

HIGH COURT OF CHHATTISGARH, BILASPUR**MAC No. 67 of 2016**

1. Smt. Kapura Bai Wd/o Toran Singh Dhurve, Aged About 33 Years
2. Ku. Santoshi D/o Toran Singh Dhurve, Aged About 15 Years
3. Deepak S/o Toran Singh Dhurve, Aged About 13 Years
4. Ku. Niteshwari Dhurve D/o Toran Singh Dhurve, Aged About 11 Years
5. Lokesh S/o Toran Singh Dhurve, Aged About 9 Years
6. Neera Bai W/o Sumiran Singh Dhurve, Aged About 63 Years
7. Sumiran Singh S/o Chhattar Singh, Aged About 66 Years

Appellants 2 to 5 are minors represented through legal guardian, mother Kapura Bai, Widow of Toran Singh Dhurve

All are R/o Village Bahra Khondara, Tahsil Bodla, Police Station Chilfi, District Kabirdham Chhattisgarh.....Claimants

---- Appellants/Claimants

Versus

1. Kishun Koshale S/o Makhnu Koshle, Aged About 50 Years R/o Village Baikoni, Police Station And Tahsil Simga, District Balodabazar Bhatapara Chhattisgarh Driving License No. C G 04 19900000354
2. Rajendra Singh Bhutani S/o D. S. Bhutani, R/o D-67, Sector 4, Devendra Nagar, Raipur Chhattisgarh
3. The Oriental Insurance Company Limited Madina Manjil Kachahari Chowk, Jail Road, Raipur Chhattisgarh.....Policy No. 190011/31/2014/9308 Insurer Truck Highwa No. C G 04 H B 8208
4. Balram Nath Yogi S/o Bhagwan Nath, Occupation Transporting, R/o Village Ghugharikala, Tahsil And District Kawardha Chhattisgarh
5. Ifco Tokyo General Insurance Company Limited, Branch Third Floor, 345-347, Lalganga Shopping Mall, G. E. Road, Raipur Chhattisgarh 492001.....Insurer Vehicle No. C G 09 B 5745

---- Respondents

For Appellants	: Ms Taniya Mandal, Advocate on behalf of Ms Sharmila Singhai, Advocate
For Respondent-3	: Shri NK Malviya, Advocate
For Respondent-5	: Shri Tessa Abraham, Advocate on behalf of Shri Amrito Das, Advocate

Hon'ble Shri Justice Parth Prateem Sahu

Order on Board

27.09.2021

1. Claimants have preferred this appeal under Section 173 of Motor Vehicles Act, 1988 (for short, 'Act of 1988') challenging impugned award dated 28.10.2015 passed by Motor Accident Claims Tribunal, Bemetara, District- Bemetara (for short, 'Claims Tribunal') in Claim Case- 55 of 2014, whereby

learned Claims Tribunal allowed application filed under Section 166 of the Act of 1988 in part, calculated total compensation of Rs.10,07,036/-. After deducting 50% towards contributory negligence, awarded total compensation of Rs.5,03,518/-, fastening liability upon NA3/respondent-3/Insurance Company to satisfy amount of compensation.

2. Facts relevant for disposal of this appeal are that on 13.01.2014 Toran Singh Dhurve (since deceased) was driving his HYVA Truck bearing No.CG09B-5745 returning to Daldali Kawardha after unloading Baxite rock at village Basni, Bemetara. While so, when he reached near sub-jail Bemetara, one another HYVA Truck bearing No.CG04HB-8208 (for short, 'offending vehicle') driven by NA1/respondent-1 rashly and negligently, dashed the truck of Toran Singh Dhurve and caused accident. There was head on collision between two trucks. In the accident, Toran Singh Dhurve suffered grievous injuries over his head, chest and leg, apart from other injuries. He was immediately taken to hospital, where, he succumbed to accidental injuries during the course of treatment.

3. Claimants, who are widow, children and parents of deceased filed an application under Section 166 of Act of 1988 seeking total compensation of Rs.55,70,000/- on the grounds pleaded therein.

4. NA1 and 2, driver and owner of offending vehicle submitted reply to claim application denying the fact of negligence pleaded against NA1. They pleaded that it was the deceased driver of other truck, while driving his truck (CG09B-5745), dashed the offending vehicle driven by NA1. Driver of offending vehicle also reported the accident to concerned Police Station, denied the fact of income pleaded in claim application and further

pleaded that on the date of accident, NA1 was possessed with valid and effective driving license. Offending vehicle was insured with NA3/Insurance Company, as such liability to satisfy amount of compensation, if any, would be upon NA3.

