AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

MAC No. 1625 of 2015

1. Smt. Tijiya Bai, W/o Nirgun Das, aged about 48 years, R/o Village Surgonger, District Balod (CG)

2. Anupdas S/o Nirgundas, aged about 28 years

3. Virendra Kumar, S/o Nirgundas, aged about 30 years.

4. Smt. Aasho Bai, W/o Devluram, aged about 73 years,

   No.2 to 4 are R/o Village Surgonger, District Balod (CG)

5. Damin Bai D/o Nirgundas, W/o Pankajlal, aged about 29 years, R/o Sonhpur, District Balod (CG)

---- Appellants

Versus

1. Gangaram Sahu, s/o Kapin Sahu, aged about 39 years, R/o Rengakathera, Tahsil Mohla, District Rajnandgaon (CG)

2. Bharti Axa General Insurance Company Limited, Through Divisional Manager, Divisional Office Devendra Nagar, Raipur, District Raipur (CG)

---- Respondents

For Appellants	:	Mr. B.P. Singh, Advocate
For Respondent No.2	:	Mr. Nilesh K Thakur, Advocate.

Single Bench: Hon'ble Shri Justice Parth Prateem Sahu

Order On Board

04/11/2020

1. Claimants/appellants have filed this appeal under Section 173 of the Motor Vehicles Act, 1988 (for short 'the Act of 1988') seeking enhancement of compensation awarded by the learned Motor Accident Claims Tribunal, Balod (for short 'the Claims Tribunal') vide award dated 26.9.2015 passed in Claim Case

No.1200159/14 thereby allowing application in part and awarding Rs.2,10,000/- as compensation in a death case, after deducting 50% towards contributory negligence fixed on the deceased.

2. Facts relevant for disposal of this appeal are that on 6.10.2014 Nirgundas was going to his house on motorcycle bearing registration number CG04-CM-4991. When he reached near village Manchua, another motorcycle bearing registration number CG08-N-0719 (for short 'the offending motorcycle'), driven by non-applicant No.1 rashly and negligently, dashed against his motorcycle, as a result, Nirgundas suffered grievous injuries on his head and other parts of body. He was immediately admitted in Chandulal Chandrakar Hospital, Bhilai, where during the course of treatment he died on 7.10.2014. Accident was reported to concerned police station based on which Crime No.192/14 was registered against non-applicant No.1 for commission of offence punishable under Sections 279, 337 & 304A of the Indian Penal Code.

3. Claimants/appellants, who are widow, children & widow mother of deceased, have filed an application under Section 166 of the Act of 1988 seeking compensation of Rs.15,40,000/- pleading therein that on the date of accident, the deceased was running a "*chaat & gupchup*" stall in village market and earning Rs.300/- per day and Rs.9000/- per month.

4. Non-applicant No.1, owner & driver of offending motorcycle, filed reply to claim application and denied all adverse

averments made therein. It was pleaded that the deceased himself drove motorcycle rashly in a high speed, lost his balance, fell down with motorcycle on road and suffered injuries. Amount of compensation claimed in the application is highly exaggerated. On the date of accident, the offending motorcycle was insured with non-applicant No.2-Insurance Company, therefore, if any amount of compensation is awarded, the insurance company would be liable to make payment of the same.

5. Non-applicant No.2-Insurer of offending motorcycle, also submitted its reply to claim application and denied the pleadings made therein. It was pleaded that on the date of accident, offending motorcycle was not insured with non-applicant No.2 because the cover note issued in favour of offending motorcycle is from the Cover Note Book bearing Nos. 32450811 to 32450820, which was lost and regarding which FIR had also been lodged. Amount of compensation claimed in application is highly exaggerated. Since there was head on collusion in between the two motorcycle, it is case of contributory negligence.

6. The Claims Tribunal upon appreciation of pleadings and evidence placed on record and considering that the accident occurred due to head-on collusion between two motorcycles, has held that both the drivers were equally responsible for the accident; the offending motorcycle was not found to be plied on road in breach of any of the conditions of insurance policy;

allowed claim application in part, worked out the total compensation at Rs.4,21,000/- and after deducting 50% of the same towards contributory negligence fixed on deceased, awarded a sum of Rs.2,10,500/- as compensation to claimants.

