NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

MAC No. 103 of 2015

1. Smt. Sumitra Bai Haldhar, W/o Shri Satindra Haldhar Aged About 40 Years R/o Pankhajur, Thana-Pankhajur, Distt. Kanker , Chhattisgarh
2. Satindra Haldhar, S/o Shri Gaurangdah Haldhar Aged About 45 Years R/o Pankhajur, Thana Pankhajur,District : Kanker, Chhattisgarh

---- Appellants/Claimants

Versus

1. Murgesh Kumar Netam, S/o Shri Tirmal Netam R/o Village Jam Katepara, Thana And Tahsil Kondagaon, Distt. Kondagaon, Chhattisgarh (Driver)
2. Lalit Tavri S/o Shri Durga Prasad Tavri R/o Vikash Nagar Ward, Kondagaon, District : Kondagaon, Chhattisgarh (Owner)
3. Branch Manager, Oriental Insurance Company Ltd., Branch Office Near Amar Talkies, Dhamtari, Distt. Dhamtari C.G (Insurance Company)

----Respondents

For Appellants	:	Shri Samir Singh, Advocate
For Respondents- 1 and 2	:	None appears
For Respondent- 3	:	Shri Anumeh Shrivastava, Advocate

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

Per Parth Prateem Sahu, J.
11.01.2021

1. Challenge in this appeal is to the award dated 29.10.2014 passed by the Additional Motor Accident Claims Tribunal, District Dhamtari (FTC) (for short, 'Claims Tribunal') in Claim Case- 147 of 2013, whereby learned Claims Tribunal allowed the application under Section 166 of the Act of 1988 and awarded Rs.4,43,000/- as total compensation in a fatal accident case.

2. Facts relevant for disposal of this appeal are that on 10.02.2013, Suresh Kumar (since deceased) was travelling on Motorcycle bearing No.CG 19BA-7526 accompanied with his friends who were on other Motorcycle and going to Raipur from Kanker. When they reached near Sandeep Bhojanalay, Bhagwati Lodge at Dhamtari, NA1 while driving the

Truck bearing No.CG 17GA-1733 (for short, 'offending vehicle') rashly and negligently, dashed Motorcycle of Suresh Kumar from its back due to which he fell down and came under the Truck. In the said accident, he died on the spot.

3. Claimants, who are parents of deceased filed an application under Section 166 of the Act of 1988 pleading therein that deceased was able bodied person, aged about 24 years, he was meritorious student and running Coaching Centre at Kanker, earning Rs.10,000/- per month and claimed Rs.64,00,000/- as total compensation.

4. NA1 and 2 submitted reply to claim application, while denying the entire pleadings made therein, have further pleaded that on the date of accident offending vehicle was insured with NA3/Insurance Company. NA1 was possessed with valid and effective driving license as such, liability to satisfy the amount of compensation, if any, would be upon NA3/Insurance Company.

5. NA3/Insurance Company submitted reply to the claim application denying the entire facts pleaded therein. It was further pleaded that deceased himself was driving his Motorcycle negligently, owner and insurer of Motorcycle to be necessary parties, in their absence, claim application is not maintainable. NA1, driver of offending vehicle was not possessed with valid and effective driving license, there was no valid permit and fitness of offending vehicle, hence, there was breach of policy conditions.

6. Learned Claims Tribunal on appreciation of pleadings and evidence brought on record by respective parties, held that Suresh Kumar died on account of motor accidental injuries suffered by him due to rash and negligent driving of offending vehicle by NA1; offending vehicle was being plied in breach of policy

conditions awarded Rs.4,43,000/- as total compensation and fastened liability to satisfy amount of compensation upon NA1 and 2, driver and owner of offending vehicle.

7. Shri Samir Singh, learned counsel for the appellants submits that appellants have challenged the impugned award on two grounds ie enhancement of amount of compensation awarded by learned Claims Tribunal and erroneous exoneration of Insurance Company from its liability . He submits that deceased was a meritorious student who completed his graduation with Physics, Chemistry and Mathematics from Bastar Vishwa Vidyalay, Jagdalpur. He was engaged in giving coaching to students. On the date of accident also, he was going to Raipur for attending a competitive examination for the post of Assistant Manager in Industrial Department of Chhattisgarh State Government at Mantralaya, Raipur. Learned Claims Tribunal without considering educational qualification of deceased, as also pleading and evidence brought on record with regard to his engagement in giving tuitions to students, earning Rs.10,000/- per month, erroneously assessed income of deceased as Rs.3,000/- per month. Tribunal overlooked the specific pleading that deceased was also engaged in the work of reporting in Newspaper, which was also one of the source of his income. Learned Claims Tribunal has not awarded any amount of towards future prospects and awarded meagre amount of Rs.35,000/- on other conventional heads. He submits that the amount of compensation be suitably enhanced. He further contended that learned Claims Tribunal erroneously exonerated the Insurance Company in its entirety by recording a finding that there was breach of policy conditions as NA1 was not possessed with valid and effective driving license. Risk of deceased was covered under the Policy which is not disputed, hence learned Claims Tribunal ought to have issued direction to the Insurance

Company to first pay the entire amount of compensation and thereafter, to recover the said amount from NA1 and 2.