5. NA3/Insurance Company, insurer of offending vehicle submitted reply denying the entire facts pleaded in claim application. It was further pleaded that it was late Toran Singh Dhurve, who was negligent in driving his own Truck. As there was head on collision between two vehicles, there was contributory negligence on the part of deceased driver of other vehicle also. NA1 was not possessed with valid and effective driving license, hence, there was breach of policy conditions.

6. NA4, owner of truck which was driven by late Toran Singh Dhurve did not appear before Claims Tribunal even after service of notice and he was proceeded *ex-parte*. NA5, insurer of truck (Iffco Tokyo) owned by NA4 and driven by deceased submitted reply to claim application and pleaded that on the date of accident, deceased was not earning Rs.10,000/- per month. He was not having valid and effective driving license to drive HYVA Truck, hence, Insurance Company is not having liability to indemnify the insurer.

7. Learned Claims Tribunal on appreciation of pleadings and evidence brought on record by respective parties, held that deceased-Toran Singh Dhurve, driver of HYVA Truck bearing No.CG 9B-5745 died on account of motor accidental injuries; deceased was contributory negligent to the extent of 50%; there was no breach of policy conditions of insurance policy issued by NA3, and awarded Rs.5,03,518/- total compensation, after deducting 50% of amount towards contributory negligence. Breach of

policy conditions of Insurance Policy issued in favour of HYVA Truck No.CG 9B-5745 was not found to be proved.

8. Ms Tanya Mandal, learned counsel for the appellants would submit that claimants in claim application have pleaded that deceased was working as driver of HYVA truck. Deceased-Toran Singh Dhurve died of motor accidental injuries between two HYVA Trucks due to head on collision, but even then, overlooking the pleadings and oral evidence brought on record by claimants with respect to earning of deceased as Rs 10,000/- per month, Tribunal assessed income of deceased as Rs.6,000/- per month only. She submits that date of accident was 13.01.2014 and on the said date, even manual labourer could have earned Rs.6,000/- per month, in view of minimum wages prevailing in the state. Driver of Truck, that too of heavy goods vehicle, HYVA truck requires to be an expert and experienced driver. Claimants have placed on record copy of driving license Ex.P62, wherein there is an endorsement stating the deceased was 'authorised' for driving HGV (heavy goods vehicle). She submits that in view of evidence brought on record, as also late Toran Singh Dhurve died while driving the HYVA Truck, owned by NA4, learned Tribunal ought to have accepted income pleaded and stated by claimants as stated in their evidence.

9. Learned counsel for the appellants further argued that Tribunal has not awarded any amount towards future prospects, even after reckoning the age of deceased as 36 years, ie below 40 years. Hon'ble Supreme Court in case of **National Insurance Company Limited Vs Pranay Sethi and others reported in (2017) 16 SCC 680**, has categorically held addition of 40% of established income towards future prospects for

calculating amount of compensation where deceased/victim not in permanent employment and below 40 years of age. She submits that compensation towards future prospects be awarded. She further submits that Tribunal erred in awarding meagre compensation on other conventional heads. No amount was awarded towards pains and suffering to family members, attendant, conveyance etc, even when claimants have placed on record medical documents showing treatment of deceased at Life Worth Hospital, Raipur. Lastly, she argued that learned Tribunal, only considering the fact that there was head on collision between two motor vehicles, has held deceased also to be contributory negligent to the extent of 50%, which is erroneous because NAs/respondents except pleading in their reply, have not brought on record any admissible piece of evidence. Finding of contributory negligence to the extent of 50% recorded by Claims Tribunal be set aside.

10. Shri NK Malviya, learned counsel for respondent-3, Insurance Company, insurer of offending vehicle would submit that learned Claims Tribunal in absence of any admissible piece of evidence with respect to income of deceased, has rightly assessed income on notional basis as Rs.6,000/- per month, which cannot be said to be erroneous in the facts of the case. He further argued that when there is head on collision between two motor vehicles and both vehicles are of same category, there shall be contributory negligence on the part of drivers of both the vehicles. Hence, compensation was rightly analysed and assessed by Tribunal and finding with respect to contributory negligence is based on appreciation of evidence, which does not call for any interference. Tribunal upon considering entire facts and circumstances of the case, awarded just amount of compensation which does not call for any interference.

11. Shri Tessy Abraham, learned counsel for respondent-5, Insurer of vehicle CG09-B 5745, supporting award of Tribunal would submit that Tribunal awarded just amount of compensation which does not call for any interference. He further pointed out that liability to satisfy the amount of compensation is fixed upon respondent-3 Insurance Company.

