

**IN THE HIGH COURT OF MADHYA PRADESH
AT JABALPUR**

BEFORE

HON'BLE SHRI JUSTICE GURPAL SINGH AHLUWALIA

ON THE 10th OF MAY, 2023

MISCELLANEOUS APPEAL No. 2244 of 2015

BETWEEN:-

**THE NEW INDIA ASSURANCE CO.LTD.
BRANCH REWA, MAHINDRA APARTMENT
BESIDE LABOUR COURT, NARENDRA
NAGAR, REWA DISTRICT REWA (M.P.)
THROUGH: DIVISIONAL MANAGER, NEW
INDIA ASSURANCE COMPANY LTD.
DIVISIONAL OFFICE 290, NAPIER TOWN
JABALPUR (MADHYA PRADESH)**

.....APPELLANT

(BY SHRI DINESH KAUSHAL - ADVOCATE)

AND

- 1. SHASHIKALA W/O LATE VANSH
BAHADUR, AGED ABOUT 26 YEARS, R/O
VILLAGE KHARRA, NIVI 540 P.S. TEH.
NAIGARHI DISTRICT REWA (M.P.)
PRESENTLY RESIDING AT NEHRU
NAGAR, DISTRICT REWA (MADHYA
PRADESH)**
- 2. JITENDRA DWIVEDI S/O VANSH
BAHADUR, AGED ABOUT 5 YEARS,
MINOR THROUGH NATURAL
GUARDIAN SMT. SHASHIKALA W/O
LATE VANSH BAHADUR DWIVEDI R/O
VILLAGE KHARRA, NIVI 540 P.S. TEH.
NAIGARHI DISTRICT REWA (M.P.)
PRESENTLY RESIDING AT NEHRU
NAGAR, DISTRICT REWA (MADHYA
PRADESH)**
- 3. JITENDRA DWIVEDI S/O VANSH
BAHADUR, AGED ABOUT 4 YEARS,
MINOR THROUGH NATURAL
GUARDIAN SMT. SHASHIKALA W/O
LATE VANSH BAHADUR DWIVEDI R/O
VILLAGE KHARRA, NIVI 540 P.S. TEH.**

**NAIGARHI DISTRICT REWA (M.P.)
PRESENTLY RESIDING AT NEHRU
NAGAR, DISTRICT REWA (MADHYA
PRADESH)**

4. **ANKITA D/O LATE VANSH BAHADUR,
AGED ABOUT 1½ YEARS, MINOR
THROUGH NATURAL GUARDIAN SMT.
SHASHIKALA W/O LATE VANSH
BAHADUR DWIVEDI R/O VILLAGE
KHARRA, NIVI 540 P.S. TEH. NAIGARHI
DISTRICT REWA (M.P.) PRESENTLY
RESIDING AT NEHRU NAGAR,
DISTRICT REWA (MADHYA PRADESH)**
5. **CHHOTA PRASAD S/O PARMESHWAR
DEEN, AGED ABOUT 65 YEARS, R/O
VILLAGE KHARRA, NIVI 540 P.S. TEH.
NAIGARHI DISTRICT REWA (M.P.)
PRESENTLY RESIDING AT NEHRU
NAGAR, DISTRICT REWA (MADHYA
PRADESH)**
6. **SMT. SAROJ DWIVEDI W/O CHHOTE
LAL DWIVEDI, AGED ABOUT 60 YEARS,
R/O VILLAGE KHARRA, NIVI 540 P.S.
TEH. NAIGARHI DISTRICT REWA (M.P.)
PRESENTLY RESIDING AT NEHRU
NAGAR, DISTRICT REWA (MADHYA
PRADESH)**
7. **SMT. RATNA UPADHYAY W/O
UMASHANKAR UPADHYAY, AGED
ABOUT 25 YEARS, R/O VILLAGE
KHARRA NIVI 540, TEHSIL AND P.S.
NAIGARHI DISTRICT REWA (MADHYA
PRADESH)**

.....RESPONDENTS

(SHRI NITYA NAND MISHRA – ADVOCATE FOR RESPONDENTS NO.1 TO 6)
.....

*This appeal coming on for admission this day, the court passed the
following:*

ORDER

This Miscellaneous Appeal under Section 173 of Motor Vehicles Act has been filed against the award dated 18.08.2015 passed by Motor Accident Claims Tribunal, Rewa (M.P.) in MACC No.185/2012.

