IN THE HIGH COURT OF MADHYA PRADESH

AT JABALPUR

BEFORE

HON'BLE SHRI JUSTICE ACHAL KUMAR PALIWAL

ON THE 7th March, 2024

MISCALLENOUS APPEAL No1333 of 2023

BETWEEN:-

MUBARAK KHAN S/O SHRI JAKHIR KHAN OCCUPATION: OWNER OF TRUCK NO. MP20HB/1786 R/O FUTERA WARD NO. 2 NEAR PEELI ATAAREE DISTRICT DAMOH (MADHYA PRADESH)

.....APPELLANT

(BY SHRI KASHI RAM PATEL – ADVOCATE)

AND

1. SMT. SUKKO BAI KOL D/O SHRI VISHRAM KOL, AGED ABOUT 45 YEARS, R/O CHANDI KI DAFAI VANSHSWAROOP WARD KATNI TEHSIL AND DISTRICT KATNI (MADHYA PRADESH)

2. THE NEW INDIA INSURANCE CO. LTD. THROUGH DIVISIONAL MANAGER DIVISIONAL OFFICE 290 NAPIER TOWN JABALPUR (INSURANCE COMPANY OF TRUCK NO. MP20HB/1786) (MADHYA PRADESH)

3. HARIRAM ATHYA S/O SHRI SHYAMLAL ATHYA, AGED ABOUT 38 YEARS, R/O VILLAGE BATIAGARH POLICE STATION AND TEHSIL BATIAGARH DISTRICT DAMOH (DRIVER OF TRUCK NO. MP20HB/1786) (MADHYA PRADESH)

.....RESPONDENTS

(SHRI JAYANT NEEKHRA – ADVOCATE FOR THE RESPONDENT NO.2 AND SHRI KRISHNA KUMAR BASSI – ADVOCATE FOR THE RESPONDENT NO.3)

MISCALLENOUS APPEAL No.5199 of 2022

BETWEEN

SUKHDEV SAHU S/O RAMDAS SAHU, AGED ABOUT 44 YEARS, NEAR SAHU MOHOLLA NEAR KANYA HIGH SCHOOL SHAHNAGAR DISTRICT PANNA (MADHYA PRADESH)

(BY SHRI PRIYANKA TIWAI – ADVOCATE)
AND

1. HARIRAM AATHYA S/O SHYAMLAL AATHYA, AGED ABOUT 35 YEARS, GRAM BATIYAGADH THANA / TEHSIL BATIYAGADH DISTRICT DAMOH (MADHYA PRADESH)

2. MUBARAK KHAN S/O ZAKIR KHAN R/O FUTERA WARD NO. 02, NEAR PILI ATAARI, DAMOH (MADHYA PRADESH)

3. THE NEW INDIA INSURANCE COMPANY LTD. THROUGH DIVISIONAL MANAGER DIVISIONAL OFFICE, 290 NAPIER TOWN JABALPUR (MADHYA PRADESH)

.....RESPONDENTS

(SHRI KASHI RAM PATEL – ADVOCATE FOR THE RESPONDENT NO.2 AND SHRI ASHISH KUMAR VAIDYA – ADVOCATE FOR THE RESPONDENT NO.3)

MISCALLENOUS APPEAL No.5242 of 2022

BETWEEN:-

MUBARAK KHAN S/O SHRI JAKHIR KHAN OCCUPATION: OWNER OF TRUCK NO. MP20HB/1786 R/O FUTERA WARD NO.

2 NEAR PEELI ATAAREE DISTRICT DAMOH (MADHYA PRADESH)

…..APPELLANT

(BY SHRI KASHI RAM PATEL – ADVOCATE)
AND

1. SUKHDEO SAHU S/O RAMDAS SAHU, AGED ABOUT 47 YEARS, R/O SAHU MOHALLA NEAR KANYAHAI SCHOOL SHAHNAGAR DISTT. PANNA. (MADHYA PRADESH)

2. THE NEW INDIA INSURANCE CO. LTD. THROUGH DIVISIONAL MANAGER DIVISIONAL OFFICE 290, NAPIER TOWN JABALPUR (INSURANCE COMPANY OF TRUCK NO. MP20HB/1786) (MADHYA PRADESH)

3. HARIRAM ATHYA S/O SHRI SHYAMLAL ATHYA, AGED ABOUT 38 YEARS, R/O VILLAGE BATIAGARH POLICE STATION AND TEHSIL BATIAGARH, DISTRICT DAMOH (DRIVER OF TRUCK NO. MP20HB/1786) (MADHYA PRADESH)

.....RESPONDENTS

(SHRI KRISHNA KUMAR BASSI – ADVOCATE FOR THE RESPONDENT NO.3)

MISCALLENOUS APPEAL No1334 of 2023

BETWEEN:-

MUBARAK KHAN S/O SHRI JAKHIR KHAN OCCUPATION: OWNER OF TRUCK NO MP20HB/1786 R/O FUTERA WARD NO. 2 NEAR PEELI ATAAREE DISTRICT DAMOH (MADHYA PRADESH)

…..APPELLANT

(BY SHRI KASHI RAM PATEL – ADVOCATE)
AND

1. MADAN KUMR KOL S/O BHAIYA LAL KOL, AGED ABOUT 55 YEARS, R/O VANSHSWAROOP WARD KATNI TEHSIL AND DISTRICT KATNI (MADHYA PRADESH)

2. SURAJ KOL S/O MADAN KUMAR KOL, AGED ABOUT 28 YEARS, R/O VANSHSWAROOP WARD, KATNI, TEHSIL AND DISTRICT KATNI (MADHYA PRADESH)

3. AKASH KOL S/O MADNA KUMAR KOL, AGED ABOUT 25 YEARS, R/O VANSHSWAROOP WARD, KATNI, TEHSIL AND DISTRICT KATNI (MADHYA PRADESH)

4. KU. NISHA KOL D/O MADAN KUMAR KOL, AGED ABOUT 21 YEARS, R/O VANSHSWAROOP WARD, KATNI, TEHSIL AND DISTRICT KATNI (MADHYA PRADESH)

5. KAPIL KOL F/O MADAN KUMAR KOL, AGED ABOUT 17 YEARS, OCCUPATION: MINOR, THROUGH NATURAL GUARDIAN FATHER MADAN KUMAR KOL S/O BHAIYA LAL KOL AGED ABOUT 55 YEARS R/O VANSHSWAROOP WARD, KATNI, TEHSIL AND DISTRICT KATNI (MADHYA PRADESH)

6. THE NEW INDIA INSURANCE CO. LTD. THROUGH DIVISIONAL MANAGER DIVISIONAL OFFICE 290, NAPIER TOWN JABALPUR (INSURANCE COMPANY OF TRUCK NO. MP20HB/1786) (MADHYA PRADESH)

7.HARIRAM ATHYA S/O SHRI SHYAMLAL ATHYA, AGED ABOUT 38 YEARS, R/O VILLAGE BATIAGARH POLICE STATION AND TEHSIL BATIAGARH, DISTRICT DAMOH (DRIVER OF TRUCK NO. MP20HB/1786) (MADHYA PRADESH)

.....RESPONDENTS

(SHRI DINESH KAUSHAL – ADVOCATE FOR THE RESPONDENT NO.6)

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

O R D E R

This order shall govern disposal of MA No.1333/2023 (Mubarak Khan Vs. Sukho Bai & others), relating to MACC No. 897/2019 (Sukho Bai Vs. Hariram and others), MA No. 1334/2023 (Mubarak Khan Vs. Madan Kumar and others), relating to MACC No. 525/2019 (Madan Kumar Vs. Hariram) & MA No. 5242/2022 (Mubarak Khan Vs. Sukhdeo Sahu and others), relating to MA No. 524/2019. (Sukhdeo Sahu Vs. Hariram and others), which have been filed by owner of offending vehicle for exonerating appellant/owner of offending vehicle Mubarak Khan from liability to pay the compensation and hold that insurance company is liable to pay the compensation & MA No. 5199/2022 (Sukhdeo Sahu Vs. Hariram and others), relating to MACC No. 524/2019 (Sukhdeo Sahu Vs. Madan Kumar and others), seeking enhancement of composition.

