
(2013) 10 CHH CK 0025
In the Chhattisgarh High Court
Case No : Misc. Appeal (C) No. 817 of 2012

Kaliram Sahu and Others

APPELLANT

Vs

Chamanlal Dewangan and Others

RESPONDENT

Date of Decision : 09-10-2013

Acts Referred:

Citation : (2014) 1 CGLJ 431

Hon'ble Judges : Sanjay K. Agrawal, J

Bench : Single Bench

Advocate : P.R. Patankar, for the Appellant; Ratan Pusty, Advocate for the Respondent No. 3, for the Respondent

Final Decision : Allowed

Judgement

Sanjay K. Agrawal, J.—Invoking the appellate jurisdiction of this Court u/s 173 of the Motor Vehicles Act, 1988 (in short "the M.V. Act"), the claimants/appellants herein have challenged the award dated 27/03/2012, passed by 4th Additional Motor Accidents Claims Tribunal, Durg (in short "Claims Tribunal") in Claim Case No. 184/2011, by which, the Claims Tribunal has partly allowed the claim petition filed u/s 166 of the M.V. Act and awarded a total compensation of Rs. 3,22,320 along with interest @ 6% per annum to the claimants. The brief facts necessary for adjudication of this appeal are as under:

1.1 The claimants/appellants, being the parents and sister of deceased Devendra Kumar Sahu, filed an application u/s 166 of the M.V. Act stating inter alia that on 08/03/2011, respondent No. 1-Chamanlal Dewangan (driver), while driving a motorcycle bearing registration No. CG-07-LU-1604, owned by respondent No. 2 and insured with respondent No. 3; rashly and negligently dashed the motorcycle of deceased bearing registration No. CG-07-LL-6140, as a result of which, the deceased suffered injury and died.

1.2 It was further pleaded that pursuant to the report lodged by the claimants an offence under Sections 279, 337, 304-A of the IPC was registered against

respondent No. 1 and charge-sheet was filed in the Court of Chief Judicial Magistrate, Bemetara, Durg which is pending consideration. The claimants made a claim for a sum of Rs. 48,14,089 from the respondents jointly and severally.

1.3 Respondents No. 1 & 2 (driver & owner) filed a joint statement and simply denied the facts pleaded in the application for compensation and alternatively pleaded that if it is found that the death occurred due to rash and negligent act of respondent No. 1/driver then respondent No. 3 be held liable to make payment of compensation as offending vehicle was insured with it.

1.4 Respondent No. 3 filed a separate written statement before the Claims Tribunal pleading that respondent No. 1 as well as the deceased both were negligent in driving their vehicles. Three persons were sitting on the motorcycle of the deceased, which is in violation of Section 128 of the M.V. Act. Thus, respondent No. 3 disclaimed its liability.

1.5 Learned Claims Tribunal, after close scrutiny of the evidence on record, held that:

? Death of Devendra Kumar Sahu was caused due to rash and negligent act of respondent No. 1, while driving the offending motorcycle No. CG-07-LU-1604 rashly and negligently.

? Two other persons, namely Mukesh Kumar and Ganesh Ram Sahu were sitting on the motorcycle being driven by Devendra Kumar Sahu therefore, deceased Devendra Kumar Sahu was also negligent in driving the vehicle to the extent of 50%.

? Total compensation was assessed to Rs. 6,44,640 along with 6% interest, but deducted 50% amount as deceased Devendra Kumar Sahu was himself liable for contributory negligence.

Submissions of Counsel

2. Mr. P.R. Patankar, learned counsel appearing for the appellants/claimants would submit that the learned Claims Tribunal has fallen into error by holding that the deceased was contributory negligent in driving the vehicle to the extent of 50%. He would further submit that though, the Insurance Company has raised a vague plea that the deceased himself was contributory negligent but it failed to lead any evidence in support of plea of contributory negligence. He would further submit that merely because three persons were allegedly sitting on the offending motorcycle in alleged violation of Section 128 of the M.V. Act, no presumption of contributory negligence against deceased Devendra Kumar Sahu can be drawn. He would further submit that after investigation, Police filed a Challan (Ex. P-1) against respondent No. 1 only for the offence under Sections 279, 337 & 304-A of the I.P.C., which is pending consideration before the jurisdictional Criminal Court. He finally submits that the finding of the Claims Tribunal with respect to the contributory negligence is liable to be set-aside.

3. Per contra, Mr. Ratan Pusty, learned counsel appearing for respondent No. 3-Insurance Company would submit that the finding of the Claims Tribunal, holding that the deceased was contributory negligent, is based on the evidence available on record. He further submits that two other persons were sitting on the motorcycle being driven by the deceased in violation of Section 128 of the M.V. Act per se which establishes the contributory negligence on the part of the deceased and thus, finding of the Claims Tribunal requires no interference by this Court.

4. I have heard and considered the rival submission and perused the original record of the claim case.

Points for determination

5. On the basis of factual and legal submissions raised on behalf of parties, the following points would arise for determination of this appeal:--

(i) Whether findings of fact recorded by the Claims Tribunal as regards contributory negligence on the part of deceased Devendra Kumar Sahu and deduction of 50% amount from the compensation are justified and warrant interference in this appeal?

