who was having valid and effective driving license, was carefully driving offending vehicle in slow speed, however, due to uneven road, the offending vehicle overturned and met with an accident.

7. Insurance Company submitted its reply to claim application and pleaded that deceased was not the third party and even he was not the Conductor of offending vehicle. On the date of accident, neither driver of offending vehicle was having valid and effective driving license nor was there a valid fitness & permit and thus, the offending vehicle was plied in violation of essential conditions of insurance policy. The Insurance Company is not liable to indemnify the insured.

8. Upon consideration the pleadings, oral and documentary evidence placed on record by both the sides, learned Claims Tribunal recorded a finding that deceased Udayshankar died in a road accident caused due to rash and driving by its driver i.e. non-applicant No.1. It was further held that there was violation of condition of Insurance Policy as there was no valid permit to ply offending vehicle on road on which accident took place. Accordingly, the Claims Tribunal partly allowed claim application, awarded them a total sum of Rs.4,47,000/- as compensation and while exonerating the insurance company on account of violation of conditions of insurance policy, held the owner of offending vehicle liable to pay amount of compensation to claimants.

9. Learned counsel for appellant/owner submits that while deciding another claim application arising out of same accident, the Claims Tribunal has held the insurance company liable to indemnify the owner of offending vehicle for the death of deceased by holding that there was no violation of any of the conditions of insurance policy. However, in case at hand, the Claims Tribunal took a somersault and held the owner of offending vehicle liable to pay amount of compensation on the ground that the offending vehicle was plied on road in violation of condition of insurance policy i.e. without a valid permit. The finding recorded by learned Claims Tribunal is erroneous, which is liable to set aside. She further submits that a copy of permit has been filed along with this appeal as Annexure A-2 and perusal of same would show that the offending vehicle had a valid permit on the date of accident. Thus, the finding recorded by the Claims Tribunal that there was no valid permit with owner of offending vehicle to ply the same on the route in question is bad in law and liable to be set aside.

10. Learned counsel for the Insurance Company submits that as per pleading and evidence of owner of offending vehicle, there is admission on his part that one another bus was running on the route Balodabazar-Kasdol operation of which was stopped due to some mechanical fault and the offending vehicle was plied on that route. He further submits that owner of offending vehicle has not specifically stated in his evidence that his bus was being operated on the route for which he was having valid permit. He further pleaded that the permit (Annexure A-2 to appeal) on which learned counsel for appellant/owner is placing reliance is issued for the route Balodabazar to Raipur via Kharora, Palari, which is altogether different than the route on which offending vehicle met with accident. He also submits that finding recorded by the Claims Tribunal that there is violation of one of the essential conditions of Insurance Policy does not suffer from any infirmity or illegality as to warrant interference in this appeal.

11. Heard learned counsels for respective parties.

12. So far as the submissions of learned counsel for the appellant/owner is concerned that in another case, Insurance Company has not been exonerated, therefore, in this case also, Insurance Company be made liable for satisfying the award is not acceptable as it is contrary to the law.

13. As regards the submission of learned counsel for appellant/owner that on the date of accident, the offending vehicle was having a valid permit. We have perused the permit (Annexure A-2). Admittedly, this document has not been filed before learned Claims Tribunal and it is filed for the first time along with instant appeal. However, to arrive at a just and proper decision, in the matter, we have perused permit. A glance of this permit reveals that it was issued to ply offending vehicle on the route 'Balodabazar to Raipur via Kharora-Palari and back, whereas as per pleading, evidence as also admission made by owner of offending vehicle, the offending vehicle met with accident on route Balodabazar to Kasdol. It was also admitted by NAW-2 (owner) that his other bus running on the route where accident took place was break down and the passengers of that bus were transported in this bus bearing No.CG04 E-0721.

