IN THE HIGH COURT OF JHARKHAND AT RANCHI

(Civil Miscellaneous Appellate Jurisdiction)

M.A. No.71 of 2011

National Insurance Company Ltd., Branch Office, Purnia, District- Purnia, Divisional Office, National Insurance Co. Ltd., Sumrit Mandal Complex, Jail Road, Tilka Manjhi, PO Bhagalpur, District Bhagalpur, represented through its Asst. Manager, Legal Cell, National Insurance Company Ltd., Ranchi Division, S.N. Ganguly Road, Main Road, Ranchi, PO Ranchi, PS Kotwali, District Ranchi, Jharkhand. ..... … Appellant

Versus

1. Ratan Devi, wife of late Nand Kishore Paswan (wife of deceased)
2. Sumitra Kumari, D/o late Nand Kishore Paswan,
3. Shweta Kumari, D/o late Nand Kishore Paswan,
4. Reetu Kumari, S/o late Nand Kishore Paswan,
5. Shubham Kumari, D/o late Nand Kishore Paswan,

Petitioners No.2, 3 and 5 are minor daughters and petitioner no.4 is minor son of the deceased, represented through their legal guardian and mother Ratan Devi.

All are resident of Village Rupani (Karua More), PO & PS Choutham, District Khagaria,

Local address- C/o Niraj Paswan, R/o Satsang Nagar, Godda, PO & PS Godda (T), District Godda

6. Anil Kumar Yadav, S/o Ghanshyam Yadav, owner of Jeep No. HR-OJ-8110, permanent Address Village Rani Kalon (Ramni Kalon), PO & PS Amour, District Purnia and 511 ADMSL C/o 56 APO
7. Rajmani Paswan, son of Chhotelal Paswan, Driver of Jeep No. HR-01J-8110, resident of Village Parmanandpur, PO & PS Muffasil, District Khagaria, Bihar.
9. Kamo Devi, W/o Sri Sita Ram Paswan (mother of the deceased) aged 60 years,
10. Sita Ram Paswan, S/ o late Bhojal Paswan (father of the deceased) aged 70 years,

Both R/o Village Rupani (Karua More), PS Choutham, District

Khagaria, Bihar …. …. Respondents

(Heard on 17.01.2024)

PRESENT

CORAM : HON'BLE MR. JUSTICE SUBHASH CHAND

For the Appellant : Mr. G.C. Jha, Advocate
For the Respondents : Mr. Manoj Kumar Shah, Advocate

J U D G M E N T

CAV On 17th January 2024 **Pronounced on 21st February 2024**

The instant miscellaneous appeal has been directed against the judgment/award dated 28.01.2011 passed by the learned District Judge-cum-M.A.C.T., Godda in M.A.C.T. No.43 of 2009 whereby and whereunder the learned Tribunal awarded the amount of Rs.8,05,780/- alongwith simple interest @ 6% per annum from 22.12.2009 till its realisation within 30 days from the date of award payable by Insurance Company/appellant herein.

2. The brief facts leading to this Miscellaneous Appeal are that the claim petition was filed with these averments that on 18.11.2006 at about 3:30 pm deceased Nand Kishore Paswan alongwith his wife Ratan Devi, the claimant no.1 in claim petition, boarded the tempo bearing registration no. BR-34A-0197 at Usary Registry Chowk and was going to house at Rupani. Amid the way 300 yards from the Registry Chowk near the village Barichak at Maheshkhut- Gogari Pacci Road, the jeep bearing registration no. HR-01J-8110 being rashly and negligently driven by its

driver dashed the tempo. As a result of the said accident Nand Kishore Paswan sustained serious injury who was referred to hospital Gogari. Police also recorded the statement in course of treatment of Nand Kishore Paswan who succumbed to the injury. The claimant no.1 wife of the deceased also sustained simple injury. The FIR of this case was also lodged with the Police Station Gogari P.S. Case No.304 of 2006 against the driver of both the vehicle Tempo and Jeep as well. Claimant no.1 is the wife claimant nos.2, 3 and 5 are the minor daughters and claimant no.4 is the minor son of the deceased. The deceased was 35 years old at the time of accident and was a government servant who was *choikidar.* His monthly income was Rs.5,987/-. The post mortem of the deceased was also conducted. The total compensation of Rs.7,73,732/- was claimed.