(ii) Compensation, which the claimants are entitled for?

Answer to Point No. 1

6. The claimants/appellants have clearly pleaded in the claim petition that respondent No. 1-driver while driving the offending motorcycle rashly and negligently, dashed the motorcycle driven by the deceased, as a result of which, the deceased fell down from the vehicle, sustained injuries and thereafter died. Offence under Sections 279, 337 & 304-A of the I.P.C. was registered against respondent No. 1 and the charge-sheet was filed against him with a specific allegation that while driving the offending motorcycle rashly and negligently, he caused the death of Devendra Kumar Sahu on 08/03/2011. The driver & owner i.e. respondents No. 1 & 2 did not take any such plea of the contributory negligence in their written statement jointly filed before the Claims Tribunal. However, respondent No. 3 took a vague plea in its written statement that the accident occurred due to rash and negligent act of both the drivers namely Devendra Kumar Sahu & respondent No. 1-Chamanlal Dewangan and claimed that both the drivers be held to be negligent. The appellants/claimants examined Talvinder Singh (AW-3), who deposed before the Claims Tribunal that the accident was caused due to rash and negligent act of respondent No. 1/driver of motorcycle No. CG-07-LU-1604. Kaliram Sahu (AW-1) was also examined, who proved the document brought on record i.e. charge-sheet (Ex. P-1) filed against respondent No. 1 before the Criminal Court. Thus, the statement of Kaliram Sahu (AW-1) further stands corroborated by registration of criminal case under Sections 279, 337 & 304-A of I.P.C. against respondent No. 1. The testimonies of aforesaid two witnesses and the document on record i.e. Ex. P-1 would establish

that the death of deceased was caused due to rash and negligent act of respondent No. 1. The Claims Tribunal also recorded a finding to this effect.

7. It is well settled that the Insurance Company taking a plea of contributory negligence on the part of the victim, must lead evidence with regard thereto and unless such evidence is led by the Insurance Company, the Insurance Company's plea with regard to the contributory negligence cannot succeed. The Insurance Company must state specifically that there was some causal connection of the deceased with the damage suffered by him to hold that the conduct of the deceased amounted to contributory negligence. Similarly, there had to be some connection on the part of the deceased showing absence of reasonable care for his own safety which contributed to the damage.

8. The Law of Torts by Justice G.P. Singh, the following propositions of law regarding contributory negligence have been stated:

It is to be noted that negligence of the plaintiff which can be described as contributory negligence must have casual connection with the damage suffered by him.

The question simply is whether the plaintiff or the deceased (in case of claims arising out of death) had failed to take reasonable care of his own safety which had contributed to the damage.

9. The Municipal Corporation of Greater Bombay Vs. Shri Laxman Iyer and Another, the Supreme Court held as under:--

6.....Where an accident is due to negligence of both parties, substantially there would be contributory negligence the crucial question on which liability depends would be whether either party could, by exercise of reasonable care, have avoided the consequence of other's whichever party could have avoided the consequence of other's would be liable for the accident. If a person's negligent act or omission was the proximate and immediate cause of death, the fact that the person suffering injury was himself negligent and also contributed to the accident or other circumstances by which the injury was caused would not afford a defence to the other. Contributory negligence is applicable solely to the conduct of a plaintiff. It means that there has been an act or omission on the part of the plaintiff which has materially contributed to the damage, the act or omission being of such a nature that it may properly be described as negligence, although negligence is not given its usual meaning. (See Charles worth on Negligence, 3rd Edn. Page 328). It is now well settled that in the case of contributory negligence, Courts have power to apportion the loss between the parties as seems just and equitable. Apportionment in that context means that damages are reduced to such an extent as the Court thinks just and equitable having regard to the claim shared in the responsibility for the damage. But in a case where there has been no contributory negligence on the part of the victim, the question of apportionment does not arise.

10. Pramodkumar Rasikbhai Jhaveri Vs. Karmasey Kunvargi Tak and Others, the Supreme Court held as under:

8. We do not think that these two reasons given by the High Court fully justify the accepted principles of contributory negligence. The question of contributory negligence arises when there has been some act or omission on the claimant's part, which has materially contributed to the damage caused, and is of such a nature that it may properly be described as "negligence." Negligence ordinarily means breach of a legal duty to care, but when used in the expression "contributory negligence" it does not mean breach of any duty. It only means the failure by a person to use reasonable care for the safety of either himself or his property, so that he becomes blameworthy in part as an "author of his own wrong."

