NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR
MAC No.755 of 2015

Mahetru Ram Sahu S/o Dhelu Ram Aged About 65 Years, R/o- Village Perswani, Tahshil -Mangerlod Distt – Dhamtari, Chhattisgarh.

---- Appellant

Versus

1. Yaman Kawar S/o Rampyare Aged About 30 Years, R/o- Village Bhalughulan Post Dahi-Tahsil Kurud, District -Dhamtari Chhattisgarh, Chhattisgarh.
2. Branch Manager, National Insurance Company Limited, Mobin Hal G.E. Road, Raipur, Chhattisgarh.

--- Respondents

For Appellant	:	Mr. A. L. Singroul, Advocate.
For Respondent No.1	:	None.
For Respondent No.2	:	Mr. Shivendu Pandya, Advocate.

Hon'ble Shri Justice Parth Prateem Sahu
Order on Board

28/10/2020

1. Appellant/claimant has filed this appeal under Section 173 of the Motor Vehicles Act, 1988 (for short 'the Act of 1988') seeking enhancement of amount of compensation awarded by learned Additional Motor Accident Claims Tribunal, Dhamtari, (CG) (for short, the Tribunal') vide award dated 12.03.2015 passed in Claim Case No.116/2014, whereby the Tribunal partly allowed application filed under Section 166 of the Act of 1988 and awarded Rs.3,31,600/- as compensation in an injury case.

2. Facts relevant for disposal of this appeal are that on 07.01.2014, claimant alongwith one Kamta Sahu were coming to village -Paraswani from village -Sarkada on motorcycle bearing registration No.CG-05/C/3418. Claimant was travelling as pillion rider whereas Kamta Sahu was driving the said motorcycle. When they reached near Paraswani Nala turn, one motorcycle bearing registration No.CG-05-R-5727 (for short 'offending vehicle') driven by Non-applicant No.1 rashly and negligently dashed their motorcycle and caused accident. In the aforesaid accident, claimant

suffered grievous injuries over his right hand and right leg. He was taken to Community Health Centre, Magarolad, however, looking to his injuries, he was referred to Naraina Hospital, Raipur, where he took treatment as in-patient from 07.01.2014 to 14.01.2014 and 06.02.2014 to 10.02.2014. During the course of treatment his right leg above knee was amputated and he became permanently disabled. Accident was reported to Police Station -Magarload based upon which crime was registered against non-applicant No.1.

3. Claimant filed an application under Section 166 of the Act of 1988 before the Tribunal seeking compensation of Rs.9,00,000/- pleadings therein that on the date of accident, he was working as 'labourer' and earing Rs.200/- per day. In motor-accident, he suffered permanent disability and now he is is unable to perform his work which he was doing prior to accident.

4. Non-applicant No.1 -driver-cum-owner of offending vehicle did not appear before the Tribunal, therefore, he was proceeded ex-parte.

5. Non-applicant No.2/Insurance Company submitted its reply to application and denied the pleadings made therein. It was further pleaded that claimant met with accident on account of his own negligence. There was head on collision between two vehicles, hence, there was contributory negligence. On the date of accident, offending vehicle was plied in breach of policy condition as non-applicant No.1 was not possessed of valid and effective driving license.

6. On appreciation of pleadings and evidence placed on record by respective parties, Tribunal held that claimant suffered 80% permanent disability on account of motor-accidental injuries suffered by him due to rash and negligent driving of offending vehicle by non-applicant No.1.

Fact of contributory negligence was not found to be proved. Offending vehicle was found to be plied in breach of policy condition. Tribunal allowed application in part, awarded a sum of Rs.3,31,600/- as compensation along with interest @ 6% p.a, while exonerating Insurance Company, fastened liability upon Non-applicant No.1. to pay the amount of compensation.