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

13. So far as submission of learned counsel for the appellant with regard to deduction of 50% of calculated amount of compensation towards contributory negligence is concerned, claimants in their claim application have pleaded that accident is a result of rash and negligent driving of offending vehicle driven by NA1. NA-1, 2 and 3, Owner, Driver and Insurer of offending vehicle refuted pleadings of negligence on the part of NA1 in claim application and further pleaded that it is the deceased himself, who was negligent and further NA3, Insurer of offending vehicle pleaded that as there was head on collision between two motor vehicles, there was contributory negligence on the part of deceased also. Learned Tribunal in paragraph-25 of impugned award recorded that except pleading, Non-applicants 1 to 3 have not brought any oral or documentary evidence to prove their pleading of contributory negligence but it erroneously considered that as there was head on collision between two vehicles, there was contributory negligence on the part of deceased also. Tribunal has not considered place of accident and pleadings with respect to directions on which both the vehicles were moving. From pleadings of reply to claim application filed by NA- 1 and 2, as well as contents of FIR Ex.P2, it is evident that truck driven by deceased was moving towards

Bemetara and offending vehicle of NA1 was moving from Bemetara to Simga. Though as per dictum of Hon'ble Supreme Court in case of **Jiju Kuruvila and others Vs Kunjujamma Mohan and others** reported in **(2013) 9 SCC 166**, spot map and position of vehicle itself will not be sufficient to record finding of contributory negligence, but spot map can be considered in absence of any other evidence, more so, when driver of other vehicle not entered into witness box to prove the pleadings and chose not to appear before claims Tribunal for recording his evidence. Spot map is placed on record as Ex.P3. Place of accident as appearing in spot map would show that accident occurred on left side of deceased or it can be said that truck driven by NA1 came on wrong side towards his extreme right and caused accident. Eyewitness or driver of both trucks could be the best witness to prove negligence on the part of drivers of other vehicle. Driver of one vehicle died, and other driver, NA1 chose not to appear as witness before Tribunal. No eyewitness to the accident was examined hence, in opinion of this Court, learned Tribunal ought to have considered the spot map as persuasive document to appreciate the pleadings. Tribunal failed to consider document Ex.P3 (Spot map).

14. Contributory negligence is a fact required to be proved by placing cogent and admissible piece of evidence. Hon'ble Supreme Court while considering the issue of contributory negligence in the matter of **Jiju Kuruvila** (supra), held as under:

“20.5 The mere position of the vehicles after accident, as shown in a Scene Mahazar, cannot give a substantial proof as to the rash and negligent driving on the part of one or the other. When two vehicles coming from opposite directions collide, the position of the vehicles and its direction, etc. depends on a number of factors like

the speed of vehicles, intensity of collision, reason for collision, place at which one vehicle hit the other, etc. From the scene of the accident, one may suggest or presume the manner in which the accident was caused, but in the absence of any direct or corroborative evidence, no conclusion can be drawn as to whether there was negligence on the part of the driver. In absence of such direct or corroborative evidence, the Court cannot give any specific finding about negligence on the part of any individual.”

15. In another judgment rendered by Hon'ble Supreme Court in the matter of **Minu Rout and another Vs Satya Pradyumna Mohapatra and others**, reported in 2013 AIR SCW 5375, 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 deleted from the charge sheet. The Tribunal has referred to certain stray answers elicited from the evidence of PW.2 and PW3 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.”

16. In light of aforementioned dictum of Hon'ble Supreme Court, if facts of this case are tested, it would only show that NA1, driver of one of the vehicles did not enter into witness box to prove his pleading, no eyewitness was examined. Spot map placed on record as Ex.P3 would show that truck driven by NA1 came on wrong side. Hence, in view of aforementioned facts available on record, and in light of aforementioned rulings of Hon'ble Supreme Court, finding of contributory negligence recorded by Claims Tribunal is not sustainable and it is hereby set aside.

17. Submission of learned counsel for the appellants with respect to assessment of income of deceased by learned Claims Tribunal to the tune of Rs.6,000/- per month only, to be erroneous is concerned, there is no dispute that deceased was engaged as driver of HYVA Truck, which is a heavy goods vehicle (hgv). Claimants have also placed on record copy of driving licence of deceased as Ex.P62C, wherein there is an endorsement, authorising deceased Toran Singh Dhurve to drive heavy goods vehicle (transport vehicle). Accident is of January, 2014. In the month of January, 2014, income of manual labourer could not be less than Rs.5,000/- per month as per minimum wages prevailing, whereas, deceased was an expert driver of heavy goods vehicle. Drivers apart from their fixed salary, also get daily allowance, hence, assessing income of deceased as Rs.6,000/- per month, in opinion of this Court, is much on lower side.