14. Considering the documents on record as also admission made by owner of offending vehicle, who was examined as NAW-2, it is apparent that there was violation of condition of insurance policy as the offending vehicle was plied on the route for which it was not having valid permit, issued by the competent Transport Authority. Since the offending vehicle was plied on the route other than the route for which permit was issued, in our considered opinion, the Claims Tribunal has not committed any error in holding that there was no valid permit with owner of offending vehicle to ply it on the route in question i.e. Balodabazar to Kasdol and hence, the submission of learned counsel for appellant (owner) is not sustainable and is hereby repelled. The other ground challenging the quantum will be considered in an appeal filed by claimants seeking enhancement of the award.

15. In view of aforementioned facts and circumstances of case, appeal (MAC No.459/2013) filed by owner of offending vehicle being sans merit is liable to be dismissed and is hereby dismissed.

16. Now coming to the appeal filed filed by claimants (MAC No.644 of 2013) seeking enhancement of compensation. Learned counsel for appellants/ claimants submits that the Claims Tribunal has overlooked the pleadings and evidence brought on record by claimants with respect to income of deceased and taken the monthly income of deceased on lower side for determining compensation. He further submits that learned Claims

Tribunal erred in not awarding any amount towards future prospects and the amount awarded under other conventional heads to the extent of Rs.15,000/- is also on lower side. Lastly, he submits that as there is violation of insurance policy only to the extent that offending vehicle was not having valid permit on the date of accident, a direction may be issued to insurance company to first pay amount of compensation to claimants and then to recover it from owner of offending vehicle, so that the claimants can get the fruit of the award at the earliest.

17. Per contra, learned counsel appearing for respondent-Insurance Company submits that claimants failed to prove income of deceased by adducing cogent and reliable piece of evidence before the Claims Tribunal. Even the owner of offending vehicle, pleaded as employer of deceased, has denied employment of deceased with him. He also pointed out that the employer/owner of offending vehicle was called into witness box, but no question was asked to him in the cross-examination about employment of deceased and that he was being paid salary of Rs.9,000/- per month. Considering the material placed on record by respective parties, the Claims Tribunal has awarded just and reasonable amount of compensation, which does not call for any interference. The learned counsel for the respondent/owner of the vehicle submits that in her appeal she has already raised the ground challenging the award of compensation to be on higher side.

18. Perusal of pleadings made by learned counsel for appellants/ claimants reveals that they have pleaded that the deceased was engaged as 'Conductor' in the offending vehicle and at the time of accident, he was getting salary of Rs.9,000/- per month. However, the claimants failed to prove income of deceased by placing any documentary evidence on record. Claimants have examined Sunita (AW1), wife of deceased, and Ajay Kosle (AW2), a labourer, as mentioned in his deposition sheet. Evidence on which learned counsel for appellants placed reliance upon is oral evidence of the persons who are not related with the 'Bus' or any other employee of the Bus operator to show that deceased was working in offending bus as Conductor, or getting monthly salary of Rs.9.000/- from owner of that vehicle. No document is placed on record to prove the salary pleaded nor any other admissible evidence.

19. In the light of evidence and pleadings available on record, it is very difficult for us to accept the contention raised by appellants/claimants that the deceased was getting salary of Rs.9,000/- per month and as such, the same is hereby repelled. But, at the same time this fact cannot be lost sight that the deceased, aged about 32 years, was having responsibility to look after himself and his six family members i.e. wife, three children & parents who were dependent upon him. Therefore, considering the price index and minimum wage rate for a 'labour' prevailing in the State on the date of accident, we deem it fit and proper to take Rs.4,000/- as monthly notional income of deceased, instead of Rs.3,000/-, as taken by the learned Claims Tribunal for calculation of loss of dependency.