2. Present miscellaneous appeals have been filed under Section 173 (1) of motor vehicle act against common award dated 06.08.2022 passed in MACC No. 524/2019, 525/2019 & 897/2019.

3. Learned counsel for appellant/owner of offending vehicle in MA No. 1333/2023, 1334/2023 and 5242/2022 has been permitted by this court to raise new ground in the appeal, i.e. that at the time of accident, driver of offending vehicle was not in a drunken state. Learned counsel for the appellant submits that in the instant case

respondent insurance company has not examined any doctor to establish that at the time of accident, driver of offending vehicle was under the influence of liquor. In the instant case, no breath, analyser test has been conducted. Hence, relying upon The divisional manager, national insurance Co Ltd Vs. Smt.Chinnamma and others (M.F.A. No. 971/2013 (MV) decided on first August 2 019), it is urged that, in the instant case, from evidence on record, it is not proved that at the time of accident, driver of offending vehicle was intoxicated. Therefore, tribunal erred in exonerating insurance company from liability to pay the compensation and saddling appellant with liability to pay the compensation. Hence, appeals filed by the appellant be allowed and appellant/owner be exonerated from liability to pay the compensation and insurance company be saddled with liability to pay the compensation.

4. Learned counsel for respondent insurance company submits that charge sheet has been filed under section 184 and 185 of motor vehicles act. In MLC exhibit D3, it is mentioned that driver of offending vehicle was under the influence of liquor. Insurance company has examined Dr Abhishek to prove the factum of driver of offending vehicle being under influence of liquor at the time of accident. It is also evident from record of the case that offending vehicle has hit persons by going on the wrong side of the road. Hence, manner of accident also shows that at the time of accident, driver of offending vehicle was drunken. Therefore, learned tribunal has rightly

applied principle of pay and recover. Hence, appeals filed by the owner of offending, vehicle be dismissed. It is also urged that tribunal has rightly determined permanent disability compensation awarded by the Tribunal is just and proper. Hence, appeal filed by claimants be also dismissed.

5. Learned counsel for the claimant Sukhdeo Sahu in MA No. 5199/2022 submits that in the instant accident, appellant/claimant's left hand has been amputated from shoulder. At the time of accident, appellant was working as mason. Therefore, permanent disability should have been determined as 75% & monthly income should have been determined as Rs.7700/-per month. Amount awarded under other various heads is also on the lower side. Hence, same also requires to be suitably enhanced.

6. I have heard learned counsel for the parties and perused record of the case.

7. So far as MA No. 1333/2023,1334/2023 and 5242/2022 are concerned, sole issue involved in above MAs is that whether at the time of accident, Hariram, driver of offending vehicle, had consumed liquor/alcohol, i.e., whether he was driving offending vehicle under the influence of liquor/alcohol & whether on account of same, it can be said that at the time of accident, offending vehicle was being driven in breach of terms & conditions of insurance policy & hence, insurance company is not liable to pay the compensation.

8. Before, examining and analysing the facts and evidence of the case and drawing final conclusions therefrom, it would be appropriate to refer and reproduce relevant provisions of law as well as relevant pronouncements of Hon'ble apex court.

9. Section 185 of the Motor Vehicles Act, 1988, reads as follows :-

> "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,--
>
> (a).
>
> has, in his blood, alcohol in any quantity, howsoever small the quantity may be, or
>
> (b). is under the 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 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 in capable of Exercising proper control over a motor vehicle."

10. Section 203 of the Motor Vehicles Act deals with breath tests and it reads as follows :-

> "1[(1) A police officer in uniform or an officer of the Motor Vehicles Department, as may be authorised in this behalf by that Department, may require any person driving or attempting to drive a motor vehicle in a public place to provide one or more specimens of breath for breath test there or nearby, if such police officer or officer has any reasonable cause to suspect him of having committed an offence under section 185:
>
> Provided that requirement for breath test shall be made (unless, it is made) as soon as reasonably practicable after the commission of such offence.]
>
> (2) If a motor vehicle is involved in an accident in a public place and a police officer in uniform has any reasonable cause to suspect that the person who was driving the motor vehicle at the time of the accident, had alcohol in his blood or that he was driving under the influence of a drug referred to in section 185 he may require the person so driving the motor vehicle, to provide a specimen of his breath for a breath test:--
>
> (a) in the case of a person who is at a hospital as an indoor patient, at the hospital,
>
> (b) in the case of any other person, either at or near the place where the requirement is made, or, if the

police officer thinks fit, at a police station specified by the police officer:

Provided that a person shall not be required to provide such a specimen while at a hospital as an indoor patient if the registered medical practitioner in immediate charge of his case is not first notified of the proposal to make the requirement or objects to the provision of a specimen on the ground that its provision or the requirement to provide it would be prejudicial to the proper care or treatment of the patient.

(3) If it appears to a police officer in uniform, in consequence of a breath test carried out by him on any person under sub-section (1) or sub-section (2), that the device by means of which the test has been carried out indicates the presence of alcohol in the person's blood, the police officer may arrest that person without warrant except while that person is at a hospital as an indoor patient.

(4) If a person, required by a police officer under sub-section (1) or sub-section (2) to provide a specimen of breath for a breath test, refuses or fails to do so and the police officer has reasonable cause to suspect him of having alcohol in his blood, the police officer may arrest him without warrant except while he is at a hospital as an indoor patient.

(5) A person arrested under this section shall while at a police station, be given an opportunity to provide a specimen of breath for a breath test there.

(6) The results of a breath test made in pursuance of the provisions of this section shall be admissible in evidence.

Explanation.-- For the purposes of this section, "breath test", means a test for the purpose of obtaining an indication of the presence of alcohol in a person's blood carried out, on one or more specimens of breath provided by that person, by means of a device of a type approved by the Central Government, by notification in the Official Gazette, for the purpose of such a test."

