HIGH COURT OF ORISSA: CUTTACK

MACA No.931 of 2009

From a judgment dated 29.08.2009 passed by the 1st Addl. District Judge-cum-1st MACT, Cuttack in MAC No.472 of 2005.

Sanju Nayak and others ... Appellants

-Versus-

Mr. Amal Das and others ... Respondents

For Appellants : M/s. Mr. B.N. Samantray, N. Parida, D. Pattnaik and P. Jena

For Respondents : M/s. N.S. Ghose, Mira Ghose & M.M. Roul (for Respondent No.2)

P R E S E N T:

THE HONOURABLE SHRI JUSTICE B.N.MAHAPATRA

Heard and disposed of on 30.03.2011

B.N.MAHAPATRA, J This appeal has been filed challenging the legality and validity of the judgment dated 29.08.2009 passed by the 1st Addl. District Judge-cum-1st MACT, Cuttack in MAC No.472 of 2005, wherein the learned Tribunal held that the death of the deceased occurred due to contributory negligence of both the parties.

2. The case of the claimants before the Tribunal was that on 16.05.2005 at about 5 A.M. on NH 5 near New Rathia Dhaba, while the deceased was taking tea, a truck bearing registration No.WB-33-7723 coming from Chandikhol towards Jaraka side in a rash and negligent

manner dashed against the deceased. As a result, the deceased died at the spot and then the post mortem examination was conducted over the dead body at the District Headquarters Hospital, Jajpur. Accordingly, an FIR was lodged before the Dharmasala Police Station and Dharmasala P.S. Case No.134 of 2005 was registered. After investigation, a charge sheet was submitted against the driver of the offending truck. It was the specific allegation of the claimants that the accident was an outcome of the rash and negligent driving of the driver of the offending vehicle. They have also pleaded that the deceased was a driver by profession and he was earning Rs.4,000/- per month during the relevant time. With these averments, the claimants filed the claim petition before the learned Tribunal claiming compensation of Rs.4,00,000/- (rupees four lakhs).

3. The owner of the offending vehicle has not filed written statement before the learned Tribunal but Insurance company has contested the above claim by stating that the claimants should prove the insurance policy, MVI Report, documents of the G.R. Case and the DL of the driver of the offending vehicle during the relevant time.

The further case of the Insurance Company was that the deceased was driving an Auto bearing registration No.OR-05-S-6696 which was going from Bhubaneswar to Bhadrak and the offending truck coming from Jaraka to Chandikhol dashed against the Auto. The specific claim of the Insurance Company was that it is a head on collusion of both the vehicles. The owner of the Auto though was a necessary party,

he had not been impleaded as a party by the claimants because the owner of the Auto had no valid and effective Driving Licence. The owner of the truck also did not have valid documents. Further case of the Insurance Company was that the amount of compensation claimed is high and excessive.

4. On the basis of pleadings of both the parties, the Tribunal framed four issues. The claimants examined two witnesses before the Tribunal. The Insurance company has not examined any witness. The claimants produced eight documents such as certified copy of F.I.R., final form, seizure list, zimanama, inquest report, dead body challan and post mortem report which were marked as Ext. 1 to Ext. 8. The insurance company has not filed any document.

5. Learned Tribunal taking into consideration both oral and documentary evidence came to a conclusion that the accident was an outcome of contributory negligence of both the deceased and the driver of the offending truck, for which the claimants are bound to loose half of the claim amount. The learned Tribunal determined the monthly income of the deceased at Rs.2,400/- and applying multiplier 18 the Tribunal determined dependency at Rs.3,45,600/- after deducting 1/3rd towards his personal expenses. Learned Tribunal directed opposite party No.2 to pay Rs.1,72,800/- to the claimants which is 50% of the total amount of dependency. Apart from that the learned Tribunal also awarded Rs.9,500/- towards funeral expenses, loss of estate and loss of

consortium to the claimants. Thus, the learned Tribunal awarded compensation amounting to Rs.1,82,300/-. Rs.500/- was also awarded towards cost. Opposite party No.2-Insurance Company was directed to pay Rs.1,82,300/- to the claimants within one month with interest at the rate of 7.5% per annum from the date of filing of the claim case, i.e. 02.08.2005 till realization along with cost of Rs.500/-. The learned Tribunal also further directed to keep a portion of the amount in fixed deposit in any nationalized bank with certain conditions. Being aggrieved by the order of the learned Tribunal, the claimant-appellants have filed this appeal.

6. Learned counsel appearing on behalf of the claimant-appellants advanced two fold argument, i.e., (a) the learned Tribunal is wrong to hold that the accident was the outcome of the contributory negligence, and (b) determination of monthly income of the deceased and amount of compensation awarded is very less.