18. Considering entirety of facts and circumstances of the case, occupation of deceased to be driver of heavy goods vehicle, date of

accident , wage structure, cost of living, I find it proper to reckon income of deceased as Rs.8,000/- per month on notional basis.

19. Hon'ble Supreme Court in case of **Pranay Sethi** (supra) has considered the issue with regard to award of compensation towards future prospects and held that deceased who was not in permanent employment and was below 40 years of age, there shall be addition of 40% of his established income. In case at hand, age of deceased on the date of accident as appearing from license is 35 years. Hence, there shall be addition of 40% of the established income of deceased to assess total income for the purpose of calculating amount of compensation. It is ordered accordingly.

20. Learned Tribunal deducted $1/3^{\text{rd}}$ towards personal and living expenses. Number of claimants are 7 including father of deceased, aged about 66 years, who is old aged parent. Hon'ble Supreme Court in case of **Sarla Verma (Smt.) and others Vs Delhi Transport Corporation and another** reported in (2009) 6 SCC 121 has considered the deductions towards personal and living expenses considering number of dependants upon deceased and has held that where number of dependants exceeds 6, there shall be deduction of $1/5^{\text{th}}$. It is ordered accordingly.

21. In copy of license, date of birth of deceased is mentioned as 16.04.1978. Hence, on the date of accident age of deceased was 35 years and 8 months and age of deceased to be reckoned as in between 31-35 years because deceased has not attained age of 36 years. Hence, there shall be application of multiplier of 16 as applied by Claims Tribunal.

22. Appellants will also be entitled for compensation on other conventional heads as held by Hon'ble Supreme Court in cases of **Pranay Sethi** (supra) and **Magma General Insurance Company Limited Vs Nanu Ram @ Chuhru Ram and Others**, (2018) 18 SCC 130.

23. Deceased was admitted in hospital from 16.01.2014 to 24.01.2014, whereas date of accident was 13.01.2014 at about 10.15 pm. Considering the period and place of treatment, place of accident, as also place of residence, claimants are further entitled for Rs.10,000/- towards conveyance expenses. Rs.3,000/- towards attendant, Rs.10,000/- for pains and suffering to claimants, particularly, parents and wife and also medical expenses of Rs.1,14,000/- as awarded by Claims Tribunal.

24. For the foregoing reasons, I propose to re-compute the amount of compensation to be awarded to the claimants as under:

(a) Income of deceased is reckoned as Rs.8,000/- per month and Rs.96,000/- per annum.

(b) Upon adding 40% of established income of deceased, his total annual income will come to Rs.1,34,400/- $\{96000 + (96000 \times 40/100)\}$.

(c) By deducting $1/5^{\text{th}}$ towards personal and living expenses, annual loss of dependency will come to Rs.1,07,520/- $\{134400 - (134400 \times 1/5)\}$.

(d) Upon applying multiplier of 16 as applied by Tribunal, total loss of dependency comes to Rs.17,20,320/- (107520×16) .

(e) Besides above total loss of dependency, claimants shall further be entitled for Rs.40,000/- towards loss of spousal consortium to wife, Rs.40,000/- loss of parental consortium to children, Rs.40,000/- towards loss of filial consortium to parents, Rs.15,000/- towards funeral expenses and Rs.15,000/- for loss of estate, Rs.10,000/- towards conveyance expenses, Rs.3,000/- towards attendant, Rs.10,000/-

towards pains and suffering to parents and wife, and Rs.1,14,000/- towards medical expenses.

25. Now, appellants/claimants will be entitled for total sum of Rs.20,07,320/- (1720320 + 40000 + 40000 + 40000 + 15000 + 15000 + 10000 + 3000 + 10000 + 114000) instead of Rs.5,03,518/-, awarded by the Claims Tribunal.

26. Liability to satisfy the amount of compensation shall be upon NA3/Insurance Company of offending vehicle. Amount of compensation shall carry simple interest @ 6% per annum from the date of filing of claim application till its realisation.

27. Other conditions of award shall remain intact.

28. In the result, appeal is allowed in part and impugned award is modified to the extent as indicated above.

Sd/-
(Parth Prateem Sahu)
JUDGE