11 Section 204 of the Motor Vehicles Act deals with laboratory test & it provides as under :

"(1) A person, who has been arrested under section 203 may, while at a police station, be required by a police officer to provide to such registered medical practitioner as may be produced by such police officer, a specimen of his blood for a Laboratory test,— (a) it appears to the police officer that the device, by means of which breath test was taken in relation to such person, indicates the presence of alcohol in the blood of such person, or (b) such person, when given the opportunity to submit to a breath test, has refused, omitted or failed to do so: Provided that where the person required to provide such specimen is a female and the registered medical practitioner produced by

such police officer is a male medical practitioner, the specimen shall be taken only in the presence of a female, whether a medical practitioner or not. (2) A person while at a hospital as an indoor patient may be required by a police officer to provide at the hospital a specimen of his blood for a laboratory test:— (a) if it appears to the police officer that the device by means of which test is carried out in relation to the breath of such person indicates the presence of alcohol in the blood of such person, or (b) if the person having been required, whether at the hospital or elsewhere, to provide a specimen of breath for a breath test, has refused, omitted or failed to do so and a police officer has reasonable cause to suspect him of having alcohol in his blood: Provided that a person shall not be required to provide a specimen of his blood for a laboratory test under this sub-section if the registered medical practitioner in immediate charge of his case is not first notified of the proposal to make the requirement or objects to the provision of such specimen on the ground that its provision or the requirement to provide it would be prejudicial to the proper care or treatment of the patient. (3) The results of a laboratory test made in pursuance of this section shall be admissible in evidence. Explanation.—For the purposes of this section, "laboratory test" means the analysis of a specimen of blood made at a laboratory established, maintained or recognised by the Central Government or a State Government."

12. Section 205 of the Motor Vehicles Act deals with presumption of unfitness to drive and it reads as follows:-

> "In any proceeding for an offence punishable under section 185 if it is proved that the accused, when requested by a police officer at any time so to do, had refused, omitted or failed to consent to the taking of or providing a specimen of his breath for a breath test or a specimen of his blood for a laboratory test, his refusal, omission or failure may, unless reasonable cause therefor is shown, be presumed to be a circumstance supporting any evidence given on behalf of the prosecution, or rebutting any evidence given on behalf of the defence, with respect to his condition at that time."

13. Hon'ble apex court in ***State vs. Sanjeev Nanda, reported in (2012) 8 SCC 450 & IFFCO-TOKIO GENERAL INSURANCE COMPANY LIMITED VS. PEARL BEVERAGES LIMITED, reported in (2021) 7 SCC 704 (3 JUDGE BENCH)*** has dealt issue involved in the case at length.

14. Hon'ble apex court in ***Sanjeev Nanda (supra)***, dealing with the issue as to when breath analyser test/blood test is required to be conducted, has held as under :-

> "82. The accused, in this case, escaped from the scene of occurrence, therefore, he could not be subjected to breath analyser test instantaneously, or to take or provide specimen of his breath for a breath test or a specimen of his blood for a laboratory test. The cumulative effect of the provisions, referred to above,

would indicate that the breath analyser test has a different purpose and object. The language of the above sections would indicate that the said test is required to be carried out only when the person is driving or attempting to drive the vehicle. The expressions "while driving" and "attempting to drive" in the above sections have a meaning "in praesenti". In such situations, the presence of alcohol in the blood has to be determined instantly so that the offender may be prosecuted for drunken driving. A breath analyser test is applied in such situations so that the alcohol content in the blood can be detected. The breath analyser test could not have been applied in the case on hand since the accused had escaped from the scene of the accident and there was no question of subjecting him to a breath analyser test instantaneously. All the same, the first accused was taken to AIIMS Hospital at 12.29 p.m. on 10-1-1999 when his blood sample was taken by Dr Madhulika Sharma, Senior Scientific Officer (PW 16). While testing the alcohol content in the blood, she noticed the presence of 0.115% weight/volume ethyl alcohol. The report exhibited as PW-16/A was duly proved by the doctor. Over and above, in her cross-examination she had explained that 0.115% would be equivalent to 115 mg per 100 ml of blood and deposed that as per traffic rules, if the

person is under the influence of liquor and alcohol content in blood exceeds 30 mg per 100 ml of blood, the person is said to have committed the offence of drunken driving.

15. Analysing relevant provisions i.e., section 185, 203 etc. of Motor Vehicles Act, Hon'ble apex court in ***IFFCO-TOKIO GENERAL INSURANCE COMPANY LIMITED (SUPRA)***, has held as under :-

"54. A conspectus of the aforesaid provisions would lead us to the following conclusions:

54.1.Section 185 of the Motor Vehicles Act creates a criminal offence. The short title of Section 185 undoubtedly proclaims that it purports to deal with driving by a drunken person or by a person under the influence of drugs. The offence as far as driving by a drunken person is concerned, was built around breach of an objective standard viz. the presence of alcohol in the driver in excess of 30 mg per 100 ml of blood detected in a test of breath analyser. The Section mandates the proving of the objective criteria of presence of alcohol exceeding 30 mg per 100 ml of blood in a test by a breath analyser.

54.2.It is here that Section 203 of the Motor Vehicles Act becomes apposite. It empowers the police officer to require any person driving or attempting to drive motor vehicle in a public place to provide one or more specimens of breath for breath test, if police officer or officer of the Motor Vehicle Department has reasonable cause to suspect the driver has committed an offence under Section 185. Section 203(2) deals with the

situation where the vehicle is involved in an accident in a public place. In such circumstances, on a police officer in uniform entertaining any reasonable cause to suspect that the person driving the vehicle, at the time of the accident, had alcohol in his blood, inter alia, he may require the person to provide specimen of his breath in the breath test in the manner provided. Section 203(6) declares that the result of the breath test made under Section 203 shall be admissible in evidence. Section 203 contemplates arrest without warrant being effected, if the test indicated the presence of alcohol in the breath test. Section 204 follows up on a person who is arrested under Section 203. It, inter alia, provides that a person who has been arrested under Section 203 is to provide to such medical practitioner as may be produced by such police officer, a specimen of his blood for a laboratory test, if either it appears to the police officer that the breath test reveals the presence of alcohol in the blood of such person or such person when given the opportunity to submit to a breath test, has refused, omitted or failed to do so. The result of the laboratory test is also made admissible.

55. It is clear that Section 185 deals with driving or attempting driving of a motor vehicle by a person with alcohol in excess of 30 mg per 100 ml in blood which is detected in a test of breath analyser. Being a criminal offence, it is indisputable that the ingredients of the offence must be established as contemplated by law which means that the case must be proved beyond reasonable doubt and evidence must clearly indicate the

level of alcohol in excess of 30 mg in 100 ml blood and what is more such presence must be borne out by a test by a breath analyser. We may also notice that with effect from 1-9-2019, the following words have been added to Section 185, that is "or in any other test including laboratory test".

