NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

Misc. Appeal (C) No.186 of 2013

IFFCO Tokio General Insurance Co. Limited, 3rd Floor, Shop No.345-347, Ganga Shopping, Near Mata, G.E. Road, Raipur, Tehsil & District Raipur, Chhattisgarh

(Respondent No.3)
---- Appellant

Versus

1. Smt. Maheshwari Thakur, W/o Late Shri Bhuwan Singh Thakur, aged about 37 years

2. Kumari Lekha Thakur, D/o Late Shri Bhuwan Singh Thakur, aged about 13 years,

3. Ku. Jagriti Thakur, D/o Late Shri Bhuwan Singh Thakur, aged about 5 years,

   Respondent No.2 & 3 being minors are represented through their mother Smt. Maheshwari Thakur

4. Smt. Uma Bai Thakur, W/o Late Shri Sitaram Thakur, aged about 60 years,

   All are residents of Village Chihbodh, Thana and Tehsil Balod, District Durg, Chhattisgarh

   Presently residing at Village Dhamna, Thana Ranchirai, Tehsil Patan, District Durg, Chhattisgarh

   (Claimants)

5. Narayan @ Babloo Solwanshi, S/o Shri Bhukhau Ram Solwanshi, aged about 25 years, R/o Village Sanjay Nagar, Balod, Thana & Tehsil Balod, District Durg, Chhattisgarh

   (Driver)

6. Rajesh Kumar, S/o Shri Govind Ram, R/o Musalman Para, Balod, Thana & Tehsil Balod, District Durg, Chhattisgarh

   (Owner)
   ---- Respondents

For Appellant: Mr. Amrito Das, Advocate.
For Respondents No.1 to 4: - Mr. Praveen K. Dhurandhar, Advocate.
For Respondent No.5: None present.
For Respondent No.6: Mr. B.P. Singh, Advocate.

Hon'ble Shri Justice Sanjay K. Agrawal

Order On Board

30/11/2021

1. This appeal under Section 173 of the Motor Vehicles Act, 1988 is directed against the award dated 10-12-2012 passed by the 2nd Additional Motor Accident Claims Tribunal, Durg in Claim Case No.179/2011, by which the learned Claims Tribunal has awarded ₹ 15,40,000/- along with 6% interest per annum from the date of the application to respondents No.1 to 4 herein / claimants. The claimants have also preferred cross-objection seeking enhancement of the amount under award.

2. Mr. Amrito Das, learned counsel appearing for the appellant herein / Insurance Company, would submit that the Claims Tribunal has grossly erred in fastening the liability on the Insurance Company by only rejecting 30% towards contributory negligence, it could have deducted 50% towards contributory negligence. He would further submit that after the death of Bhuwan Singh Thakur, his wife Maheshwari Thakur has been given compassionate appointment, therefore, the amount received would constitute pecuniary advantage and such amount on such appointment is liable for deduction for determination of compensation under the Motor Vehicles Act, 1988 and as such, the award is liable to be modified.

3. Mr. Praveen K. Dhurandhar, learned counsel appearing for respondents No.1 to 4 herein / claimants, would submit that there is no plea of contributory negligence raised on behalf of the Insurance Company and no evidence has been brought and therefore the Claims Tribunal is totally unjustified in deducting 30% towards contributory negligence. He would further submit that multiplier of 15 should have been applied for determining the compensation and the claimants

would also be entitled for ₹ 17,000/- which the deceased was earning monthly salary by working as Sub-Inspector in Krishi Upaj Mandi, Balod at the time of his death.

4. I have heard learned counsel for the parties and considered their rival submissions made herein-above and also went through the record with utmost circumspection.

5. The first ground is, whether the Claims Tribunal is justified in deducting only 30% towards contributory negligence made by deceased Bhuwan Singh Thakur.

6. The Claims Tribunal has held the deceased liable for negligent driving and deducted 30% towards contributory negligence. A careful perusal of the claim application would show that there is no express plea of contributory negligence raised on behalf of the Insurance Company in the written statement filed before the Claims Tribunal. Similarly, the Insurance Company did not adduce any evidence to prove the alleged plea of contributory negligence except its Law Officer namely, Naveen Soni (NAW-1) stated that the driver while plying the offending vehicle was intoxicated and after having intoxicated, he was driving the vehicle. Thus, the deceased was found guilty of contributory negligence.

7. The Supreme Court in the matter of **Jiju Kuruvila and others v. Kunjujamma Mohan and others**[1] has held that merely on the basis of postmortem report that the deceased has taken liquor, no definite opinion can be given that the deceased was driving the vehicle rashly and negligently at the time of accident. It has been observed by their Lordships of the Supreme Court in paragraph 20.6. of the report as under: -

1 (2013) 9 SCC 166

> "20.6. The post-mortem report, Ext.A-5 shows the condition of the deceased at the time of death. The said report reflects that the deceased had already taken meal as his stomach was half-full and contained rice, vegetables and meat pieces in a fluid with strong smell of spirit. The aforesaid evidence, Ext.A-5 clearly suggests that the deceased had taken liquor but on the basis of the same, no definite finding can be given that the deceased was driving the car rashly and negligently at the time of accident. The mere suspicion based on Ext.B-2 "scene mahazar" and Ext.A-5 post-mortem report cannot take the place of evidence, particularly, when the direct evidence like PW 3 (independent eyewitness), Ext.A-1 (FIR), Ext.A-4 (charge-sheet) and Ext.B-1(FI statement) are on record.

