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HIGH COURT OF CHHATTISGARH BILASPUR

M. A. (C) No. 534 of 2014

Tulsi Dhankar son of late Milan Dhankar, aged about 36 years, R/o Civil Lines Kasaridih, Durg, Tahsil & P.S. Durg, Civil and Revenue District Durg (C.G.).

---- Appellant

Versus

1. Sanjay Deshmukh, son of Khemlal, R/o Birejhar, Post Anjora, Tahsil and P.S. Durg, District Durg (C.G.). (Driver).
2. Khemlal Son of Chhannu Lal Deshmukh, R/o Birejhar, Post Anjora, Tahsil and P.S. Durg, District Durg (C.G.). (Owner).
3. Reliance Insurance Company Limited, Through The Manager, Reliance Insurance Company Limited, Nehru Nagar East, Commercial Complex, Supela, Bhilai, Tahsil and District Durg (C.G.).

---- Respondents

For Appellant : Shri Atanu Ghosh, Advocate
For Respondent No.1 & 2 : Shri Avinash Chand Sahu, Advocate
For Respondent No.3 : Shri Sourabh Sharma, Advocate

Hon'ble Shri P. R. Ramachandra Menon, Chief Justice
Hon'ble Shri Parth Prateem Sahu, Judge

Judgment on Board

Per Parth Prateem Sahu, Judge

30/09/2020

1. Appellant/claimant has filed this appeal under Section 173 of the Motor Vehicles Act, 1988 (hereinafter referred to as 'M.V. Act') challenging the award dated 31/07/2013 passed by the First Additional Claims Tribunal Durg District Durg, Chhattisgarh (hereinafter referred to as 'Claims Tribunal') in Claim Case No.30 of 2012 whereby learned Claims Tribunal allowed the claim application in part and awarded a sum of

Rs.1,25,000/- as compensation after deducting 50% towards contributory negligence.

2. Brief facts relevant for disposal of this appeal, are that, on 10/08/2011 at about 7.00 p.m. when appellant/claimant was travelling on his motorcycle bearing No.CG-04/CN/0758 and coming to his house from Durg to village Sankara and reached near Mata Awla Bagicha (garden) at Thanod, Tractor bearing No.CG-07/N/3469 (hereinafter referred to as 'offending vehicle') driven by non-applicant No.1 rashly and negligently dashed the motorcycle of appellant/claimant. In the said accident, appellant/claimant suffered grievous injuries over his right leg. He was taken to Government District Hospital, Durg, from there, referred to Sector – 9 Hospital, Bhilai and thereafter, he was again referred to Dr. Bhimrao Ambedkar Memorial Hospital, Raipur. Upon diagnosis, it was found that his foot below ankle was badly damaged, suffered injury on toe, it was affixed with the help of wire, and skin grafting was done. The accident was reported to concerned Police Station, based upon which, Crime No.401/2011 was registered against non-applicant No.1 for the offence punishable under Sections 279 and 337 of IPC.

3. Appellant/claimant filed an application under Section 166 of the M.V. Act pleading therein that on the date of accident, he was aged about 36 years and earning Rs.8,000/- per month

from his own cycle store, but on account of motor accidental injuries suffered by him, he became permanently disabled and claimed compensation of Rs.25,52,000/- on different heads.

4. Non-applicant No.1/ driver of the offending vehicle submitted reply to claim application denying the pleadings made against him with regard to rash and negligent driving of the offending vehicle. It was pleaded that the amount claimed is highly exaggerated and there was contributory negligence on the part of the appellant/claimant.

5. Non-applicant No.2/owner of the offending vehicle submitted separate reply to claim application and denied the facts pleaded therein. It was admitted that on the date of accident, non-applicant No.1 was the driver of offending vehicle, appellant/claimant did not suffer any grievous injury and the amount of compensation claimed is on the higher side. It was further pleaded that on the date of accident, non-applicant No.1 was possessing valid and effective driving licence, it was insured with non-applicant No.3/Insurance Company, hence, the liability, if any, for payment of amount of compensation would be on non-applicant No.3/Insurance Company.