56.It is to be noticed that this Court had occasion to deal with the question whether the prosecution under Section 185 can succeed in the absence of a test by a breath analyser. In the decision reported in State v. Sanjeev Nanda [State v. Sanjeev Nanda, (2012) 8 SCC 450 : (2012) 4 SCC (Civ) 487 : (2012) 3 SCC (Cri) 899] , the accused escaped from the scene of occurrence. He could not, therefore, be subjected to breath test analyser instantaneously or to provide a specimen of his breath for a breath test or a specimen for his blood for a laboratory test. Dealing with these provisions, K.S. Radhakrishnan, J., in his concurring judgment has held as follows : (SCC pp. 480-81, paras 82-84)

> "82. The accused, in this case, escaped from the scene of occurrence, therefore, he could not be subjected to breath analyser test instantaneously, or to take or provide specimen of his breath for a breath test or a specimen of his blood for a laboratory test. The cumulative effect of the provisions, referred to above, would indicate that the breath analyser test has a different purpose

and object. The language of the above sections would indicate that the said test is required to be carried out only when the person is driving or attempting to drive the vehicle. The expressions “while driving” and “attempting to drive” in the above sections have a meaning “in praesenti”. In such situations, the presence of alcohol in the blood has to be determined instantly so that the offender may be prosecuted for drunken driving. A breath analyser test is applied in such situations so that the alcohol content in the blood can be detected. The breath analyser test could not have been applied in the case on hand since the accused had escaped from the scene of the accident and there was no question of subjecting him to a breath analyser test instantaneously. All the same, the first accused was taken to AIIMS Hospital at 12.29 p.m. on 10-1-1999 when his blood sample was taken by Dr Madhulika Sharma, Senior Scientific Officer (PW 16). While testing the alcohol content in the blood, she noticed the presence of 0.115% weight/volume ethyl alcohol. The report exhibited as PW-16/A was duly proved by the doctor. Over and above, in her cross-examination she had explained that 0.115% would be equivalent to 115 mg per 100 ml of blood and deposed that as per traffic rules, if

the person is under the influence of liquor and alcohol content in blood exceeds 30 mg per 100 ml of blood, the person is said to have committed the offence of drunken driving.

83. Further, the accused was also examined in the morning of 10-1-1999 by Dr T. Milo, PW 10, Senior Resident, Department of Forensic Medicine, AIIMS, New Delhi who reported as follows:

‘On examination, he was conscious, oriented, alert and cooperative. Eyes were congested, pupils were bilaterally dilated. The speech was coherent and gait unsteady. Smell of alcohol was present.’

84. Evidence of the experts clearly indicates the presence of alcohol in blood of the accused beyond the permissible limit, that was the finding recorded by the courts below. The judgments [Ed. : Reference may be made to the decisions in State of U.P. v. Singhara Singh, AIR 1964 SC 358 : (1964) 1 Cri LJ 263 (2) and Nazir Ahmad v. King Emperor, 1936 SCC OnLine PC 41 : (1935-36) 63 IA 372.] referred to by the counsel that if a particular procedure has been prescribed under Sections 185 and 203, then that procedure has to be followed, has no application to the facts of this case. The

> judgments [Ed. : Reference may be made to the decisions in Rowlands v. Hamilton, (1971) 1 WLR 647 (HL) and Gumbley v. Cunningham, 1989 AC 281 : (1989) 2 WLR 1 (HL).] rendered by the House of Lords were related to the provision of the Road Safety Act, 1967, the Road Traffic Act, 1972, etc. in UK and are not applicable to the facts of this case."

16. So far as scientific aspects of alcohol are concerned, Hon'ble apex court in ***IFFCO-TOKIO GENERAL INSURANCE COMPANY LIMITED (Supra)*** has held as under :-

> "61.In Modi's Medical Jurisprudence and Toxicology, 26th Edn., it is, inter alia, stated:
>
> "Pure ethyl alcohol is a transparent, colourless, mobile and volatile liquid, having a characteristic spirituous odour and a burning taste. Ethyl alcohol exists in alcoholic beverages in varying proportions. Absolute alcohol (alcohol dehydratum) contains 99.95% of alcohol.
>
> Alcohol acts differently on different individuals and also on the same individual at different times. The action depends mostly on the environment and temperature of the individuals and upon the degree of dilution of the alcohol consumed. The habitual drinker usually shows fewer effects from the same dose of alcohol.

Widmark's Formula.—The basis for calculating the approximate quantity of alcohol in the body, after equilibrium between the blood and tissues has been reached, is by Widmark's formula:

a = cpr

(i) a represents the amount of alcohol expressed in grams;

(ii) c, the amount of alcohol in grams per kg estimated in the blood;

(iii) p is the weight of the person in kg, and

(iv) r is the value obtained by dividing the average concentration of alcohol in the body by the concentration of alcohol in the blood. This is constant and the average is + 0.085 for men and + 0.055 for women.

For a male with a body weight of 69.85 kg and assuming average alcohol content, having 45 mg in the blood or 60 mg/100 ml of alcohol in urine, the minimum amount consumed must be 2 fluid oz of whisky (70% proof = 9.98 g/fluid oz) and with 55 mg in blood or 73 mg/100 ml in urine, the minimum amount of beer consumed must be 1½ pints (ordinary beer = 14.7 g/pint).” [We may profitably remind ourselves in Kennedy v. Smith, 1975 SC 266 (see para 25 of the judgment), it was a case of one-and-a-half pints of lager (a kind of beer) and it would have meant today 55 mg/100 ml well over the 30 mg/100 ml limit in India.]

"… Taken orally, alcohol is quickly absorbed as it is, by simple diffusion mostly from the small intestine, less than 20% from the stomach and circulates in the blood. The absorption of alcohol is facilitated if it is swallowed rapidly in a concentrated solution on an empty stomach, and it is delayed if a weaker solution is slowly drunk while the stomach is full of food; particularly, if it is fatty or contains much proteins. Seventeen to twenty per cent of ingested alcohol may not be absorbed in the blood stream if there is food in the stomach. The rate of absorption of 6% alcohol is 4.7ml/minute. Even drinks mixed with carbonated soda increase absorption. Milk is a potent factor in delaying the absorption of alcohol. Alcohol reaches its maximum concentration in the blood within approximately 30 minutes to about 2 hours after it is taken and thus concentration is ordinarily proportional to the amount consumed. While the concentration of alcohol that is excreted in the urine reaches its maximum level in about 20-25 minutes later than in the blood, the range of the fall is parallel to the fall in the level of alcohol in the blood. The concentration of alcohol in the urine is usually 20-30% higher than that in the blood and is fairly constant. The distribution of alcohol after absorption is throughout the fluids and tissues of the body in proportion to their water content and is the least in fat and bones.

The peculiar feature of metabolism of alcohol is that a fixed quantity of alcohol is metabolised in unit

time. This is called the zero order kinetic of metabolism (most of the drugs are metabolised by first order kinetics where a certain proportion of the drug is metabolised and the absolute quantity metabolised quantity will go on decreasing as the blood level decreases). About 90% of the consumed alcohol is metabolised in the body, chiefly by oxidation in the liver, which contains the enzyme alcohol dehydrogenase @ about 9-15 ml/hour which is equal to about half a peg of whisky. The result is lowering of alcohol in blood by about 12-15 mg/hour.