8. At this stage, it would be appropriate to notice the decision of the Supreme Court in the matter of **Minu Rout and another v. Satya Pradyumna Mohapatra and others**[2] in which the plea of contributory negligence was taken by the Insurance Company, but neither the driver nor any independent witness was examined to prove the allegation of contributory negligence. Their Lordships of the Supreme Court while setting aside the finding of contributory negligence, held as under: -

> "12. … 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

2 2013 AIR SCW 5375

> 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. For the aforesaid reasons, the findings and reasons recorded by the Tribunal on the contentious issue No.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. ..."

9. Reverting to the facts of the instant case in the light of the aforesaid legal position, it is quite vivid that the Insurance Company taking the plea of contributory negligence on the part of the deceased, must take the plea of contributory negligence on the part of the deceased and must lead evidence with regard to that and unless the plea is made and evidence is led, the Insurance Company cannot be absolved of its liability qua the contributory negligence. In the instant case, neither plea was taken nor evidence was led by the Insurance Company except the statement of Law Officer Naveen Soni (NAW-1), who has simply stated that the driver was driving the vehicle after being intoxicated and the Claims Tribunal relying upon the postmortem report Ex.P-9, held the deceased guilty of contributory negligence which runs contrary to the decision rendered by the Supreme Court in **Jiju Kuruvila** (supra). As such, it cannot be held that the deceased was driving the offending vehicle in rash and negligent manner. Accordingly, the plea of contributory negligence is not established and the Claims Tribunal has committed legal error in holding that the deceased was driving the offending vehicle in rash and negligent manner and is guilty of contributory negligence. As such, the plea of contributory negligence is rejected.

10. Now, the cross-objection / cross-appeal of the claimants is taken-up

for consideration.

11. The deceased, at the time of death, was working as Sub-Inspector in Krishi Upaj Mandi, Balod and his income is stated to be ₹ 17,501/- per month. Age of the deceased at the time of death was less than 45 years.

12. The plea of the Insurance Company is that the deceased died due to rash and negligent driving and his wife respondent No.1 herein was given compassionate appointment, therefore, the claimants are not entitled for compensation and the amount received earlier on such appointment is liable for deduction for determination of compensation under the Motor Vehicles Act, 1988.

13. The issue is no longer res integra and stood settled by the Supreme Court in the matter of **Vimal Kanwar and others v. Kishore Dan and others**[3] in which their Lordships have formulated question in paragraph 20 and thereafter, answered the issue in paragraph 21, in negative, as under: -

> "20. The second issue is "whether the salary receivable by the claimant on compassionate appointment comes within the periphery of the Motor Vehicles Act to be termed as 'pecuniary advantage' liable for deduction."
>
> 21. "Compassionate appointment" can be one of the conditions of service of an employee, if a scheme to that effect is framed by the employer. In case, the employee dies in harness i.e. while in service leaving behind the dependents, one of the dependents may request for compassionate appointment to maintain the family of the deceased employee who dies in harness. This cannot be stated to be an advantage receivable by the heirs on account of one's death and have no correlation with the amount receivable under a statute occasioned on account of accidental death. Compassionate appointment may have nexus with the death of an employee while in service but it is not necessary that it should have a correlation with the accidental death. An employee dies in harness even in

3 (2013) 7 SCC 476

> normal course, due to illness and to maintain the family of the deceased one of the dependents may be entitled for compassionate appointment but that cannot be termed as "pecuniary advantage" that comes under the periphery of the Motor Vehicles Act and any amount received on such appointment is not liable for deduction for determination of compensation under the Motor Vehicles Act."

14. As such, their Lordships of the Supreme Court have clearly held that the compensation cannot be termed as pecuniary advantage that comes under the periphery of the Motor Vehicles Act and any amount received on such appointment is not liable for deduction for determination of compensation under the Motor Vehicles Act. As such, this plea is also rejected.

15. Now, the question is, how much compensation the claimants are entitled for?

16. The Claims Tribunal has rightly assessed the income of the deceased as ₹ 17,000/- per month which is not disputed by learned counsel for the parties. Age of deceased to be 40 years at the time of death is also not disputed by the parties.

17. Taking into consideration the monthly income of the deceased to be ₹ 17,000/-, yearly income would be ₹ 2,04,000/-, deducting ¼th towards personal living expenses, it will come to ₹ 1,53,000/-. Applying the appropriate multiplier of 15, it will come to ₹ 22,95,000/-. Following amount of compensation is awarded under the relevant conventional and traditional heads: -

(i)	Loss of consortium	₹ 5,000/-
(ii)	Funeral expenses	₹ 4,000/-
(iii)	Loss of estate	₹ 4,000/-
(iv)	Loss of love and affection	₹ 15,000/-

18. The Constitution Bench of the Supreme Court in the matter of **National**

Insurance Company Limited v. Pranay Sethi and others[4] has held that while determining the income, an addition of 50% of actual salary to the income of the deceased towards future prospects, where the deceased had a permanent job and was below the age of 40 years, should be made. The addition should be 30%, if the age of the deceased was between 40 to 50 years. In case the deceased was between the age of 50 to 60 years, the addition should be 15%. Actual salary should be read as actual salary less tax. Here, in the present case, since the deceased was working as Government servant and admittedly, aged about 40 years, therefore, 50% of the actual salary towards future prospects should have to be made and it would come to ₹ 11,47,500/- (50% of 22,95,000).

19. On totality of the facts and circumstances of the case, the total compensation works out to ₹ 34,70,500/- (22,95,000 + 11,47,500 + 5,000 + 4,000 + 4,000 + 15,000) which the claimants are entitled to along with 6% interest per annum from the date of making the claim application. The appellant / Insurance Company is directed to deposit the amount of compensation within 60 days.

20. In the result, the appeal of the appellant Insurance Company is dismissed and the cross-objection / cross-appeal of the claimants is allowed. No order as to cost(s).

Sd/-
(Sanjay K. Agrawal)
Judge

Soma

4 (2017) 16 SCC 680