7. Mr. B.P. Singh, learned counsel appearing on behalf of claimants-appellants submits that contributory negligence can be inferred only on the basis of admissible piece of evidence and not merely because accident was outcome of head-on collusion between two vehicles. In case at hand, AW-2 has specifically stated in his evidence that non-applicant No.1, driver of offending motorcycle, came to the side of deceased i.e. wrong side, and dashed his motorcycle. However, the Claims Tribunal overlooking the aforementioned piece of evidence, merely on the ground that it is a case of head-on collusion and the deceased was not having valid and effective driving license on the date of accident, has held the deceased to be contributory negligent to the extent of 50% for the accident, which is not sustainable in law and liable to be interfered with. He further contended that registration of criminal case against non-applicant No.1 owner & driver of offending motorcycle for causing motor vehicular accident has not been challenged by him before any forum or Court, as has been admitted by non-applicant No.1 in his evidence also, and this clearly goes to show that non-applicant No.1 has admitted rash and negligence on his part. He also points out that for any reason if claimants have not produced on record driving license

of deceased, who was driving motorcycle, the same cannot be a ground for holding that the deceased was guilty of contributory negligence. In support of this submission, he places his reliance on the decision of Hon'ble Supreme Court in case of **Dinesh Kumar J. alias Dinesh J. Vs. National Insurance Company Ltd. & ors** reported in **(2018) 1 SCC 750**. Ultimately, he prays that finding of the Claims Tribunal holding the deceased to be contributory negligence to the extent of 50% for the accident may be set aside.

He further submits that the claimants-appellants have not only pleaded in claim application and stated in their evidence with regard to occupation and income of deceased to be Rs.9,000/- per month, but in order to show that deceased was selling 'chat & gupchup' in village market had also filed original market receipts issued by Gram Panchayat Makatola @ Surdonger as Ex.P-12 collectively, however, the Claims Tribunal disbelieving the pleading, evidence of claimants and market receipts (Ex.P-12), has erroneously assessed monthly income of deceased at Rs.3,000/- on notional basis, which is meagre. He further submits that the Claims Tribunal has wrongly deducted one-third from the income of deceased towards personal and living expenses of deceased, as the family of deceased is consisted of five members and as per decision of Hon'ble Supreme Court in case of **Sarla Verma vs. Delhi Transport Corporation Ltd.** reported in **(2009) 6 SCC 121** where number of dependent family members is 4 to 6, the deduction towards personal and living expenses should be one-fourth. This apart, on the date of accident the deceased was 55 years of age, but the Claims Tribunal has not awarded any amount towards future prospects. Lump sump amount of Rs.25,000/- awarded under other conventional heads is also on lower side and requires reconsideration. On the aforementioned grounds, learned counsel prays that appeal be allowed and compensation be enhanced suitably.

8. Mr. N.K. Thakur, learned counsel representing respondent Insurance Company submits that the Claims Tribunal is perfectly correct in holding the deceased to be contributory negligent to the extent of 50% as it was a case of accident between two motorcycles. He further submits that the driver of offending motorcycle had entered into witness box and very clearly stated that there was head-on collusion between the offending motorcycle and motorcycle of deceased, therefore negligence on the part of deceased cannot be ignored, as such, the Claims Tribunal has rightly held that the deceased had also contributed to the accident. He further contends that negligence can also be inferred from the fact that on the date of accident, deceased was not possessed with a valid and effective license to drive motorcycle. The claimants have also not been able to bring on record of driving license of deceased. Hence, finding of the Claims Tribunal with regard to contributory negligence being based on material and evidence available on record does not call for any interference.

Referring to the decision of Hon'ble Supreme Court relied upon by learned counsel for appellants, it is submitted by learned counsel for insurance company that in that case driver of offending vehicle was not examined, therefore, Hon'ble Supreme Court reached to the conclusion that the Tribunal erred in holding the deceased to be guilty of contributory negligence. Facts of cited case are clearly distinguishable and not applicable to the facts and circumstances of present case. He further contended that one-third deduction towards personal and living expenses of deceased is just and proper in the given facts of case where Claimant No.2, 3 & 5 are major and married children of deceased having their own family. Referring to Para-9 of the impugned award learned counsel submits that Claimant No.1 herself has admitted in her evidence that her two sons are married and they are residing with their family and even she is being looked after by them. She has further stated that her daughter is also married and living in her matrimonial home. In such a situation, the Claims Tribunal treating the widow and mother of deceased only as dependent of deceased has deducted one-third towards personal and living expenses and thereby not committed any illegality. Hence, the amount of compensation awarded by the Claims Tribunal being just and reasonable does not call for any interference.