***

Alcohol from the blood passes into the alveolar air through the lungs and during the active absorption stage, a breath analysis will give reliable information. …"

(emphasis supplied)

62. The learned author discusses about "acute alcohol intoxication". He also talks about chronic poisoning of habitual drinker. We may, at once, observe that under the exclusion clause, the Court need not be detained by either condition. In other words, it is not necessary for the insurer to establish that there was acute alcohol intoxication and equally, it need not be shown that the vehicle was driven by a person who was a chronic alcoholic. All that is required is to show that at the time of driving the vehicle, resulting in the

accident, the driver was under the influence of alcohol. In this regard, we may notice the following observations of Modi:

"In order to ascertain whether a particular individual is drunk or not, a medical practitioner should bear the following points in mind:

1. The quantity taken is no guide.

2. An aggressive odour of alcohol in the breath, loss of clearness of intellect and control of himself, an unsteady gait, a vacant look, dry and sticky lips, congested eyes, sluggish and dilated pupils, increased pulse rate, an unsteady and thick voice, talking at random and want of perception of the passage of time, are the usual signs of drunkenness. However, the smell of an alcohol drink can persist in the breath for many hours after the alcohol has been excreted from the body, as it is due to non-alcoholic constituents (congeners) in the drink."……

(emphasis supplied)

63. We notice that blood alcohol concentration or BAC is, thus, the concentration of alcohol in a person's blood. In India, the permissible BAC level is pegged at 30 mg of alcohol in 100 ml of blood in Section 185 of the MV Act, 1988. This corresponds to 0.03 percentage of alcohol in the blood, beyond which, it is an offence under Section 185 to drive or attempt to drive as declared. As noticed, BAC is correlated to a number of variables. It is affected

by gender and body weight. The male has more water content than a female. On same quantity drunk, the latter builds up greater BAC than the former. BAC is also affected clearly on whether the person drank on an empty stomach or not. The liver metabolises ordinarily a standard drink at the rate of a drink in an hour. The frequency, at which the drinks are taken, impacts the BAC level. Even the genes play their part."

17. Impact of alcohol consumption on driving has been considered by Hon'ble apex court in ***Sanjeev Nanda (supra)*** & it has observed as follows :-

"86.Drunken driving has become a menace to our society. Every day drunken driving results in accidents and several human lives are lost, pedestrians in many of our cities are not safe. Late night parties among urban elite have now become a way of life followed by drunken driving. Alcohol consumption impairs consciousness and vision and it becomes impossible to judge accurately how far away the objects are. When depth perception deteriorates, eye muscles lose their precision causing inability to focus on the objects. Further, in more unfavourable conditions like fog, mist, rain, etc., whether it is night or day, it can reduce the visibility of an object to the point of being below the limit of discernibility. In short, alcohol leads to loss of coordination, poor judgment, slowing down of reflexes and distortion of vision."

18. In the context of question involved in the case, issue relating to burden of proof and application of section 106 of the Evidence Act has been examined in ***IFFCO TOKIO GENERAL INSURANCE COMPANY LIMITED (supra)*** & Hon'ble apex court has held as under :-

> "78. Coming to the question again on burden of proof, insofar as the appellant insurer seeks to establish exclusion of liability is concerned, the burden of proof is upon it, subject to what we hold
>
> 79.In the context of question relating to burden of proof, in the case of this nature, we cannot but notice Section 106 of the Evidence Act. Section 106 of the Evidence Act speaks of the burden of proving facts which are in the special knowledge of the person. Section 106 of the Evidence Act reads as follows:
>
> "**106. Burden of proving facts specially within knowledge**.—When any fact is specially within knowledge of any person the burden of proving that fact is upon him."
>
> This Section enshrines the principle which conduces to establishing facts when those facts are especially within the knowledge of a party. There can be no doubt this is a salutary provision which applies to both civil and criminal matters also. We do notice V. Kishan Rao [V. Kishan Rao v. Nikhil Super Speciality Hospital, (2010) 5 SCC 513 : (2010) 2 SCC (Civ) 460] , where this Court held as follows : (SCC p. 521, para 13)

"13. Before the District Forum, on behalf of Respondent 1, it was argued that the complainant sought to prove Yashoda Hospital record without following the provisions of Sections 61, 64, 74 and 75 of the Evidence Act, 1872. The Forum overruled the objection, and in our view rightly, that complaints before the Consumer Fora are tried summarily and the Evidence Act in terms does not apply. This Court held in Malay Kumar Ganguly v. Dr Sukumar Mukherjee [Malay Kumar Ganguly v. Sukumar Mukherjee, (2009) 9 SCC 221 : (2009) 3 SCC (Civ) 663 : (2010) 2 SCC (Cri) 299] that provisions of the Evidence Act are not applicable and the Fora under the Act are to follow the principles of natural justice (see para 43, p. 252 of the report)."

80.Even if, Section 106 of the Evidence Act, 1872 as such is not applicable to the Consumer Protection Act, there can be no reason why the principle cannot apply to proceedings under the Consumer Protection Act. We may notice a decision of this Court in Shambu Nath Mehra v. State of Ajmer [Shambu Nath Mehra v. State of Ajmer, AIR 1956 SC 404 : 1956 Cri LJ 794] . Para 11 of the said judgment reads as under : (AIR p. 406)

"11. This lays down the general rule that in a criminal case the burden of proof is on the prosecution and Section 106 is certainly not intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult, for the prosecution to establish facts which are "especially" within the

knowledge of the accused and which he could prove without difficulty or inconvenience.

The word "especially" stresses that. It means facts that are pre-eminently or exceptionally within his knowledge. If the section were to be interpreted otherwise, it would lead to the very startling conclusion that in a murder case the burden lies on the accused to prove that he did not commit the murder because who could know better than he whether he did or did not. It is evident that that cannot be the intention and the Privy Council has twice refused to construe this section, as reproduced in certain other Acts outside India, to mean that the burden lies on an accused person to show that he did not commit the crime for which he is tried. These cases are Attygalle v. R. [Attygalle v. R., 1936 SCC OnLine PC 20 : AIR 1936 PC 169] and Seneviratne v. R. [Seneviratne v. R., 1936 SCC OnLine PC 57 : (1936) 3 All ER 36] , All ER p. 49."

……(emphasis supplied)

The same view has been taken in Murlidhar v. State of Rajasthan [Murlidhar v. State of Rajasthan, (2005) 11 SCC 133 : (2006) 1 SCC (Cri) 86] .

81. If we apply the principle of Section 106 of the Evidence Act, would it not produce the following result?

82. The respondent set up the case that the driver had not consumed any alcohol. In the very next sentence, it is pleaded that further assuming that he had consumed alcohol, as he was not intoxicated the exclusion

clause is not attracted. When it came to affidavit evidence, however, the driver has not deposed that he had not consumed intoxicating liquor. He has only stated that he was neither under the influence of intoxicating liquor or drugs at the time of the accident. In view of the evidence that pointed to the driver smelling of alcohol and the absence of any evidence by even the driver that he has not consumed alcohol and as even found by the National Commission, it would appear to be clear that the car was driven by the driver after having consumed alcohol. In such a case as to what was the nature of the alcohol and what was the quantity of alcohol consumed, and where he had consumed, it would certainly be facts within the special knowledge of the person who has consumed the alcohol. The driver has not, for instance also, once we proceed on the basis that he has consumed alcohol, indicated when he has consumed the alcohol. It would be "disproportionately difficult" as laid down by this Court for the insurer in the facts to have been proved as to whether the driver has consumed liquor on an empty stomach or he had food and then consumed alcohol or what was the quantity and quality of the drink (alcohol content) which would have been circumstances relevant to consider as to whether he drove the vehicle under the influence of alcohol. The driver has merely stated that he was not under the influence of intoxicating liquor and he was in his full senses."