7. Learned counsel for the appellant/claimant submits that the Tribunal erred in assessing income of claimant as Rs.3,000/- per month only, ignoring the fact that claimant has very specifically stated in his pleadings and evidence that he was working as 'labourer' and earning Rs.200/- per day; The Tribunal has also overlooked the date of accident ie of 07.01.2014 and age of claimant ie between 61-65 years. The Tribunal has not awarded appropriate amount of compensation under other heads like medical expenses; special diet; pain and suffering; loss of amenities and joy in life; transportation and attendant. He further submits that the Tribunal ought to have considered that claimant suffered 100% loss of earning capacity instead of 80% as assessed by the Tribunal. He further submits that when the Tribunal has arrived at a finding that policy issued by Insurance Company is a valid policy and inforce on the date of accident, then even if non-applicant No.1 was not possessed of valid and effective driving licence leading to breach of condition of Insurance Policy, a direction to insurance Company to first deposit the entire amount of compensation and, thereafter, recover the same from Non-applicant No.1/driver-cum-owner of offending vehicle ought to have been issued, particularly when claimant is a third party.

8. I have heard learned counsel for the respective parties and perused the record of claim case.

9. Claimant in support of his pleadings placed on record documents ie Ex.P -1 final report & Ex.P-7 MLC report. Ex.P -8 is discharge summary of Shree Narayana Hospital, Raipur in which it is mentioned that claimant suffered "fracture of right femur & diabetic foot. Further, placed on record Ex.P-16 second discharge summary of Shree Narayana Hospital in which it is mentioned that claimant took treatment as in-patient from 06.02.2014 to 10.02.2014. The injuries suffered by claimant is mentioned as below :-

> "old fracture right with traumetic; detachment of implant; blackning of right foot”
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> under procedure of treatment it is mentioned that amputation of right "UNDES" SA on 07.02.2014”

10. In view of above documents, it is clear that claimant suffered fracture injuries over his right femur and he was admitted at Shree Narayana Hospital, Raipur. Initially his right femur was operated and affixed by implant but thereafter, looking to the infection, his right leg was amputated above knee. Claimant placed on record disability certificate as Ex.P-104 (C) issued by the District Medical Board, Dhamtari on 13.11.2014 in which it is mentioned that amputation of right leg and percentage of disability is mentioned as 80%.

11. So far as submission with regard to income of claimant is concerned, perusal of record would show that claimant has not placed on record any cogent and reliable piece of documentary evidence in this regard, therefore, in absence of any admissible piece of evidence, income of claimant is to be assessed on notional basis. Taking into consideration

the price index, cost of living, date of accident and nature of occupation of claimant, I find it appropriate to reckon income of claimant as Rs.4,500/- per month.

12. Coming to the submission with regard to non-award of appropriate amount of compensation under other conventional heads is concerned, the Tribunal has awarded consolidated amount of Rs.1,30,000/- towards pains and suffering, special diet & medical expenses, which in the considered opinion of this Court is on lower side. The Tribunal has not awarded any amount towards attendant & loss of amenities and joy in life.

13. For the foregoing reasons, I propose to recompute the amount of compensation awarded by the Tribunal.

14. Income of claimant is taken as Rs.4,500/- per month and yearly Rs.54,000/- (4500X12). The Tribunal has assessed age of claimant in between 61 to 65, hence, appropriate multiplier would be '7'. By applying multiplier of 7, total loss of income will come to Rs.3,78,000/- (54000 X 7). Loss of income as assessed is 80%, hence, loss of income suffered by claimant would be Rs.3,02,400/- (80% of Rs.3,78,200).

15. Apart from above, claimant is also entitled for a sum of Rs.86,500/- towards medical expenses for the period from 07.02.2014 to 14.02.2014 vide Ex.P-15 & Rs.29,000/- towards medical expenses for the period from 06.02.2014 to 10.02.2014 vide Ex.P17.

16. Claimant will be further entitled for amount of Rs.37,712/- which they have incurred in purchasing medicines from Shri Narayana Pharmacy vide Ex.P-31 to 51 & Ex.56, 62, 63, 70, 71, 72, 81, 82, 83, 84, 85 & 90.