6. Non-applicant No.3/Insurance Company submitted reply to claim application and pleaded that there was head on collision between two vehicles, hence, the appellant/claimant

was also contributory negligent. Permanent disability suffered by the appellant/claimant was denied. It was further pleaded that appellant/claimant was not entitled for any amount of compensation because the accident took place on account of self negligence on the part of the appellant/claimant. It was also pleaded that on the date of accident, non-applicant No.1 was not possessing valid and effective driving licence, there was breach of conditions of insurance policy, hence, Insurance Company is not liable to pay any amount of compensation.

7. On appreciation of the pleadings, evidence and material placed on record by the respective parties, Claims Tribunal held that there was contributory negligence on the part of the appellant/claimant as well as non-applicant No.1 to the extent of 50%; appellant/claimant suffered permanent disability on account of motor accidental injuries; on the date of accident, non-applicant No.1 was possessing valid and effective driving licence; there was no breach of conditions of insurance policy and awarded a sum of Rs.1,25,000/- as compensation to appellant/claimant in an injury case.

8. Shri Atanu Ghosh, learned counsel for the appellant/claimant submits that learned Claims Tribunal erred in holding the appellant/claimant to be contributory negligent to the extent of 50% without any evidence and arrived at a conclusion of contributory negligence on the part of appellant/claimant

only on the basis of presumption and surmises. The Claims Tribunal erroneously has drawn adverse inference of not filing the spot-map and further taken into consideration the evidence of doctor where he stated that smell of alcohol was coming out from the mouth of the appellant/claimant. It is argued that merely alcoholic smell found by the doctor during the course of treatment will not itself be sufficient to hold that appellant/claimant was driving the motorcycle under the influence of liquor. It is contended that injury was proved, appellant/claimant has suffered permanent disability, which was proved by him by placing on record the permanent disability certificate (Ex.P/39) issued by the competent authority and he also examined the doctor to prove the same. Learned Claims Tribunal has also taken into consideration the disability certificate and disability suffered by the claimant, but contrary to the evidence of medical expert, reduced the loss of earning capacity from 45% to 20% without any basis. It is further contended that learned Claims Tribunal has taken the monthly income of claimant as Rs.5,000/- contrary to the evidence placed on record by the appellant/claimant to be Rs.8,000/- per month. Awarded meager amount of compensation under the head of transportation, attendant, special diet, pain and suffering and loss of amenities and enjoyment in life. He pointed out that no amount has been awarded towards loss of income during

the period of treatment and submits that amount of compensation be enhanced suitably.

9. Per contra, Shri Avinash Chand Sahu, learned counsel for respondents No.1 and 2/driver and owner of the offending vehicle supported the impugned award passed by learned Claims Tribunal.

10. Shri Sourabh Sharma, learned counsel for respondent No.3/Insurance Company submits that there was head on collision between the two vehicles; during medical examination of the appellant/claimant, doctor has found appellant/claimant to have consumed liquor; he has not placed on record spot-map, hence, learned Claims Tribunal was justified in the facts and circumstances of the case for holding him to be 50% contributory negligent. He further submits that looking to the date of accident, learned Claims Tribunal has assessed the income as Rs.5,000/- per month, which cannot be said to be on lower side, the amount of compensation awarded is just and proper, which does not call for any interference. In support of the plea with regard to contributory negligence, he referred to paragraphs-9, 10 and 12 of the impugned award to argue that the findings are based on evidence.

11. We have heard learned counsel for the respective parties and perused the record carefully.

12. So far as the first ground raised by learned counsel for the appellant/claimant with regard to contributory negligence assessed by learned Claims Tribunal to the extent of 50% is concerned, perusal of impugned award would show that one of the factors which was considered by learned Claims Tribunal is non-production of spot-map. The place of accident and road as appeared from the pleadings and evidence available on record is a rural road (road was narrow) and merely non-production of spot-map will not lead inference that both the drivers are contributory negligent to the extent of 50%.