19. Last question in the context of issue involved in the case is that if there is no breath analyser/blood alcohol concentration (BAC) report on record, then, how it is to be proved/established that at the time of accident, driver of offending vehicle was driving it after having consumed liquor/alcohol. Hon'ble apex court has examined above aspect in ***IFFCO-TOKIO GENERAL INSURANCE COMPANY LIMITED (supra)*** & has held as under :-

> "53.If in a case, without there being any blood test, circumstances, associated with effects of consumption of alcohol, are proved, it may certainly go to show that the person who drove the vehicle, had come under the influence of alcohol. The manner, in which the vehicle was driven, may again, if it unerringly points to the person having been under the influence of alcohol, be reckoned. Evidence, if forthcoming, of an unsteady gait, smell of alcohol, the eyes being congested, apart from, of course, actual consumption of alcohol, either before the commencement of the driving or even during the process of driving, along with the manner in which the accident took place, may point to the driver being under the influence of alcohol. It would be a finding based on the effect of the pleadings and the evidence.
>
> 105.We would think that it would not be appropriate to conflate the two situations viz. the requirement under Section 185 of the MV Act and an exclusion clause in the contract of insurance in

question. The requirements of drunken driving under Section 185 of the MV Act, can be proved only with reference to the presence of the alcohol concentration which is 30 mg per 100 ml of blood. This corresponds to 0.03% BAC. In fact, it is noteworthy that in Sweden and in China, it is 0.02.

106.As far as establishing the contention by the insurer in a clause of the nature, we are dealing with viz. a case where the insurer alleges that the driver was driving the vehicle under the influence of alcohol, it is all very well, if there is a criminal case and evidence is obtained therein, which shows that the driver had 30 mg/100 ml or more. Or in other words, if the BAC level was 0.03 or more. We would think that in a case where, there is a blood test or breath test, which indicates that there is no consumption at all, undoubtedly, it would not be open to the insurer to set up the case of exclusion. The decision of this Court in Bachubhai Hassanalli Karyani [Bachubhai Hassanalli Karyani v. State of Maharashtra, (1971) 3 SCC 930 : 1972 SCC (Cri) 178] was rendered under Section 117 of the Motor Vehicles Act, 1939, prior to its substitution in 1977, and what is more it turned on the evidence also.

107.However, in cases, where there is no scientific material, in the form of test results available, as in the case before us, it may not

disable the insurer from establishing a case for exclusion. The totality of the circumstances obtaining in a case, must be considered. The scope of the enquiry, in a case under the Consumer Protection Act, which is a summary proceeding, cannot be lost sight of. A consumer under the Act can succeed only on the basis of proved deficiency of service. The deficiency of service would arise only with reference to the terms of the contract and, no doubt, the law which surrounds it. If the deficiency is not established, having regard to the explicit terms of the contract, the consumer must fail.

108.It is, in this regard, we would think that an exclusion of the nature involved in this case, must be viewed. We can safely proceed in this case, on the basis that the person driving the vehicle had consumed alcohol. We can proceed on the basis that he drove the car after having consumed alcohol. It is true that the exact quantity, which he had consumed, is not forthcoming. The fact that he smelt of alcohol, is indisputable, having regard to the contents of the FIR and also the MLC. He was accompanied by PW 3. PW 3 also smelt of alcohol. The incident took place in the early hours of 22-12-2007. It happened at New Delhi. It is further clear that it happened in the close vicinity of India Gate. The driver and the passenger were in their twenties. At that time of the day viz. the early hours, the version of the parties must be

appreciated without reference to any possibility of the accident happening as a result of any sudden incident happening, as for instance, attempted crossing of a person or an animal, which necessitated the vehicle, being involved in the accident, in the manner, which is borne out by the FIR. There is simply no such case for the respondent.

109.It is clear that we can safely proceed on the basis that the vehicle was driven in a rash and negligent manner, having regard to the conviction entered under Section 279 IPC. This is also to be viewed in the context of the respondent putting up the case that the driver had not consumed alcohol and that the case, even under Section 279 IPC was a false case. Still further, if we examine the exact nature of the accident, it speaks eloquently for the influence, which the consumption of alcohol had produced on the driver of the vehicle. The car, which is undoubtedly a Porsche, which we presume, has a very powerful engine and capable of achieving enormous speed, is reported to have gone out of control and hit at a massive force with the footpath of the road. It overturned. It caught fire. In fact, it is the case of the respondent that the car was a complete wreck. It was described as a total loss. The vehicles of the fire brigade came to douse the fire. We are conscious that speed and its impact can be relative to the road, the traffic and the speed limits. The FIR refers to the car

being driven “very fast”. A person can be rash and negligent without having been under the influence of alcohol. At the same time, being under the influence of alcohol can also lead to rash and negligent driving. They are not incompatible.

110.This Court would not be remiss, if it takes into account the improbability of any traffic worth the name at the time of the accident. While we may be in agreement with the respondent that it would be for the insurer to make out a case, for pressing the exclusion clause, we cannot be oblivious to the fact that there is no material in the pleadings of the respondent or in the evidence tendered for explaining the accident. We can take judicial notice of the fact that the roads in the capital city, particularly in the area, where the accident occurred, are sufficiently wide and the vehicle dashing against the footpath and turning turtle and catching fire, by itself, does point to, along with the fact that the alcohol which was consumed manifests contemporaneously in the breath of the driver, to conclude that alcohol did play the role, which, unfortunately, it is capable of producing.

111.Applying the principles, which have been referred to, to the facts of the present case, we summarise the following conclusions:

111.1.Firstly, in the MLC, in regard to the driver, the report, inter alia, indicates that smell of alcohol (+).

111.2.Pertinently, the very same report is there in regard to the co-passenger. Both the driver and the passenger were in the late twenties.

111.3.The smell of alcohol has been discerned by a medical practitioner.

111.4.Though the case was set up by the respondent that the driver had not consumed alcohol, the driver, in his evidence (affidavit evidence), has not even stated that he has not consumed alcohol, as was the specific case set up in the complaint. On the other hand, the alternate case, which was set up that he was not under the influence of alcohol, alone was deposed to. This is even though the respondent had reiterated in the rejoinder affidavit that the driver of the vehicle had not consumed alcohol or any other intoxicating drink/drug.

111.5.Even the NCDRC has proceeded on the basis that the driver had consumed some alcohol. Therefore, the conclusion is inevitable that the appellant has established that the driver had consumed alcohol and was driving the vehicle, when the accident took place.

111.6.There is no evidence as to the quantity of alcohol consumed. It is also true that there is no evidence other than the smell of alcohol being detected on both the driver and the co-passenger, of any other effects of consumption of alcohol.

111.7.The requirement under Section 185 of the Motor Vehicles Act is not to be conflated to what constitutes driving under the influence of alcohol under the policy of insurance in an own-damage claim. Such a claim must be considered on the basis of the nature of the accident, evidence as to drinking before or during the travel, the impact on the driver and the very case set up by the parties.