17. The Tribunal has not awarded separately the amount of compensation towards pain and suffering; special diet; loss of amenities and joy in life; attendant; transportation & Loss of income during the period of treatment, which this Court compute as Rs.40,000/- towards pains and suffering; Rs.20,000/- loss of amenities and joy in life; Rs.8,000/- towards transportation and special diet; Rs.3,000/- towards attendant.

18. Now claimant will be entitled for a total compensation of **Rs.5,26,612/-** **(**Rs.3,02,400 + Rs.86,500 + Rs.29,000 + Rs.37,712 + 40,000 + 20,000 + 8,000 + 3,000/-) instead of **Rs.3,31,600/-** as awarded by the Tribunal. This amount of compensation shall carry interest @ 6% p.a. from the date of application till its realization. Rest of the conditions of impugned award shall remain intact.

19. Now coming to the submission made by learned counsel for the appellant/claimant that a direction be issued to Insurance Company to first deposit the entire amount of compensation and thereafter to recover the same. Insurance Policy issued for offending vehicle is not disputed by learned counsel for the respondent/Insurance Company. Copy of policy is placed on record as Ex. NA-1. The Tribunal has exonerated the Insurance Company from its liability only on the ground that non-applicant No.1 has not produced copy of driving license and held that offending vehicle was being driven by a person not having valid and effective driving licence.

20. Issue with regard to the driving of the vehicle by a person not possessed with valid and effective driving has been considered by the Hon'ble Supreme Court in case of **Papu & Ors vs Vinod Kumar Lamba & Anr** reported in **2018 3 SCC 208** held as under :-

> **"17**. This issue has been answered in **National Insurance Company Limited versus Swaran Singh** reported in **(2004) 3 SCC 297.** In that case, it was contended by the insurance company that once the defence taken by the insurer is accepted by the Tribunal, it is bound to discharge the insurer and fix the liability only on the owner and/or the driver of the vehicle. However, this Court held that even if the insurer succeeds in establishing its defence, the Tribunal or the Court can direct the insurance company to pay the award amount to the claimant(s) and, in turn, recover the same from the owner of the vehicle. The three-Judge Bench, after analysing the earlier decisions on the point, held that there was no reason to deviate from the said well-settled principle. In paragraph 107, the Court then observed thus:
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> > "107. We may, however, hasten to add that the Tribunal and the court must, however, exercise their jurisdiction to issue such a direction upon consideration of the facts and circumstances of each case and in the event such a direction has been issued, despite arriving at a finding of fact to the effect that the insurer has been able to establish that the insured has committed a breach of contract of insurance as envisaged under sub-clause (ii) of clause (a) of sub-section (2) of Section 149 of the Act, the insurance company shall be entitled to realize the awarded amount from the owner or driver of the vehicle, as the case may be, in execution of the same award having regard to the provisions of Sections 165 and 168 of the Act. However, in the event, having regard to the limited scope of inquiry in the proceedings before the Tribunal it has not been able to do so, the insurance company may initiate a separate action therefor against the owner or the driver of the vehicle or both, as the case may be. Those exceptional cases may arise when the evidence becomes available to or comes to the notice of the insurer at a subsequent stage or for one reason or the other, the insurer was not given an opportunity to defend at all. Such a course of action may also be resorted to when a fraud or collusion between the victim and the owner of the vehicle is detected or comes to the knowledge of the insurer at a later stage.

18. Further, in paragraph No.110, the Court in **National Insurance Co. Ltd vs Swaran Singh** (supra) observed thus :

> 110. The summary of our findings to the various issues as raised in these petitions are as follows:
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> > (i) Chapter XI of the Motor Vehicles Act, 1988 providing compulsory insurance of vehicles against third party risks is a social welfare legislation to extend relief by compensation to

victims of accidents caused by use of motor vehicles. The provisions of compulsory insurance coverage of all vehicles are with this paramount object and the provisions of the Act have to be so interpreted as to effectuate the said object.