13. Hon'ble Supreme Court has considered the importance of the spot map/scene mahazar for arriving at a finding of contributory negligence in case of **Jiju Kuruvila and others v. Kunjujamma Mohan and others**[1] and held thus :-

> “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

1 **(2013) 9 SCC 166**

> 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."

14. Further, in the matter of **Minu Rout and another v. Satya Pradyumna Mohapatra and others**[2], Hon'ble Supreme Court has held as to how the plea of contributory negligence is to be considered and decided and held thus :-

> "17. The Tribunal, on appreciation of the oral and documentary evidence, has recorded the erroneous finding by placing strong reliance upon the charge-sheet- Ext.1 without considering the fact that the criminal case was abated against the deceased and further has made observation in the judgment that the appellants had not produced the FIR. Therefore, it has held that there was 50% contributory negligence on the part of the deceased driver in causing accident. 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 IPC

2 **(2013) 10 SCC 695**

> 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 PW 3 in their cross-examination and placed reliance on them to record the finding on Issue 1."

15. In case of **Jiju Kuruvila** (supra), Hon'ble Supreme Court has considered the issue with regard to the founding of alcohol in stomach and the alcohol smell coming out from the mouth of the injured/deceased and held thus :-

> “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.”

16. Section 185 of the M.V. Act envisages driving by a drunken person or by a person under the influence of drugs to be punishable under the M.V. Act which reads as under :-

> **“185. Driving by a drunken person or by a person under the influence of drugs.**—Whoever, while driving, or attempting to drive, a motor vehicle,—
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> (a) has, in his blood, alcohol exceeding 30 mg. per 100 ml. of blood detected in a test by a breath analyser, or]

(b) is under this influence of a drug to such an extent as to be incapable of exercising proper control over the vehicle,

shall be punishable for the first offence with imprisonment for a term which may extend to six months, or with fine which may extend to two thousand rupees, or with both; and for a second or subsequent offence, if committed within three years of the commission of the previous similar offence, with imprisonment for a term which may extend to two years, or with fine which may extend to three thousand rupees, or with both.

Explanation.—For the purposes of this section, the drug or drugs specified by the Central Government in this behalf, by notification in the Official Gazette, shall be deemed to render a person incapable of exercising proper control over a motor vehicle."

17. Section 185(b) of the M.V. Act mentions that driver who consumed liquor shall be punished, if he is found in the influence of a drug to such an extent as to be incapable of exercise proper control over the vehicle. Section 185(a) prescribes for the quantity of alcohol to be present in blood. In the case at hand, there is no mention of the quantity of the alcohol in blood nor any such observation is made by doctor in MLC.

18. But one thing cannot be ignored that there was head on collision between motorcycle and tractor. Drivers of both the vehicles have stated that both of them stop their vehicles down the road. In absence of any material placed on record, but looking to class of vehicle involved in the accident i.e. motorcycle and tractor, accident is of night, the bright lights might be of tractor, we find it appropriate to hold that there was contributory negligence to the extent of 20% on the part of the appellant/claimant and 80% on the part of non-applicant No.1/driver of the offending vehicle.

19. So far as the second ground raised by learned counsel for the appellant/claimant with regard to non-awarding of future prospects even after assessing permanent disability to the extent of loss of earning capacity at the rate of 20% is concerned, award of future prospects has been considered by Hon'ble Supreme Court in case of **National Insurance Company Limited v. Pranay Sethi and others**[3]. In the case at hand, on the date of accident, appellant/claimant was aged about less than 40 years of age i.e. 36 years, hence, there will be an addition of 40% of the established income i.e. 40% of Rs.5,000/- per month towards future prospects.

20. The other submission made by learned counsel for the appellant/claimant that doctor has assessed the permanent disability to the extent of 37%, but learned Claims Tribunal

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3 **(2017) 16 SCC 680**

assessed the permanent disability to the extent of 30% and considered the loss of earning capacity only to the extent of 20% is concerned, we have perused the disability certificate (Ex.P/39) issued by a single doctor and not by the District Medical Board. Learned Claims Tribunal might have considered the nature of injury based on the documents of treatment placed on record, part of the body as also from physical appearance of appellant/claimant before learned Claims Tribunal as also the nature of occupation.