20. So far as the submission made by learned counsel for appellant that learned Claims Tribunal has not awarded any amount towards future prospects is concerned, this issue has already been dealt with and decided by Hon'ble Supreme Court in the matter of **National Insurance**

Company Limited Vs Pranay Sethi and others reported in **2017 16 SCC 680** wherein it has been held that in case the deceased, victim of motor accident, was self-employed or on fixed salary and below age of 40 years, an addition of 40% of actual income of deceased towards future prospects should be made in the income of deceased. Relevant paragraph of **Pranay Sethi's** case reads thus;-

> "59.4. In case the deceased was self-employed or on a fixed salary, an addition of 40% of the established income should be the warrant where the deceased was below the age of 40 years. An addition of 25% where the deceased was between the age of 40 to 50 years and 10% where the deceased was between the age of 50 to 60 years should be regarded as the necessary method of computation. The established income means the income minus the tax component."

21. In the instant case, the deceased, who was 32 years of age, was not in permanent employment, but the Claims Tribunal while calculating compensation payable to claimants failed to add any amount to income of deceased towards future prospects and thereby committed serious error. There will be addition of 40% of the established income of the deceased in his monthly income for the purpose of assessing total income of deceased.

22. That apart, in the given facts and circumstances of the case, the amount awarded by the Claims Tribunal under other conventional heads also appears to be on lower side and need to be enhanced suitably.

23. As discussed above, income of deceased is taken as Rs.4,000/- per month and since at the time of accident the deceased was less than 40 years of age (32 years old) and was not in permanent employment, therefore, in view of the law laid down in the matter of **Pranay Sethi's case** (supra), the income of deceased is required to be enhanced by 40% towards future prospects, which makes the total monthly income as Rs.5,600/- {4000 + (4000 x 40/100)}. Thus, annual income of deceased for the purpose of calculating compensation comes to Rs.67,200/- (5600x12). In view of law laid down by Hon'ble Supreme Court in case of **Sarla Verma (Smt) and Others Vs Delhi Transport Corporation and Another** reported in **(2009) 6 Supreme Court Cases 12**, there will be deduction of 1/4th towards personal and living expenses. After deducting 1/4th towards personal and living expenses of deceased, the annual loss of dependency comes to Rs.50,400/- (67200-16800). By applying multiplier of 16, as applied by Claims Tribunal, to annual loss of dependency, total loss of dependency comes to Rs.8,06,400/- (50400x16). In view of the fact that three minor children and old parents were dependent on the deceased and law laid down by Hon'ble Supreme Court in **Magma General Insurance Company Vs Nanu Ram @ Chuhru Ram and others** reported in 2018 (18) SCC 130, we deem it fit and proper to award a sum of Rs.40,000/- towards parental consortium and Rs.40,000/- towards filial consortium. We also deem it fit to award a sum of Rs.10,000/- towards pain and suffering on account of instantaneous death of deceased in a road accident. The wife will be entitled for spousal consortium of Rs.40,000/- and further the claimants will be entitled for Rs.15,000/- towards funeral expenses and Rs.15,000/- towards loss of estate.

24. At this stage, learned counsel for the appellant again submits that even though learned Claims Tribunal arrived at a finding that there is violation of conditions of Policy, but it ought to have directed for payment of amount of compensation by the Insurance Company at the first instance and thereafter, to recover the same from the owner of offending vehicle.

25. Coming to the submission of learned counsel for claimants/appellants in MAC No.644 of 2013 that there is violation of insurance policy only to the extent that offending vehicle was not having valid permit on the date of accident, hence, the Insurance Company may be directed to first pay amount of award to claimants and then recover the same from owner of offending vehicle. Admittedly, the accident is of the year 2009, claimants belong to poor family and till date they have not received the entire amount of compensation, as awarded by learned Claims Tribunal. Offending vehicle was insured with respondent No.3-Insurance Company. The issuance of direction to pay & recover has been considered by the Hon'ble Supreme Court in the matter of **National Insurance Co. Ltd. v. Challa Bharathamma and others** reported in **(2004) 8 SCC 517**. Relevant portion of the said judgment reads as under:-

> “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."