(ii) An insurer is entitled to raise a defence in a claim petition filed under Section 163-A or Section 166 of the Motor Vehicles Act, 1988 inter alia, in terms of Section 149(2)(a) of the said Act.

(iii) The breach of policy condition, e.g. disqualification of driver or invalid driving licence of the driver, as contained in Sub-section (2)(a)(ii) of Section 149, have to be proved to have been committed by the insured for avoiding liability by the insurer. Mere absence, fake or invalid driving licence or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by duly licensed driver or one who was not disqualified to drive at the relevant time.

(iv) The insurance companies, however, with a view to avoid their liability must not only establish the available defence(s) raised in the said proceedings but must also establish 'breach' on the part of the owner of the vehicle; the burden of proof where for would be on them.

(v) The court cannot lay down any criteria as to how said burden would be discharged, inasmuch as the same would depend upon the facts and circumstance of each case.

(vi) Even where the insurer is able to prove breach on the part of the insured concerning the policy condition regarding holding of a valid licence by the driver or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards insured unless the said breach or breaches on the condition of driving licence is/ are so fundamental as are found to have contributed to the cause of the accident. The Tribunals in interpreting the policy conditions would apply "the rule of main purpose" and the concept of "fundamental breach" to allow defences available to the insured under Section 149(2) of the Act.

> (vii) The question as to whether the owner has taken reasonable care to find out as to whether the driving licence produced by the driver, (a fake one or otherwise), does not fulfil the requirements of law or not will have to be determined in each case.
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> (viii) xxx
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> (ix) xxx
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> (x) Where on adjudication of the claim under the Act the tribunal arrives at a conclusion that the insurer has satisfactorily proved its defence in accordance with the provisions of Section 149(2) read with Sub-section (7), as interpreted by this Court above, the Tribunal can direct that the insurer is liable to be reimbursed by the insured for the compensation and other amounts which it has been compelled to pay to the third party under the award of the Tribunal Such determination of claim by the Tribunal will be enforceable and the money found due to the insurer from the insured will be recoverable on a certificate issued by the Tribunal to the Collector in the same manner under Section 174 of the Act as arrears of land revenue. The certificate will be issued for the recovery as arrears of land revenue only if, as required by Sub-section (3) of Section 168 of the Act the insured fails to deposit the amount awarded in favour of the insurer within thirty days from the date of announcement of the award by the tribunal.
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> (xi) The provisions contained in Sub-section (4) with proviso thereunder and Sub-section (5) which are intended to cover specified contingencies mentioned therein to enable the insurer to recover amount paid under the contract of insurance on behalf of the insured can be taken recourse of by the Tribunal and be extended to claims and defences of insurer against insured by, relegating them to the remedy before, regular court in cases where on given facts and circumstances adjudication of their claims inter se might delay the adjudication of the claims of the victims." (emphasis supplied).

21. This issue has been again considered by the Hon'ble Supreme Court in case of **Shamanna & Anr Vs. Divisional Manager, Oriental Insurance**

Company Limited & Ors reported in **2018 9 SCC 650** and held as under :-

> “**6.** As per the decision in **National Insurance Company Limited vs. Swaran Singh** (supra), 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 fulfill the requirements of law or not will have to be determined in each case”

22. In the aforementioned rulings the Hon'ble Supreme Court has issued direction of pay to Insurance Company with liberty to recover the same from owner and driver of offending vehicle.

23. Taking support of the above rulings of Hon'ble Supreme Court on the issue, I direct respondent/Insurance Company to first deposit the entire amount of compensation alongwith interest and thereafter, to recover the same from non-applicant No.1/respondent No.1 in accordance with law.

24. In the result, appeal is allowed in part and the impugned award stands modified to the extent as indicated herein-above.

Sd/-

(Parth Prateem Sahu)
Judge

Jamal/-