2. The facts necessary for disposal of the present appeal in short are that the claimants filed an application under Section 163-A of Motor Vehicles Act for compensation of Rs.10,00,000/- on the ground that the deceased Vansh Bahadur Dwivedi was driving the auto bearing registration No.MP 17 R 1141. He was taking the auto for mechanical repairs. All of a sudden there was a collision between heavy vehicle and the auto, as a result the deceased died on the spot on 22.12.2011.

3. It appears that the identity of the heavy vehicle could not be established and accordingly, the claim petition was filed against the owner of the auto as well as the Insurance Company of the auto. The Claims Tribunal by the impugned award has awarded a sum of Rs.4,84,700/-.

4. Challenging the award passed by the Claims Tribunal, it is submitted by the counsel for the appellant that since the auto was not having permit therefore, the Insurance Company is not liable to pay compensation amount. Since the deceased has stepped into the shoes of the owner of the vehicle, therefore, the claim petition under Section 163-A of the Motor Vehicles Act was not maintainable and accordingly, relied upon the judgment passed by the Supreme Court in the case of **Ramkhiladi and Another Vs. The United India Insurance Company and Another** reported in (2020) 1 TAC 353 SC.

5. *Per contra*, the counsel for the respondents No.1 to 6 has supported the findings recorded by the Claims Tribunal.

6. Heard the learned counsel for the appellant.

7. It is the case of the claimants that the deceased was taking the auto for mechanical repair purposes. Jamuna Prajapati had lodged an FIR, Exhibit P/1. In the FIR, it is mentioned that on 22.12.2011, Vansh Bahadur Dwivedi, Umashankar as well as Jamuna Prajapati were going back towards their house after admitting their relative in the hospital. The auto was being driven by Umashankar, whereas Jamuna Prajapati and Vansh Bahadur/ deceased were sitting in the auto. At about 4.00 pm, when the auto reached near the Bazar, it was dashed by unknown truck, which was coming from the side of Allahabad. Because of collision, the auto was badly damaged. Jamuna Prajapati/ complainant fell out of the auto, whereas Umashankar got trapped in the auto. The legs of Vansh Bahadur also got entangled in the auto. Umashankar and Vansh Bahadur have expired and their dead bodies are lying on the road. Thus, it is clear from the FIR that three persons were sitting in the auto and in fact auto was being driven by Umashankar, whereas it is the case of the claimants that although, Umashankar Upadhyay was the owner of the auto but Vansh Bahadur was driving the auto. In clause 16 of the claim petition, it is mentioned that since Umashankar Upadhyay has expired therefore, his wife has been impleaded as respondent but in paragraph 11 of the claim petition, it is specifically mentioned that Vansh Bahadur as well as Umashankar have expired in the accident. The claim petition is completely silent about the presence of Jamuna Prajapati. The claimants themselves have relied upon the FIR, Exhibit P/1, in which it is specifically mentioned that the complainant Jamuna Prajapati, deceased Umashankar Upadhyay and Vansh Bahadur were coming back from the hospital. It is not mentioned that the auto was

being taken for mechanical repair purposes. The appellant has examined Shraddha Shrivastava (D.W.1), who has proved the certificate that the auto was not having any permit, Exhibit D/1. The appellant has also examined Ratan Kumar Ghosh (D.W.2), who has proved that the deceased was having the driving licence to drive LMV and motor cycle with gear. But one thing is clear that the claimants themselves have relied upon the FIR, Exhibit P/1, in which it was specifically mentioned that Umashankar was driving the auto. For the reasons best known to the claimants, they have twisted the facts of the case and they have claimed that in fact it was Vansh Bahadur, who was driving the auto. This twisting of facts must have been done for the simple reason that Umashankar Upadhyay must not be having any driving licence at all.

8. The claimants have also filed the photographs of the accident as Exhibits P/9 to P/12. Two persons have lost their lives but surprisingly, the correct photographs of the accident have not been placed on record. In photographs, Exhibits P/10 and P/12, the dead body of probably Vansh Bahadur is visible. Jamuna Prajapati in FIR, Exhibit P/1, had specifically mentioned that the legs of Vansh Bahadur got entangled in the auto itself. From the photographs, Exhibit P/10 and P/12, it is clear that the legs of the deceased were entangled in the auto and the remaining body of the deceased was lying on the road. However, the dead body of Umashankar is not visible. It was the case of Jamuna Prajapati in FIR, Exhibit P/1, that Umashankar Upadhyay had got stuck in the auto but it appears that the photograph of the dead body of Vansh Bahadur was taken after removing the dead body of Umashankar from the auto. Why this manipulation was done by the claimants is not clear.