8. In support of his contentions, learned counsel for the appellant places his reliance on cases of **National Insurance Company Limited Vs Pranay Sethi and others** reported in 2017 16 SCC 680, **Magma General Insurance Company Limited Vs Nanu Ram @ Chuhru Ram and Others** reported in (2018) 18 SCC 130, and **Shamanna and another Vs Divisional Manager, Oriental Insurance Company Limited and others** (2018) 9 SCC 650.

9. Shri Anumeh Shrivastava, learned counsel for respondent-3/Insurance Company submits that claimants have not placed on record any admissible piece of evidence in support of their pleading with regard to income of the deceased on the date of accident, in absence of any proof of income, Tribunal justified in assessing income of deceased on notional basis. Claims Tribunal has awarded just amount of compensation in the facts and circumstances of the case. He further contended that Claims Tribunal has rightly taken into consideration that respondents 1 and 2, who are driver and owner of offending vehicle even after granting proper opportunity of hearing and sufficient time to produce evidence to prove the fact of license with NA1, have failed to place on record the same, rightly held that there was breach of policy conditions and exonerated Insurance Company from its liability. The above finding of learned Claims Tribunal cannot be said to be erroneous in any manner, the impugned award does not call for any interference.

10. We have heard learned counsel for the respective parties and also perused the record of claim case.

11. So far as the 1st ground raised by learned counsel for the appellants with regard to enhancement of amount of compensation is concerned, perusal of record of claim case would show that claimants in support of their pleadings have placed on record copies of Mark-sheet of deceased of Primary Certificate Exam ie of Class-5, where he secured 78%, Mark-sheet of Middle School Certificate Exam ie of Class-8, where he secured 64.54%, Mark-sheet of High School Certificate Exam ie of Class-10, where he secured distinction in all subjects. Mark-sheet of Higher Secondary School Certificate ie Class-12, where he got distinction in Physics, Chemistry and Mathematics, Mark-sheet of BSc III showing him to be passed in First Division. Claimants have further filed several appreciation certificates issued by different institutions. These documents have been marked as Ex.P8(c) to P17. Learned Claims Tribunal overlooking these documents available on record, showing educational qualification and deceased to be meritorious student, has assessed his income as Rs.3,000/- per month only.

12. Deceased on the date of accident has been shown to be 24 years only. Upon considering the entire facts and circumstances of the case, as well as documentary evidence placed on record by the appellants, we are of considered view that learned Claims Tribunal erred in assessing income of deceased as Rs.3,000/- per month only. Date of accident is of 10.02.2013 and on which date even a manual labourer could have earned more wages than the income of deceased assessed by the Tribunal.

13. True, it is that the claimants have failed to place on record any documentary evidence to prove income of deceased. But then, in absence of any proof of income like salary certificate income Tax Return it is the duty of Tribunal and Courts to assess income of a person on notional basis considering the date

of accident, age of deceased, qualification, wage structure, cost of living and pleadings and evidence brought on record by the claimants in this regard.

14. In view of above, taking into consideration date of accident, qualification of deceased and further oral evidence of parents with regard to nature of work in which deceased was engaged prior to the date of accident, we find it appropriate to assess income of deceased as Rs.6,000/- per month and Rs.72,000/- per annum.

15. In case of **Pranay Sethi** (supra) Hon'ble Supreme Court has issued guidelines for awarding future prospects and as such, upon considering age of deceased to be less than 40 years and he was not in permanent employment, there shall be addition of 40% of the established income in the income of deceased for the purpose of assessing total income of deceased on the date of accident.

16. Claims Tribunal has applied multiplier of 17 which in view of dictum of Supreme Court in case of **Sarla Verma and others Vs Delhi Transport Corporation and another reported in** (2009) 6 SCC 121 is erroneous. Deceased has been shown and proved to be 24 years of age, hence, appropriate multiplier would be 18 in place of 17. Learned Claims Tribunal erred in awarding only Rs.35,000/- on other conventional heads, which is on lower side in view of dictum of Hon'ble Supreme Court in case of **Pranay Sethi** and **Magma** (supra).