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

10. As regards the question of contributory negligence, I have perused the pleadings of claimants and non-applicant No.1 available on record. In Para-4 of claim application, the claimants have categorically pleaded that deceased was going to his house on motorcycle and when he reached near village Manchuwa, non-applicant No.1 while driving his motorcycle rashly and negligently, dashed motorcycle of deceased and caused accident. In the said accident, deceased suffered grievous injuries and died in hospital during the course of treatment. Going through the pleadings of non-applicant No.1, it is seen that non-applicant No.1 has totally denied the fact of accident or involvement of his motorcycle in accident. In fact, in the additional submissions, he has pleaded that it was the deceased who drove his motorcycle in rash & negligent manner as a result he lost his balance, fell down on road and sustained injuries. Non-applicant No.1 has not pleaded in his reply that there was accident between two vehicles and alleged negligence on the part of deceased. However in the examination-in-chief submitted before the Claims Tribunal in the shape of an affidavit under Order 18 Rule 4 of CPC, non-applicant No.1 has, for the first time, stated that the deceased, who was coming from opposite direction, while driving his motorcycle in rash and negligent manner, dashed his motorcycle. It is well settled that in the absence of pleadings the evidence let in by a party cannot be accepted. Here also, in absence of any pleading in respect of the aforementioned evidence of non-applicant No.1 that the deceased drove his

motorcycle in a high speed and rash & negligent manner and dashed his motorcycle, the same cannot be read in evidence, as it is nothing but an afterthought, more so when involvement of his motorcycle was denied in reply. Thus, submission of learned counsel for respondent Insurance Company that driver of offending motorcycle has been examined and he has proved the manner in which accident took place ultimately proving contributory negligence on the part of deceased, is not sustainable and it is hereby repelled.

11. The Claims Tribunal relying on the evidence of non-applicant No.1, which is not supported by pleadings, and ignoring specific evidence of AW-2 examined on behalf of claimants, has arrived at a conclusion that there was negligence on the part of deceased and thereby committed mistake. AW-2 has stated in his evidence that non-applicant No.1 drove his motorcycle in a rash and negligent manner, went on wrong side and dashed the motorcycle of deceased. In the cross-examination of this witness, no specific question has been put to AW-2 with regard to his version in Para-2 of his examination-in-chief filed in the shape of Order 18 Rule 4 of CPC. In absence of any specific question put to him, the evidence or statement of NAW-2 remains unshaken.

12. Another ground based on which the Claims Tribunal has recorded finding of contributory negligence on the part of deceased to the extent of 50% is that on the date of accident, the deceased was not possessed with driving license. In case

of **Dinesh Kumar (supra)** similar issue came for consideration and Hon'ble Supreme Court taking into consideration its earlier decisions, has held thus:-

> “7.Insofar as the judgment of the High Court is concerned, the Division Bench has placed a considerable degree of importance on the fact that there was no visible damage to the lorry but that it was the motor cycle which had suffered damage and that there was no eye-witness. We are in agreement with the submission which has been urged on behalf of the appellant that plea of contributory negligence was accepted purely on the basis of conjecture and without any evidence. Once the finding that there was contributory negligence on 1 (2008) 12 SCC 436 the part of the appellant is held to be without any basis, the second aspect which weighed both with the tribunal and the High Court, that the appellant had not produced the driving licence, would be of no relevance. This aspect has been considered in a judgment of this Court in Sudhir Kumar (supra) where it was held as follows :
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>> “9.If a person drives a vehicle without a licence, he commits an offence. The same, by itself, in our opinion, may not lead to a finding of negligence as regards the accident. It has been held by the courts below that it was the driver of the mini truck who was driving rashly and negligently. It is one thing to say that the appellant was not possessing any licence but no finding of fact has been arrived at that he was driving the two-wheeler rashly and negligently. If he was not driving rashly and negligently which contributed to the accident, we fail to see as to how, only because he was not having a licence, he would be held to be guilty of contributory negligence…
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>> 10. The matter might have been different if by reason of his rash and negligent driving, the accident had taken place.”
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> 9 In view of the above position, we are of the view that the deduction of forty per cent which was made on the ground of contributory negligence is without any basis. Accordingly, we direct that the appellant shall be entitled to an additional amount of Rs 4.60

lakhs which was wrongly disallowed."

13. In case at hand, the non-applicants/respondents failed to establish negligent driving on the part of deceased, therefore, the law laid down in Dinesh Kumar's case (supra) squarely applies in the present case. This being the position, the Claims Tribunal should not have held the deceased to be contributory negligent to the extent of 50% for the accident merely on the ground that at the time of accident, the deceased was not possessing license.

14. In view of above, I am of the view that the Claims Tribunal erred in holding the deceased to be contributory negligent to the extent of 50% for the accident. The finding of the Claims Tribunal with regard to contributory negligence is not sustainable and the same is hereby set aside.