3. The owner of the offending vehicle Jeep OP no.1 Anil Kumar Yadav filed the written statement with these averment that he is owner of the Jeep and OP no.2 Rajmani Paswan was driver of the same. This vehicle was insured by OP no.3 National Insurance Company Limited. The accident was not caused on account of rash and negligent driving by the driver of the Jeep.

4. OP no.3 National Insurance Company Limited filed the written statement with these averments that the claim petition was not maintainable. The same is bad for non-joinder of party as the owner and insurance of the tempo were not impleaded as party to this claim petition. The vehicle was ensured as a private vehicle but the same was carrying passenger on hire. Hence the insurance company is absolved from the liability if any.

5. The learned Tribunal passed the impugned judgment/award on 28.01.2011 directing OP no.3 National Insurance Company Limited to pay the amount of Rs.8,05,780/- alongwith simple interest @ 6% per annum from 22.12.2009 till the actual date of payment within 30 days from the date of passing award.

6. Aggrieved from the impugned judgment/award dated 28.01.2011 the instant miscellaneous appeal has been directed on behalf of insurance company on the ground that earlier the claimants had filed the petition under section 140 of MV Act bearing MACT case, Godda No. 29 of 2007 in which the National Insurance Company Limited the appellant and New India Assurance Company which is the insurer of the Tempo was also made party and the award was passed in the same and both companies were directed to satisfy the award equally. In the instant M.A.C.T Case No.43 of 2009 New India Assurance Company the insurer of the Tempo has not been impleaded as a party. The jeep which was insured by the appellant insurance company, was insured as private vehicle whereas the same was used as a passenger carrying vehicle which is in violation of the terms & condition of insurance policy.

7. I have heard the learned counsel of parties and perused the material on record. For disposal of this miscellaneous appeal following **point of determination** is being framed:

(i) **whether the motor accident was the result of composite negligence, if so the claim petition was bad for non-joinder of owner and the insurance company of another vehicle Tempo**?

(ii) **Whether there is fundamental breach of policy of the offending vehicle Jeep, if so, its effect**?

8. **Point of Determination No.1:** the **factum of accident caused by the two vehicle Tempo and Jeep** is admitted. **Claimant no.1 Ratan Devi who is the wife of deceased is the eye witness of the accident. She had examined herself as CW1**. This witness has specifically stated that the jeep which was driven by its driver rashly and negligently came from the opposite side dashed to the Tempo in which she alongwith her husband was boarded. Her husband sustained serious injuries and was admitted to Gogari Hospital where he succumbed to injuries during treatment. She also sustained simple injury on her elbow. This witness was also cross-examined on behalf of opposite party no.3 National Insurance Company and her testimony could not be shaken in cross-examination on the point of negligence which was deposed to be on the part of the driver of offending jeep.

8.1 **From the averment made in the claim petition and also the evidence on record, oral and documentary, it was a case of composite negligence and in case of a composite negligence where the damage or death is caused to any person by two or more wrongdoers, they may be either joint or independent tort-feasors, they are jointly and severely liable. Injured person has the choice to claim whole damage against all or any of them since it is a case of composite negligence**.

8.2. The learned counsel for the appellant has contended that it was a case of contributory negligence, the person who either contributes the author of the accident would be liable for contribution to the accident

having taken place.

8.3. In the case in hand though the charge-sheet was filed by the investigating officer in the FIR Case Crime No. 304 of 2006 against the driver of the Tempo and Jeep as well, yet the eye witness of the occurrence is the claimant no.1 Ratan Devi who was also accompanying her husband at the time of occurrence. She has deposed that while she was boarding by the Tempo alongwith her husband, a Jeep came from the opposite side driven by its driver rashly and negligently and dashed to the Tempo whereby her husband sustained grievous injury. She also sustained injury and her husband was rushed to the hospital and succumbed to injury in the hospital. So far as the charge-sheet (exhibit-4) is concerned, in the charge-sheet itself amongst the charge-sheeted witness, Kare Yadav is shown as the informant, Ratan Devi is eye witness of the occurrence. Though from the evidence on record, the negligence has been proved on part of the driver of the offending Jeep, yet if there is any negligence on part of the Tempo driver, the deceased was a third party and the accident being the result of composite negligence of the drivers of the two vehicles, it is at the volition of the claimant to claim compensation from any of the owner/insurance company of the vehicle or from the both.