17. In view of the above facts and circumstances of the case, we find it appropriate to re-calculate the amount of compensation, which is as under.

a) Income of the deceased is taken @ Rs.6,000/- per month and Rs.72,000/- (6000 x 12) per annum.

b) By adding 40% of his established income towards future prospects, total yearly income comes to Rs.1,00,800/- {72000 + (72000 x 40/100)}.

c) Deceased was bachelor, hence, there will be deduction of ½ towards his personal and living expenses from yearly income. Now, yearly loss of dependency comes to Rs.50,400/- {100800 – (100800 x ½)}.

d) Upon multiplying yearly loss of dependency with 18, total loss of dependency comes to Rs.9,07,200/- (50400 x 18).

e) Apart form above loss of dependency, claimants are further entitled for Rs.40,000/- towards filial consortium, Rs.15,000/- for loss of estate, and Rs.15,000/- for funeral expenses.

18. Now the claimants are entitled for a sum of **Rs.9,77,200/-** (907200 + 40000 + 15000 + 15000) instead of Rs.4,43,000/- as awarded by the Claims Tribunal.

19. Amount of compensation shall carry interest @ 6% per annum from the date of filing of claim application, till its realisation. Other conditions imposed by the learned Claims Tribunal shall remain intact.

20. Now, we will consider submission made by learned counsel for the appellant with regard to the direction to the Insurance Company to first pay the entire amount of compensation and thereafter to recover the same from owner and driver of the offending vehicle.

21. Perusal of impugned award would show that learned Claims Tribunal arrived at a finding with regard to breach of policy conditions on the ground that NA1, driver of offending vehicle was not possessed with valid and effective driving license.

22. Hon'ble Supreme Court in case of **Shamanna** (supra) has considered the issue of no valid license with driver of offending vehicle and held thus :

“5. In the case of third party risks, as per the decision in *National Insurance Company Ltd. v. Swaran Singh and others (2004) 3 SCC 297*, the insurer had to indemnify the compensation amount payable to the third party and the insurance company may recover the same from the insured. Doctrine of "pay and recover" was considered by the Supreme Court in Swaran Singh case wherein the Supreme Court examined the liability of the insurance company in cases of breach of policy condition due to disqualifications of the driver or invalid driving licence of the driver and held that in case of third-party risks, the insurer has to indemnify the compensation amount to the third party and the insurance company may recover the same from the insured. Elaborately considering the insurer's contractual liability as well as statutory liability vis-a-vis the claims of third parties, the Supreme Court issued detailed guidelines as to how and in what circumstances, “pay and recover” can be ordered. In para 110, the Supreme Court summarised its conclusions as under: (SCC pp. 341-42)

> “110. The summary of our findings to the various issues as raised in these petitions is 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.
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> > (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)(ii) of the said Act.
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> > (iii) The breach of policy condition e.g. disqualification of the driver or invalid driving licence of the driver, as contained in sub-section (2)(a)(ii) of Section 149, has 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 the 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 a duly licensed driver or one who was not disqualified to drive at the relevant time.

(iv) 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 wherefore would be on them,

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

(viii) If a vehicle at the time of accident was driven by a person having a learner's licence, the insurance companies would be liable to satisfy the decree.

(ix) The Claims Tribunal constituted under Section 165 read with Section 168 is empowered to adjudicate all claims in respect of the accidents involving death or of bodily injury or damage to property of third party arising in use of motor vehicle. The said power of the Tribunal is not restricted to decide the claims inter se between claimant or claimants on one side and insured, insurer and driver on the other. In the course of adjudicating the claim for compensation and to decide the availability of defence or defences to the insurer, the Tribunal has necessarily the power and jurisdiction to decide disputes inter se between the insurer and the insured. The decision rendered on the claims and disputes inter se between the insurer and insured in the course of adjudication of claim for compensation by the claimants and the award made thereon is enforceable and executable in the same manner as provided in Section 174 of the Act for enforcement and execution of the award in favour of the claimants.

(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.

(xi) The provisions contained in sub-section (4) with the proviso there under and sub-section (5) which are

> intended to cover specified contingencies mentioned therein to enable the insurer to recover the amount paid under the contract of insurance on behalf of the insured can be taken recourse to by the Tribunal and be extended to claims and defences of the insurer against the 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,”
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> (emphasis supplied)
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> 6. As per the decision in Swaran Singh case, 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
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> “as to whether the owner has taken reasonable care to find out as to whether the driving licence produced by the driver... does not fulfil the requirements of law or not will have to be determined in each case.”

23. In view of aforementioned law laid down by Hon'ble Supreme Court, we find it appropriate to direct respondent-3 Insurance Company to first deposit entire amount of compensation along with interest and thereafter to recover the same from respondents 1 and 2 in accordance with law.

24. The appeal is allowed in part and impugned award is modified to the extent as indicated above.

Sd/-	Sd/-
(PR Ramachandra Menon)	**(Parth Prateem Sahu)**
Chief Justice	**Judge**

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