15. As regards the quantum of compensation, the date of accident is 6.10.2014. Admittedly, appellants-claimants have not examined any office bearer of concerned village panchayat to prove market receipts said to have been issued to the deceased permitting him to sell chat & gupchup in village market, but at the same time, it cannot be overlooked the original receipts have been filed. It is submitted by learned counsel for respondent Insurance Company that the Claims Tribunal has rightly disbelieved receipts as it does not bear name of deceased, but a glance of receipts would show that it does not have any column or space to mention name of person depositing market fee for running a stall in the market of village

panchayat. True it is that claimants have not filed any documentary evidence showing income of deceased, which may not be possible also looking to nature of work in which deceased was engaged during his lifetime. However, nature of occupation of deceased has been stated by AW-1 in his evidence, who is not a family member of deceased. Thus, taking into consideration overall facts and circumstances of case, date of accident on which income of a manual labourer might be more than what the Claims Tribunal has assessed as income of deceased, I am of the considered opinion that income of deceased fixed by the Claims Tribunal at Rs.3000/- is on lower side. Accordingly, I assess income of deceased as Rs.5,500/- per month.

16. As far as non-grant of future prospects is concerned, in the matter of **National Insurance Company Ltd. Vs. Pranay Sethi** reported in **(2017) 16 SCC 680**, Hon'ble Supreme Court while dealing with the issue of grant of future prospects has held 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."

In the case hand, there is no dispute that on the date of accident, the deceased was 55 years of age, as mentioned in post-mortem report Ex.P-7, and he was not in permanent employment, therefore, in view of law laid down by the Apex Court in Pranay Sethi's case (supra), the claimants/appellants are entitled for an additional amount of 10% of established income of the deceased as future prospects.

17. So far as deduction towards personal expenses of deceased is concerned, perusal of impugned award shows that the Claims Tribunal while computing loss of dependency has deducted 'one-third' from the income of deceased towards his personal & living expenses. In the matter of **Sarla Verma (supra)** Hon'ble Supreme Court while dealing with the issue of deduction towards personal & living expenses of the deceased, has held that where number of dependent family members are 4 to 6, one-fourth is to be deducted towards personal expenses. The purpose behind deducting amount towards personal and living expenses is that a person who is having liability of more dependent on his shoulder, would naturally expend little less upon him than a person having responsibility of less dependent. In case at hand, the Claims Tribunal based on evidence of Claimant No.1, widow of deceased, who has stated that her children are major and married, they are having their own family and she is also being maintained by her sons, has treated the widow and mother of deceased only as dependent and accordingly deducted one-third towards personal and living expenses. In light of evidence of claimant No.1-widow of deceased, I am of the considered view that the Claims Tribunal has not committed any mistake in deducting one-third towards personal and living expenses of deceased. Submission made

by learned counsel for appellant with respect to standard deduction is not sustainable and is hereby repelled.

18. As regards the award of lump sum amount under other conventional head i.e. Rs.25,000/-. In the opinion of this Court, the amount awarded under other conventional heads is on lower side and deserve to be enhanced as per decision of Hon'ble Supreme Court in **Pranay Sethi's case (supra)** and **Magma General Insurance Company Limited vs. Nanu Ram alias Chuhru Ram & ors** reported in **(2018) 18 SCC 130**.

19. For the foregoing reasons, I propose to recompute the amount of compensation payable to claimants/appellants to award just compensation.

20. The income of deceased is taken as Rs.5,500/- per month and since at the time of accident the deceased was 55 years of age and was not in permanent employment, in view of law laid down in the matter of **Pranay Sethi** (supra), the income of deceased is required to be increased by 10% towards future prospects, which comes to Rs.6,050/- (5500+550). Accordingly, annual income of deceased for the purpose of calculating compensation comes to Rs.72,600/- (6050x12). Out of this amount, one-third is to be deducted towards personal & living expenses of the deceased and after deducting one-third, annual loss of dependency would come to Rs.48,400/- (72600-24200). By applying multiplier of 11, as applied by the Claims Tribunal, to annual loss of dependency, total loss of dependency would come to Rs.5,32,400/- (48400x11). Besides

this, appellant No.1, widow of deceased, is entitled for a sum of Rs.40,000/- towards spousal consortium and appellant Nos.2 to 4, children of deceased, are entitled for a sum of Rs.40,000/- towards parental consortium and appellant No.5 is entitled for Rs.40,000/- towards filial consortium, as held by Hon'ble Supreme Court in the matters of **Pranay Sethi (supra)** and **Magma General Insurance Company Limited (supra)**. In addition to aforesaid amount, the appellants are also entitled to get a sum of Rs.15,000/- for funeral expenses; Rs.15,000/- for loss of estate. Thus, claimants/appellants are entitled for a total sum of Rs.6,84,400/-, instead of Rs.2,10,500/- as awarded by the Claims Tribunal. This amount of compensation shall carry simple interest @ 8% p.a. from the date of filing of claim application till its realization. Rest of the conditions mentioned in the impugned award shall remain intact. Any amount already paid to claimants/appellants as compensation shall be adjusted from the total amount of compensation as calculated above.

21. In the result, the appeal stands allowed in part and the impugned award stands modified to the extent indicated above.

Sd/-
(Parth Prateem Sahu)
Judge

roshan/-