26. The Hon'ble Supreme Court in the matter of **Manura Khatun & ors v. Rajesh Kumar Singh & ors** reported in **(2017) 4 SCC 796** has considered the issue of pay and recover and held thus:-

"14.The aforesaid question, in our opinion, remains no more res integra. As we notice, it was subject matter of several decisions of this Court rendered by three Judge Bench and two Judge Bench in past, viz., National Insurance Co. Ltd. vs. Baljit Kaur & ors, (2004) 2 SCC 1, National Insurance Co. Ltd. vs. Challa Upendra Rao & Ors., (2004) 8 SCC 517, Natinal Insurance Co. Ltd. vs. Kaushalaya Devi & ors, (2008) 8 SCC 246, National Insurance Col Ltd. vs. Roshan Lal, (Order dated 19.1.2007 in SLP © No. 5699 of 2006], and National Insurance Co. Ltd. vs. Parvathneni & anr, (2009) 8 SCC 785.

15. This question also fell for consideration recently in Manager, National Insurance Company Limited vs. Saju P. Paul & Anr., (supra) wherein this Court took note of entire previous case law on the subject mentioned above and examined the question in the context of Section 147 of the Act. While allowing the appeal filed by

> the Insurance Company by reversing the judgment of the High Court, it was held on facts that since the victim was travelling in offending vehicle as "gratuitous passenger" and hence, the Insurance Company cannot be held liable to suffer the liability arising out of accident on the strength of the insurance policy. However, this Court keeping in view the benevolent object of the Act and other relevant factors arising in the case, issued the directions against the Insurance Company to pay the awarded sum to the claimants and then to recover the said sum from the insured in the same proceedings by applying the principle of "pay and recover".
>
> 21.In view of the foregoing discussion, we are of the view that the direction to United India Insurance Company (respondent No. 3) - they being the insurer of the offending vehicle which was found involved in causing accident due to negligence of its driver needs to be issued directing them (United India Insurance Company-respondent No.3) to first pay the awarded sum to the appellants (claimants) and then to recover the paid awarded sum from the owner of the offending vehicle (Tata Sumo)-respondent No.1 in execution proceedings arising in this very case as per the law laid down in Para 26 of Saju P. Paul's case quoted supra."

27. Recently, in the matter of **Amrit Paul Singh and another v. Tata AIG General Insurance Company Limited and others** reported in **(2018) 7 SCC 558** Hon'ble Supreme Court while dealing with 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 Swaran Singh (supra) and Lakhmi Chand (supra) 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."

28. Considering the ratio laid down in above decisions of Hon'ble Supreme Court as also considering beneficial object of the Act of 1988 as well, this Court is of the view that it will be in larger interest of justice to direct the insurer to first pay amount of compensation to claimants and then to recover it from non-applicant No.2 in MAC No.644/2013, though under law it has no liability to pay amount of compensation.

29. In the result;

- MAC No.459/13 filed by the owner of offending vehicle is dismissed.
- MAC No.644/13 filed by claimants/appellants is allowed in part and the impugned award is modified in following terms;
- Claimants/appellants will now be entitled for a total sum of Rs.9,66,400/- (Rupees nine lakhs sixty-six thousand four

hundred) (806400 + 40000 + 40000 + 40000 + 15000 + 15000 + 10000) along with interest @ 7% p.a. from the date of application till its realization. The amount already deposited shall be adjusted from the total amount of compensation and balance amount of compensation be paid to claimants.

- Insurance Company though having no liability under the law to pay compensation to claimants, but keeping in mind the beneficial object of the Act of 1988 as also dictum of Hon'ble Supreme Court in above referred cases, this Court directs insurer of offending vehicle viz, respondent No.3 in MAC No.644/13, to first pay the amount of compensation to claimants and thereafter to recover the said sum from respondent No.2. It is made clear that for recovery of amount of compensation so deposited by the Insurance Company, it is not required to file separate suit but can recover it in the same proceedings by filing execution application.

30. Other conditions imposed by the learned Claims Tribunal will remain intact.

Sd/-
(PR Ramachandra Menon)
Chief Justice

Sd/-
(Parth Prateem Sahu)
Judge

padma