7. Per contra, learned counsel appearing on behalf of Insurance Company submits that it is a fit case which should be remanded to the Tribunal as the appellant-claimants failed to implead proper and necessary parties, who are the owner of the Auto and the insurer of the said Auto. In support of his contention, he referred to the written statement filed by the Insurance Company agitating the same ground before the learned Tribunal.

8. The first question is with regard to contributory negligence of the drivers of both the vehicles. The learned Tribunal has come to the conclusion that the accident was the outcome of the contributory negligence of the deceased and the driver of the offending truck for the following reasons:

The claimants have not filed any paper to show that the documents of the Auto were also seized during investigation. During the course of investigation, seizure of the documents of Auto is quite natural but very cunningly the claimants have not filed the seizure list relating to the documents of the Auto. It is further observed by learned Tribunal that the I.O. in the body of the charge sheet has mentioned that the documents of the Auto were also seized and those were given in zima of the owner. In such a situation, the plea taken by the insurance company that it is a head on collusion sounds probable. Therefore, it can be said that the death of the deceased was due to head on collusion of two vehicles. P.W. 2, who claims to be an eyewitness to the occurrence, has also stated that the deceased was sitting in the Auto rickshaw when the truck dashed against the Auto. The F.I.R. was lodged by the brother of the deceased.

The learned Tribunal relying on the F.I.R. version and the evidence of P.W.2, came to the conclusion that the accident occurred due to the negligence of both the drivers of the vehicles and at the relevant time, the deceased was driving the vehicle. The Tribunal further

held that the extent of injury received by the driver if taken up from the post mortem report, it could be concluded that the accident was due to head on collusion of both the vehicles. The Tribunal further held that the letter addressed by the I.O. to the C.D.M.O. which was a part of Ext.7 also indicated that the deceased was plying the Auto at the relevant time.

9. Now the question that arises for consideration as to whether the conclusion reached by the learned Tribunal that the accident in question was the outcome of the contributory negligence of the deceased and the driver of the offending vehicle is based on no relevant material on record. Admittedly, in the F.I.R. the driver of the offending truck was charge sheeted. It is nobody's case that either in the charge sheet or in the F.I.R. there is any mention that the accident in question was the outcome of head on collusion of both the vehicles.

It is hard to believe that from the post-mortem report, one can come to a conclusion that the death of the deceased was caused due to head on collusion. The reason given by the learned Tribunal is that the deceased was driving the Auto. On the basis of the above said reason also, it cannot be concluded that the accident was an outcome of the contributory negligence of the deceased and the driver of the offending vehicle. Apart from that before the Tribunal the Insurance Company has neither examined any witness nor produced any document in support of

his contention that the accident was an outcome of the head on collusion.

10. The stand taken by learned counsel for the Insurance company that even if in the written statement a specific stand was taken that the owner of the Auto and the insurer should be impleaded as parties, the Tribunal has not directed the claimants to implead both of them as parties in their claim petition. The stand taken by the Insurance Company merits no consideration for the reason that even if the Tribunal has not directed to implead them as parties, he has divided the amount of compensation among the parties. Therefore, it makes no difference even if they are not impleaded as parties. Secondly, the claimants have never claimed any relief against the owner of the Auto and insurer of the Auto. Therefore, they are not necessary or proper parties so far as the claim is concerned. For the reasons stated above, this Court is of the view that the Tribunal is not justified to come to a conclusion that the accident was an outcome of attributable of negligence of both the vehicles.

11. The second contention of learned counsel for the claimants is that the amount of compensation awarded and the determination of monthly income at Rs.2,400/- are inadequate. However, the claimants have not adduced any evidence either before the learned Tribunal or before this Court to the effect that the deceased was earning more than Rs.2,400/- per month.

12. In that view of the matter, the claim of the appellant-claimants is not accepted, therefore, the monthly income of the deceased determined by the learned Tribunal is correct.

13. In the fact situation, this Court directs the Insurance Company-opposite party No.2 to deposit the total amount of compensation of Rs.3,56,000/- along with interest at the rate of 7.5% per annum from the date of filing of the claim petition i.e. on 28.02.2005 till the date of deposit before the Tribunal besides cost of Rs.500/- within a period of ten weeks from today.

14. On deposit of the above said amount before the Tribunal, the learned Tribunal shall disburse the same in favour of the claimants immediately in the manner it has directed in its judgment.

15. The appeal is allowed to the extent indicated above.

.....
B.N.Mahapatra,J.

Orissa High Court,Cuttack
The 30th March, 2011/Jena