9. **The term negligence means failure to exercise care towards the others which a reasonable and prudent persons would do under similar circumstances or taking action which such a reasonable person would not. Negligence can be both intentional or accidental which is normally accidental. More particularly, it connotes reckless driving and the injured must always prove that either side is negligent. If the**

injury rather death is caused by something owned or controlled by the negligent party then he is directly liable otherwise the principle of *res ipsa loquitur* meaning thereby "the things speak for itself" would apply.

10. The principle of contributory negligence has been discussed time and again. A person who either contributes or author of the accident would be liable for his contribution to the accident having taken place.

10.1 The Hon'ble Apex Court in "***Khenyei Vs. New India Assurance Company Limited & Others" (2015) 9 SCC 273*** held:

> *"3. It is a case of composite negligence where injuries have been caused to the claimants by combined wrongful act of joint tort feasors. In a case of accident caused by negligence of joint tort feasors, all the persons who aid or counsel or direct or join in committal of a wrongful act, are liable. In such case, the liability is always joint and several. The extent of negligence of joint tort feasors in such a case is immaterial for satisfaction of the claim of the plaintiff/claimant and need not be determined by the court. However, in case all the joint tort feasors are before the court, it may determine the extent of their liability for the purpose of adjusting inter-se equities between them at appropriate stage. The liability of each and every joint tort feasor vis a vis to plaintiff/claimant cannot be bifurcated as it is joint and several liability.* ***In the case of composite negligence, apportionment of compensation between tort feasors for making payment to the plaintiff is not permissible as the plaintiff/claimant has the right to recover the entire amount from the***

easiest targets/solvent defendant.

*13. There is **a difference between contributory and composite negligence**. In the case of contributory negligence, a person who has himself contributed to the accident cannot claim compensation for the injuries sustained by him in the accident to the extent of his own negligence;**whereas in the case of composite negligence, a person who has suffered has not contributed to the accident but the outcome of combination of negligence of two or more other persons. This Court in T.O. Anthony v. Karvarnan & Ors. [2008 (3) SCC 748]** has held that in case of contributory negligence, injured need not establish the extent of responsibility of each wrong doer separately, nor is it necessary for the court to determine the extent of liability of each wrong doer separately. It is only in the case of contributory negligence that the injured himself has contributed by his negligence in the accident. Extent of his negligence is required to be determined as damages recoverable by him in respect of the injuries have to be reduced in proportion to his contributory negligence. The relevant portion is extracted hereunder :*

> *"6. 'Composite negligence' refers to the negligence on the part of two or more persons. Where a person is injured as a result of negligence on the part of two or more wrong doers, it is said that the person was injured on account of the composite negligence of those wrong-doers. In such a case, each wrong doer, is jointly and severally liable to the injured for payment of the entire damages and the injured*

person has the choice of proceeding against all or any of them. In such a case, the injured need not establish the extent of responsibility of each wrong-doer separately, nor is it necessary for the court to determine the extent of liability of each wrong-doer separately. On the other hand where a person suffers injury, partly due to the negligence on the part of another person or persons, and partly as a result of his own negligence, then the negligence on the part of the injured which contributed to the accident is referred to as his contributory negligence. Where the injured is guilty of some negligence, his claim for damages is not defeated merely by reason of the negligence on his part but the damages recoverable by him in respect of the injuries stands reduced in proportion to his contributory negligence.

7. Therefore, when two vehicles are involved in an accident, and one of the drivers claims compensation from the other driver alleging negligence, and the other driver denies negligence or claims that the injured claimant himself was negligent, then it becomes necessary to consider whether the injured claimant was negligent and if so, whether he was solely or partly responsible for the accident and the extent of his responsibility, that is his contributory negligence. Therefore where the injured is himself partly liable, the principle of 'composite negligence' will not apply nor can there be an automatic inference that the negligence was 50:50 as has been assumed in

this case. The Tribunal ought to have examined the extent of contributory negligence of the appellant and thereby avoided confusion between composite negligence and contributory negligence. The High Court has failed to correct the said error."