111.8.The other aspect, which is pressed is, as regards the manner in which the accident itself occurred. In this regard, it is clear that in any such case, this is an important circumstance, which may establish that the driver was under the influence of alcohol. Driving, while under the influence of alcohol, is to be understood as driving when, on account of consumption of alcohol, either before commencement of driving or during the driving and before the accident, when consumption of alcohol by the driver would affect (influence) his faculties and his driving skills. We would expatiate and hold that it means that the alcohol consumed earlier was the cause or it contributed to the occurrence of the accident.

111.9.The respondent has no case that the accident occurred as a result of a sudden event which took place, which necessitated the car being driven into the footpath. For instance, if there was sudden attempted human or animal crossing, and the driver to obviate any such accident, may drive in the manner, which culminated in the accident. It would be a case where the driver would still be in control of his faculties even while having caused the accident. There is material (particularly, in the nature of the summary proceedings) under the Consumer Protection Act, in the form of the FIR. The police officer, who has lodged the information has specifically stated that the car was being driven in a very fast manner.

111.10.The driver, in his chief-examination, has not given any explanation, whatsoever, for the happening of the accident. He does not have a case that there was any breakdown in the car or of the brakes.

111.11.The driver has pleaded guilty and stands convicted under Section 279 IPC, which penalises rash or negligent driving. A person, who is not under the influence of alcohol, can be rash and negligent. But a person, who is under the influence of alcohol, can also be rash and negligent. In other words, they are not wholly incompatible. On the other hand, being under the

> influence of alcohol, aggravates the possibility of rash and negligent driving as it can be the proximate cause. The car was driven by the driver aged about 27. Both, he and his companion had, indeed, consumed alcohol. The accident took place when the road would have been wholly free from any traffic (there is no case whatsoever that the accident was caused by another vehicle being driven in any manner or any person or animal attempting to cross the road or otherwise deflecting the attention of the driver). The accident has no apparent cause, even according to the respondent and the driver and his companion (PW 3), yet we are asked to believe that the driver was in full control of his senses. If the State Commission, in the circumstances, believed the version of the respondent, in a summary proceeding, we would believe that NCDRC erred in interfering, on the reasoning, which we find as erroneous."

20. Now facts & evidence of the case will be discussed & examined in the light of above legal provisions & principles of law enunciated by Hon'ble apex court in above pronouncements.

21. Admittedly in the instant case, there is no breath analyser/blood alcohol concentration (BAC) report on record.

22. So far as relevant documentary evidence available on record of the case is concerned, it is as follows:-

22.1. Dehati Nalisi has been lodged by eye witness/applicant witness Ram Swaroop

immediately after the accident & therein number/name of driver of offending vehicle is clearly mentioned. FIR Exh.P-2 has been registered on the basis of above Dehati Nalisi.

22.2. After investigation into present accident, Exh.P1's chargesheet has been filed against driver of offending vehicle u/s 279, 337, 338, 304 & 308 of IPC & u/s 184, 185 of Motor Vehicles Act.

22.3. As per MLC Exh.D-3 of accused Hariram (driver of offending vehicle), he has been medically examined on 21.06.2019 at 1.10 AM & in the instant case accident occurred on 20.06.2019 at 23.30 (11.30 PM). In medical requisition form/MLC of accused Hariram Exh.D-3, it is mentioned that on account of being drunk, above truck driver is unable to control/balance himself. In above MLC, it is mentioned that smell of alcohol was coming out of the mouth of Hariram.

22.4 From site map Exh.D-10, it is evident that the road is straight at the accident site & on both the side of the road, there are houses & shops & there is also nearby Nandan Kanan marriage garden. From evidence on record, both oral & documentary, it is quite evident that marriage party was going to Nandan Kanan marriage garden & when accident

occurred, marriage party was about to reach Nandan Kanan marriage garden & marriage party was having its own persons carrying light. Thus, at the time of accident, scene of accident was quite/sufficiently lighted up/there was enough light at the scene of accident. Further, in the instant case, claimants/victims/injured/deceased were part of above marriage party/persons carrying light in the marriage party.

23. So far as relevant oral testimonies of applicant witnesses & non-applicant witnesses are concerned, while assessing/examining/evaluating the same, it has to be kept in mind that in the instant case, driver of offending vehicle is non-applicant No.1 & owner of offending vehicle is non-applicant No.2 & they have remained present before Tribunal & have filed written reply to claim petitions & have also cross-examined applicant/non-applicant witnesses.

24. Injured Sukhdev Sahu and eye witness Ramswarup have deposed in their examination in chief that non-applicant No.1, driver of offending vehicle, driving the vehicle rashly & negligently & waveringly hit members of the marriage party after going in the wrong side. Injured Sukho Bai has deposed in her examination in chief that non-applicant No.1, came driving truck bearing registration No. M.P.20 HB-1786 from Kanti side rashly & negligently & hit him/Sheela Kol & other members of marriage party.

25. Perusal of record of the case reveals that non-applicant No.3, insurance company, has examined ASI Vinod Patel & Dr. Abhishek. As per deposition of ASI Vinod Patel, he had investigated present

accident & after investigation, filed chargesheet Exh.D-2. He had found in the case that Hariram, driver of truck bearing registration No. M.P.-20-H.B.-1786, being under the influence of alcohol, had caused accident hitting Sheela Bai Kol, Sukhdev Sahu, Sukho Kol & Tamanna Gupta, moving along wedding procession, by driving the truck speedily & negligently & waveringly.

26. Non-applicant No.3 witness Dr. Abhishek, medical officer government district hospital, Kanti, had examined non-applicant No.1 Hariram, driver of offending vehicle, almost within two hours of the accident & prepared MLC Exh.D-3. As per Dr. Abhishek's deposition, he found multiple abrasions & lacerated wound on the person of Hariram & smell of alcohol was coming out of the mouth of him.

27. Perusal of cross-examination of applicant witnesses Sukhdev, Ramswarup & Sukhobai on behalf of driver and owner of offending vehicle reveals that only suggestion given to Sukhdev is that no accident occurred from truck bearing registration No. M.P. 20-HB-1786, only suggestion given to Ram Sarup is that he is not an eye witness and incident did not occur from the front and only suggestion given to Sukhobai is that she did not witness that number and colour of truck and no accident occurred with him. Further, from cross examination of Investigating officer Vinod Patel, it is apparent that only suggestion given to him is that no accident occurred from the vehicle and he did not sent driver for medical examination. Perusal of deposition of Dr. Abhishek reveals that he has not been cross-examined on behalf of driver and owner of offending, vehicle and in the deposition sheet of above witness, it is mentioned " cross examination for non-applicant No. 1 & 2- None".

28. In the instant case, driver and owner of offending vehicle has filed reply to claim petition filed by claimants and therein, they have completely denied the fact of accident by offending vehicle but has admitted that non-applicant No.1 drives the offending vehicle. In above reply, it is not mentioned that if instant accident did not occur from offending vehicle, then, on the date & time of present accident, where was non-applicant/offending vehicle & why offending vehicle has been falsely implicated in the present accident.

29. From evidence on record, it is clearly established/proved that instant accident has been caused by rash & negligent driving of offending vehicle & at the time of accident, it was being driven by non-applicant No.1.