21. Dr. Akhilesh Yadav (AW-2) in his evidence has stated that the disability of the appellant/claimant for whole body to the extent of 37% and thereby learned Claims Tribunal has taken permanent disability for whole body to the extent of 30%, but at the time of calculating the amount compensation on the head of loss of earning capacity, assessed 20% loss of earning capacity looking to the nature of occupation of the appellant/claimant to be cycle mechanic.

22. We are not inclined to interfere with the finding recorded by learned Claims Tribunal that appellant/claimant suffered 20% loss of earning capacity taking into consideration the nature of injury *vis a vis* nature of occupation and the law laid down by Hon'ble Supreme Court in case of **Raj Kumar v. Ajay Kumar and another**[4].

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4 **(2011) 1 SCC 343**

23. Learned Claims Tribunal has awarded only Rs.10,000/- towards pain and suffering and Rs.5,000/- towards loss of amenities and enjoyment in life, which in the opinion of this Court looking to the nature of injuries and treatment as well as injury suffered on toe, while giving treatment, it was affixed with the help of wire, is on the lower side. We award a sum of Rs.25,000/- towards loss of amenities and enjoyment of life, Rs.25,000/- towards pain and suffering.

24. For the forging reasons as well as the facts and circumstances of the case, we deem it fit and proper to recalculate the amount of compensation as under :

As discussed above, income of the appellant/ claimant is taken as Rs.5,000/- per month i.e. Rs.60,000/- per annum. By adding 40% towards loss of future prospects, the annual income of the appellant comes to Rs.84,000/- (60,000 x 40% = 24,000 and 60,000 + 24,000). The loss of income assessed as 20%, which makes the yearly loss of income of the appellant/claimant as Rs.16,800/- (84,000 x 20%). At the time of accident, the appellant/claimant was aged about 36 years, multiplier of 15 is applicable in the present case in view of dictum rendered by Hon'ble Supreme Court in case of **Sarla Verma (Smt.) and others v. Delhi Transport Corporation and another**[5]. After applying the multiplier of 15, the total loss of income due to

5 **(2009) 6 SCC 121**

permanent disability comes to Rs.2,52,000/- (16,800 x 15). In addition to the aforesaid amount of compensation, the appellant/claimant is also entitled to Rs.48,000/- towards medical bills, Rs.25,000/- towards loss of amenities and enjoyment of life, Rs.25,000/- towards pain and suffering, Rs.3,000/- towards transportation, Rs.3,000/- towards attendant (instead of Rs.2,000/-), Rs.2,000/- towards special diet and Rs.21,000/- towards loss of income during the period of treatment as the appellant/claimant might not have worked for three months from the date of accident looking to the nature of treatment and injuries suffered by him.

25. On the basis of above recalculation, the total amount of compensation will come to Rs.3,79,000/- (2,52,000 + 48,000 + 25,000 + 25,000 + 3,000 + 3,000 + 2,000 + 21,000). As we have held that there was contributory negligence on the part of the appellant/claimant to the extent of 20%, which is to be deducted from the total amount of compensation. After deducting 20% towards contributory negligent, the amount of compensation for the appellant/claimant will come to Rs.3,03,200/- (3,79,000 x 20% and 3,79,000 – 75,800).

26. Now, the appellant/claimant will be entitled for a total compensation of Rs.3,03,200/- instead of Rs.1,25,000/- as awarded by the learned Claims Tribunal. The amount of compensation will carry interest at the rate of 7% per annum from the date of filing of the claim application till its

realization. Other conditions imposed by learned Claims Tribunal shall remain intact.

27. In the result, appeal is allowed in part. The impugned award is modified to the extent indicated herein above.

Sd/-
(P. R. Ramachandra Menon)
Chief Justice

Sd/-
(Parth Prateem Sahu)
Judge

Yogesh