*20. This Court in **Challa Upendra Rao and Nanjappan** has dealt with the breach of policy conditions by the owner when the insurer was asked to pay the compensation fixed by the tribunal and the right to recover the same was given to the insurer in the executing court concerned if the dispute between the insurer and the owner was the subject-matter of determination for the tribunal and the issue has been decided in favour of the insured.*

21. The same analogy can be applied to the instant cases as the liability of the joint tort feasor is joint and several. In the instant case, there is determination of inter se liability of composite negligence to the extent of negligence of 2/3rd and 1/3rd of respective drivers. Thus, the vehicle – trailor-truck which was not insured with the insurer, was negligent to the extent of 2/3rd. It would be open to the insurer being insurer of the bus after making payment to claimant to recover from the owner of the trailor-truck the amount to the aforesaid extent in the execution proceedings. Had there been no determination of the inter se liability for want of evidence or other joint tort feasor had not been impleaded, it was not open to settle such a dispute and to recover the amount in execution proceedings but the remedy would be to file another suit or appropriate proceedings in accordance with law.

22. What emerges from the aforesaid discussion is as follows :

22(1) In the case of composite negligence, plaintiff/claimant is entitled to sue both or any one of the joint tort feasors and to recover the entire compensation as liability of joint tort feasors is joint and several.

22(2) In the case of composite negligence, apportionment of compensation between two tort feasors vis a vis the plaintiff/claimant is not permissible. He can recover at his option whole damages from any of them.

22(3) In case all the joint tort feasors have been impleaded and evidence is sufficient, it is open to the court/tribunal to determine inter se extent of composite negligence of the drivers. However, determination of the extent of negligence between the joint tort feasors is only for the purpose of their inter se liability so that one may recover the sum from the other after making whole of payment to the plaintiff/claimant to the extent it has satisfied the liability of the other. In case both of them have been impleaded and the apportionment/ extent of their negligence has been determined by the court/tribunal, in main case one joint tort feasor can recover the amount from the other in the execution proceedings.

22(4) It would not be appropriate for the court/tribunal to determine the extent of composite negligence of the drivers of two vehicles in the absence of impleadment of other joint tort feasors. In such a case, impleaded joint tort feasor should be left, in case he so desires, to sue the other joint

tort feasor in independent proceedings after passing of the decree or award."

10.2 In view of the discussion made hereinbelow it is found that the motor accident in the case in hand was a case of composite negligence of the two vehicles and the claimant has chosen to seek compensation from the owner/insurance company of the offending Jeep and has proved the negligence on the part of the driver of the offending Jeep, though in view of the charge-sheet (exhibit-4) the contributory negligence is also found.

10.3 Herein it is also pertinent that on behalf of the owner of the offending Jeep or the insurance company, none of them has adduced the evidence nor produced any documentary evidence to rebut the evidence adduced on behalf of the claimant. As such the evidence adduced on behalf of the claimant being unrebutted is found trustworthy and cogent.

10.4 The Hon'ble Apex Court held in "***Jiju Kuruvila v. Kunjujamma Mohan" 2013 O Supreme (SC) 556*** that **contributory negligence had on collision between car and the bus coming from the opposite direction resulting in death of car driver. Eye witness who was accompanying deceased stated that bus hit the car and the accident was due to the rash and negligent driving of the driver of the bus. The FIR was lodged. Charge-sheet was filed against the driver of the bus. Neither the owner nor the driver of the bus denied the allegation of the claimant. The insurance company was made liable to pay the compensation**.

In view of the above, **this point of determination is being decided in favour of the claimant and against the insurance company/**

appellant.

11. On the **point of determination no.(ii)**: Whether there is fundamental breach of policy of the offending vehicle Jeep, if so, its effect?

11.1 The learned counsel for the appellant has submitted that the vehicle was the private vehicle and it was used for carrying passenger so it violated the terms and conditions of the insurance policy. On this point of determination on behalf of the insurance policy no evidence documentary or oral was adduced neither before the learned Tribunal nor in Appeal.

In view of the above, not adducing any evidence oral or documentary by the insurance company **this point of determination is being decided against the appellant insurance company and in favour of the claimants**.

12. In view of the analysis of the evidence on record, the impugned judgment passed by the learned Tribunal **needs no interference**. Accordingly, this miscellaneous appeal **deserves to be dismissed**.

13. The **Miscellaneous Appeal** is hereby **dismissed** and the impugned award passed by the learned **Tribunal** in M.A.C.T. No.43 of 2009 is hereby **affirmed**.

14. Let the record of learned court below be sent back alongwith copy of the judgment and also the statutory amount if any deposited be sent back to the learned Tribunal.

(Subhash Chand, J.)

Jharkhand High Court, Ranchi
AFR
Dated: 21 .02.2024
RKM