But one thing is clear that they have not approached the Claims Tribunal with clean hands and they have tried to twist the facts of the case.

9. Furthermore, from the photograph, Exhibit P/11, in which the background of the place of accident is also clearly visible, it is clear that the auto was on the extreme right side of the road, whereas it should have been on the extreme left side of the road. Thus, it is clear that Umashankar Upadhyay was driving the auto on the wrong side of the road, which majorly contributed to the accident.

10. From the contents of FIR, Exhibit P/1, it is clear that in fact it was Umashankar Upadhyay, who was driving the auto and not Vansh Bahadur as claimed by the claimants. It is not out place to mention here that the present claim petition was filed by the legal representatives of Vansh Bahadur. Since Vansh Bahadur was sitting in the auto, therefore, the principle of contributory negligence would not apply and the principle of composite negligence would apply and the claimants of the such victim can file a claim petition against the owner, driver and Insurance Company of both the offending vehicles or against the owner, driver and Insurance Company of one of the vehicle. Since the whereabouts of the heavy vehicle, which collided with the auto, could not be traced, therefore, the claim petition was filed against the owner and Insurance Company of the auto. Since, it is the case of composite negligence, therefore, the claim petition was maintainable against the owner and the Insurance Company of the auto.

11. The appellant has successfully proved that the auto was not having permit. Now the only question for consideration is as to whether the provisions of Section 66(3)(p) of the Motor Vehicles Act would apply or not?

12. Section 66(3)(p) of the Motor Vehicles Act reads as under:

“(p) to any transport vehicle while proceeding empty to any place for purpose of repair.”

13. It is clear from the abovementioned provision that if a transport vehicle is proceeding for repair purposes and is completely empty, then the requirement of permit would not apply. However, in the present case, undisputedly three persons were travelling, out of whom two lost their lives. From *Naksha Panchayatnama*, Exhibit P/2, it is clear that the name of the deceased was mentioned as Umashankar alias Kallu and in *Naksha Panchayatnama*, Exhibit P/3, the name of the deceased was mentioned as Vansh Bahadur. In the Merg intimation, Exhibit P/4, which was lodged by Jamuna Prajapati, the names of the deceased were mentioned as Umashankar Upadhyay and Vansh Bahadur. Vinod Kumar Dwivedi (A.W.4) has also stated that after the accident when he reached on the spot, he found that the dead bodies of two persons were lying there. Thus, it is clear that in fact, the auto was not empty and accordingly, Section 66(3)(p) of the Motor Vehicles Act would not apply.

14. Since the auto was being driving by Umashankar Upadhyay and it is not the case of the claimants that Umashankar Upadhyay was having any licence to drive the auto. On the contrary, the claimants with a malafide intention have twisted the facts and claimed that Vansh Bahadur was driving the auto. Even the auto was not having permit coupled with the fact that auto was not being taken for repair purposes. Thus, this Court is of the considered opinion that the driver of the auto Umashankar was not having any driving licence at all. Accordingly, the Insurance Company is not liable to pay the compensation. Under the

facts and circumstances of the case, specifically when the claimants have not approached with clean hands, even the doctrine of pay and recover would not apply.

15. So far as the question of quantum is concerned, although the claimants had filed a claim petition under Section 163-A of the Motor Vehicles Act but this Court has already come to a conclusion that in fact Umashankar Upadhyay was driving the auto and the claimants have wrongly twisted the fact. Since the deceased Vansh Bahadur was sitting in the auto and the doctrine of contributory negligence would not apply and the doctrine of composite negligence would apply, therefore, it is directed that the entire liability is of the owner of the offending vehicle i.e. respondent No.7 and the Insurance Company is exonerated from its liability in its entirety.

16. With aforesaid modification, the award dated 18.08.2015 passed by Motor Accident Claims Tribunal, Rewa (M.P.) in MACC No.185/2012 is hereby **affirmed**.

17. The appeal succeeds and is hereby **allowed** to the extent mentioned above.

(G.S. AHLUWALIA)
JUDGE

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