9. Subject to non-requirement of the existence of duty, the question of contributory negligence is to be decided on the same principle on which the question of defendant's negligence is decided. The standard of reasonable man is as relevant in the case of plaintiff's contributory negligence as in the case of defendant's negligence. But the degree of want of care which will constitute contributory negligence, varies with the circumstances and the factual situation of the case. The following observation of the High Court of Australia in *Astley Vs. Austrust Ltd.* (1999) 73 ALJR 403 is worthy of quoting:

A finding of contributory negligence turns on a factual investigation whether the plaintiff contributed to his or her own loss by failing to take reasonable care of his or her person or property. What is reasonable care depends on the circumstances of the case. In many cases, it may be proper for a plaintiff to rely on the defendant to perform its duty. But there is no absolute rule. The duties and responsibilities of the defendant are a variable factor in determining whether contributory negligence exists and, if so, to what degree. In some cases, the nature of the duty owed may exculpate the plaintiff from a claim of contributory negligence; in other cases, the nature of the duty may reduce the plaintiff's share of responsibility for the damage suffered; and in yet other cases the nature of the duty may not prevent a finding that the plaintiff failed to take reasonable care for the safety of his or her person or property. Contributory negligence focuses on the conduct of the plaintiff. The duty owed by the defendant, although relevant, is one only of many factors that must be weighed in determining whether the plaintiff has so conducted itself that it failed to take reasonable care for the safety of its person or property.

11. In a recent decision in *Minu Rout and Another Vs. Satya Pradyumna Mohapatra and Others*, the plea of contributory negligence was taken by Insurance Company, but neither driver nor any independent witness was examined to prove the allegation of contributory negligence. 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 u/s 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 Verile, 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.

12. In the instant case, though the Insurance Company was granted permission u/s 170 of the M.V. Act by the Claims Tribunal on 04/01/2012 to contest the proceeding by availing the defence of the owner of the offending vehicle, it did not examine either driver of the vehicle/respondent No. 1 or any other independent witness to establish the plea of contributory negligence on the part of deceased-Devendra Kumar Sahu and thus, the finding recorded by the Claims Tribunal that deceased Devendra Kumar Sahu was contributory negligent appears to be erroneous in law.

13. The next submission raised by Mr. Pusty that it has been proved that the deceased was driving the motorcycle on which two other persons were sitting in violation of Section 128 of the M.V. Act, per se establishes his plea of contributory negligence.

14. Section 128 of the M.V. Act and Rule 123 of the Motor Vehicles Rules are quoted herein below:--

Section 128. Safety measures for drivers and pillion riders.--(1) No driver of a two wheeled motor cycle shall carry more than one person in addition to himself on the motor cycle and no such person shall be carried otherwise than seating on a proper seat securely fixed to the motor cycle behind the driver's seat with appropriate safety measures.

(2) In addition to the safety measures mentioned in Sub-section (1), the Central Government may, prescribe other safety measures for the drivers of two wheeled motor cycles and pillion riders thereon.

Rule 123. Safety devices in motor cycle.--No motor cycle which has provision for pillion rider, shall be constructed without provision for a permanent hand grip on the side or behind the driver's seat and a foot rest and a protective device covering not less than half of the rear wheel so as to prevent the clothes of the person seating on the pillion from being entangled in the wheel.

15. A plain reading of Section 128 of the M.V. Act quoted above would show that Sub-section (1) casts a duty on the driver of a two wheeled motor cycle not to carry more than one person in addition to himself on the motor cycle. Similarly, Rule 123 of the Rules quoted above mentions the safety devices to be provided while manufacturing a motor cycle. These provisions obviously are safety measures for the driver and pillion rider and violation of Section 128 of the M.V. Act by itself may not lead to finding of contributory negligence as there is no evidence on record that the deceased contributed to the accident. Merely because two other persons were sitting with the deceased on the motorcycle, it will not raise a presumption of contributory negligence, therefore, the deceased cannot held to be guilty of contributory negligence.

16 Sudhir Kumar Rana Vs. Surinder Singh and Others, the Supreme Court held as under:

8. If a person drives a vehicle without a licence, he commits an offence. The same, by itself, in our opinion, may not lead to a finding of negligence as regards the accident. It has been held by the courts below that it was the driver of the mini-truck which was being driven rashly and negligently. It is one thing to say that the appellant was not possessing any licence but no finding of fact has been arrived at that he was driving the two-wheeler rashly and negligently. If he was not driving rashly and negligently which contributed to the accident, we fail to see as to how, only because he was not having a licence, he would be held to be guilty of contributory negligence.

17. For the aforementioned reasons, the finding recorded that the deceased was contributory negligent to the extent of 50% is erroneous for want of proper pleadings and evidence. Thus, point No. 1 is answered accordingly in favour of the appellants/claimants.

Answer to Point No. 2

18. In the instant case, the learned Claims Tribunal has awarded a total compensation of Rs. 6,44,640, but has deducted 50% towards contributory negligence. Since the finding relating to contributory negligence is not sustainable and has been set-aside, the appellants/claimants are entitled for full compensation of Rs. 6,44,640 along with interest @ 6% per annum. The Claims Tribunal has already awarded a sum of Rs. 3,22,320, thus, the balance amount to be deposited would be Rs. 3,22,320 (6,44,640-3,22,320). Thus, this question is answered accordingly in favour of the appellants/claimants.

Conclusion

19. As such, the appeal is partly allowed and the award of the Claims Tribunal is modified to the extent indicated above. Respondent No. 3/Insurance Company is granted 3 months" time to deposit the balance amount of Rs. 3,22,320 along with interest @ 6% per annum before the concerned Claims Tribunal.

Certified copy as per Rules.