30. Thus, perusal of written statement filed by owner & driver of offending vehicle reveals that therein, it is not mentioned that driver Hariram, while driving offending vehicle at the time of accident, had not consumed alcohol & perusal of cross examinations of applicant witnesses as well as non-applicant no. 3's witnesses on behalf of owner & driver of offending vehicle, reveals that no such suggestion has been given to them that driver Hariram, while driving vehicle at the time of accident, had not consumed alcohol. Further, in the instant case, Hariram, who was driving offending vehicle at the time of accident, did not enter into the witness box & get himself examined whereas he was the most material witness & no explanation has been furnished for the same. Hence, an adverse inference is to be drawn against driver Hariram that while driving offending vehicle at the time of accident, he was intoxicated, that's why, he did not examine himself.

31. Further, while evaluating/assessing/examining facts & evidence of the case & probative/evidentiary value of the same/to be attached to them, it has also to be kept in mind :-

(i) That, section 185, 203, 204 & 205 of the Motor Vehicles Act primarily/basically/substantially relate to criminal offence/criminal liability & a criminal offence is required to be proved beyond reasonable doubt;

(ii) That, on the contrary, an application under section 166 of the Motor Vehicles Act & question relating to liability to pay the compensation is civil in nature, it has to be decided on the basis of preponderance of probability. Further, proceedings under section 166 of the Motor Vehicles Act are essentially summary in nature;

(iii) That, an insurance policy is a contract between insured & insurer. Therefore, any liability under the insurance policy is to be determined essentially as per/in accordance with terms & conditions of the insurance policy & not on any other grounds;

32. In the instant case, insurance policy & terms & conditions attached thereto is Exh.D-1& clause 2 (c) of terms & conditions of above of above insurance policy provides that :-

"2-The company shall not be liable to make any payment in respect of :

(C). Any accidental loss or damage suffered whilst the insured or any person driving with the knowledge and consent of the insured is under the influence of intoxicating liquor or drugs."

33. Thus, in Exh.D-1 & terms & conditions attached thereto, there is no reference to section 185, 203, 204 & 205 of the Motor Vehicles Act & therein, no minimum content/amount of alcohol etc. in blood is mandatory so as to attract application of above clause mentioned in terms & conditions attached with insurance policy Exh.D-1 for excluding/exempting/exonerating insurance company from liability to pay the compensation.

34. **T**hus, from discussion/analysis/assessment of facts/averments/evidence on record/relevant legal provisions & pronouncements in preceding paras, following facts stands established/following conclusions can be safely drawn:-

(i). That, at the time of accident, driver Hariram was driving the offending vehicle,

(ii). That, at the time of accident, driver Hariram was driving the offending vehicle, after having consumed alcohol,

(iii). That, in view of factual/legal position of the case, as discussed in the preceding paras, for determining liability with respect to payment of compensation, it is immaterial in the instant case that content/amount/extent of consumption of alcohol by driver Hariram at the time of accident is not established,

(iv). That, conjoint reading of relevant provisions of law applicable to the facts of the case/principles of law enunciated in pronouncements as referred in the preceding paras, alongwith facts/evidence of the case, as discussed & assessed in the foregoing paras, clearly establish that in the instant case, at the time of accident, driver, driver Hariram was driving the offending vehicle after having consumed alcohol & thereby in breach of terms & conditions of Exh.D-1's insurance policy. Hence, insurance company is not liable to pay the compensation.

35. Hence, in view of discussion in the foregoing paras, learned Tribunal has not erred/committed illegality in exonerating/exempting insurance company from liability to pay the compensation and in applying principle of pay & recover.

36. Resultantly, appeals filed by owner of offending vehicle i.e., MA No. 1333/2023, 1334/2023 & 5199/2022 are dismissed & findings recorded by the tribunal with respect to exonerating/exempting insurance company from liability to pay the compensation and application of principle of pay & recover are hereby affirmed.

M.A.N0.5242/22:-

37. Now issue of enhancement of compensation in MA No. 5242/2022 will be dealt with. From evidence available on record, especially medical evidence and findings recorded by Tribunal in para No.15 and 16, in the instant accident, appellant's left hand has been amputated from elbow on account of injuries sustained in the accident.

38. In view of minimum wages notified under the minimum wages Act, appellant's monthly income is determined as Rs.7,700/- per month. As per findings recorded by the Tribunal in para-25 of impugned award, appellant was aged 45 years on the date of accident. In view of age as well as nature of job, 25% is to be added as future prospect and multiplier of 14 is to be applied.

39. So far as percentage of permanent functional disability/loss of earning capacity is concerned, in the instant case, appellant's left hand has been amputated from elbow and at the time of accident, appellant was working as a labourer, therefore, in view of above, functional disability/loss of future earning capacity is determined as 75%.

40. Perusal of para-32 of impugned award reveals that Tribunal has not awarded any amount for loss of amenities. In the instant case, at the time of accident, appellant was aged 45 years and his left hand has been amputated from elbow, therefore, in this Court's considered opinion, appellant is entitled to receive Rs.2,00,000/- for loss of amenities**.**

41. Further, appellant is also entitled to receive amount as determined by Tribunal under other various heads in para-32 of impugned award.

42. In view of above, compensation awarded by the Tribunal is recalculated as under:-

S.NO.	**HEADS**	**COMEPNSATION**
1	Monthly Income of appellant	**Rs.7,700/-**
2.	Additional Future prospects(25%)	**Rs.9625/-**

4.	Annual Income of Appellant	**Rs.1,15,500/-**
5.	Loss of Future Earnings per annum (75% of permanent functional disability)	**Rs.86,625/-**
6.	Multiplier Applicable 14	**Rs.12,12,750/-**
7.	Total Loss of Future Earnings	**Rs.12,12,750/-**
8.	Expenses relating to treatment, hospitalization & medicines	**Rs.1,73,543/-**
9.	Expenses relating to transportation, nourishing food	**Rs.10,000/-**
10.	Expenses relating to attendant etc.	**Rs.10,000/-**
11.	Damages for pain, suffering & trauma as a consequences of the injuries	**Rs.25,000/-**
12.	Loss of amenities (and/or loss of prospects of marriage)	**Rs.2,00,000/-**
18	Total compensation	**Rs.16,31,293/-**
19.	Total compensation awarded by the Tribunal	**Rs.7,83,543/-**
20.	Actual Enhancement	**Rs.7,47,750/-** /-

43. Hence, in view of above, appellant Sukhdev Sahu is entitled to receive enhanced amount of Rs.**7,47,750/-**

44. Enhanced compensation Rs**. 7,47,750/-** shall carry interest at the rate awarded by the Tribunal. Other findings of the Tribunal shall remain intact.

45. Appellant Sukhdev Sahu has valued present appeal Rs.5,00,000/- Hence, appellant Sukhdev Sahu shall be entitled to receive enhanced compensation Rs**. 7,47,750/-** only after payment of deficit court fees.

46. Appeal filed by claimant is partly allowed to the extent as indicated above.

47. Appeals filed by appellant owner & claimant are disposed of accordingly.

(ACHAL KUMAR PALIWAL)
JUDGE

vai