Before Arun Kumar Tyagi, J

PHOOL SINGH— *Appellant*

versus

VIRENDER SINGH AND OTHERS—*Respondents*

FAO No.363 of 2012

March 13, 2019

A. Motor Vehicles Act, 1988—S. 166—Code of Civil Procedure—Order 41 Rule 33—Contributory negligence—Triple riding—No cross appeal or objections—Compensation cannot be reduced.

Held that in the absence of such appeal or cross-objections the questions of contributory negligence and consequent apportionment of compensation cannot be adjudicated upon and the compensation payable to the claimant cannot be reduced by re-course to Order 41 Rule 33 of the CPC.

(Para 30)

B. Motor Vehicles Act, 1988—Ss.128(1), 177. Contributory negligence—Triple riding whether contributory negligence—pending before Larger Bench. Appeal to be decided on prevalent legal position—doctrine of stare decisis—triple riding by itself not contributory negligence.

Further held that even otherwise the question which arises is whether carrying of two pillion riders by itself constitutes contributory negligence or not. In view of the provisions of Section 128 (1) of the M.V. Act prohibiting the driver of a two-wheeled motor cycle from carrying more than one person in addition to himself, carrying of two pillion riders on the motor cycle constitutes an offence punishable under Section 177 of the M.V. Act. However, the question as to whether the same constitutes contributory negligence is not free from controversy. In **FAO No.3760 of 2011 titled *Oriental Insurance Company*** versus ***Baljinder Singh*** **decided on 26.05.2011** an Hon'ble Coordinate Bench of this Court took the view that triple riding on two wheeler did not constitute contributory negligence. However, in **FAO No. 6550 of 2010 titled *Angrejo Devi and Others*** versus ***Jai Parkash and others*** **decided on 23.05.2012** and Hon'ble Coordinate Bench of this Court took the view that triple riding by itself constitutes contributory negligence. In view of this conflict of views of Hon'ble

Coordinate Benches of this Court, the matter was referred to larger Bench by an Hon'ble Coordinate Bench of this Court vide order dated 07.03.2014 passed in **FAO No.2218 of 2012 (O&M) titled *Sona Devi and others*** versus ***Ramesh Kumar and others***. However, the decision of the present appeal cannot be deferred due to pendency of the reference to larger Bench and the appeal has to be decided on the basis of legal position prevalent as per the doctrine of stare decisis. The view taken in **FAO No.3760 of 2011 titled *Oriental Insurance Company*** versus ***Baljinder Singh*** **decided on 26.05.2011** will constitute the binding precedent till the same is overruled by a larger Bench and triple riding on two wheeler will not by itself constitute contributory negligence. On a similar question in respect of driving without driving licence raised in ***Saraswati Palariya*** versus ***New India Assurance Company Ltd.*** **2019 ACJ 42** Hon'ble Supreme Court has held that the driving without a valid driving licence may expose driver to penal liability but no inference of contributory negligence can be arrived on that basis.

(Para 31)

Raj Kapoor Malik, Advocate
for the appellant.

Ashwani Talwar, Advocate and

Jagjit Singh Chatrath, Advocate
for respondent No.3-Insuance Company.

ARUN KUMAR TYAGI, J.

(1) The claimant, father of deceased-Rakesh Kumar, has filed the present appeal seeking enhancement of the compensation awarded by the learned Motor Accidents Claims Tribunal, Kaithal (for short 'the Tribunal') vide award dated08.08.2011 passed in ***MACT case No.51 of 2010 titled as Phool Singh*** versus ***Virender Singh and others*** on account of death of Rakesh Kumar due to injuries suffered in motor vehicle accident which took place on 25.03.2010.

(2) The claimant filed the above-said claim petition under Section 166 of the Motor Vehicles Act, 1988 (for short 'the M.V.Act') on the averments that on 25.03.2010 when Rakesh Kumar was coming on motorcycle bearing registration No.HR-08C-6697 with Vikram and Tarsem as pillion riders from village Kalayat to village Barsikiri Kalan, Mahindra Pick-up bearing registration No.HR-64-3629, owned by respondent No.2 and insured with respondent No.3, driven by

respondent No.1 in a rash and negligent manner hit their motorcycle by coming on the wrong side due to which they fell down and suffered injuries. Rakesh Kumar succumbed to the injuries suffered in the accident on his way to the hospital. FIR No.39 dated 25.03.2010 was registered under Sections 279 and 304-A of the Indian Penal Code at Police Station Kalayat, District Kaithal. The deceased was aged about 22 years and was earning Rs.5,157/-. While claiming himself to be dependent and legal representative of the deceased, the claimant-father of the deceased sought award of compensation with costs and interest against the respondents No.1 to 3.

(3) The petition was contested by the respondents. In their written statement, the respondents No.1 and 2 denied the accident and their liability. In its written statement, the respondent No.3 took the objections as to respondent No.1 not having valid and effective driving licence, respondent No.2 not having valid permit and the claim petition having been filed by the claimant in collusion with respondents No.1 and 2. Respondent No.3 also controverted the averments made in the petition and denied its liability.

(4) The Tribunal framed the issues and recorded the evidence produced by the parties. On perusal of the material on record and consideration of the submissions made by the learned Counsel for the parties, the Tribunal held that Rakesh Kumar died due to injuries suffered in accident caused by rash and negligent driving of Mahindra Pick-up bearing registration No.HR-64-3629 by respondent No.1; that respondent No.1 was having valid and effective driving licence and respondent No.2 was not required to have route permit and that the claimant being legal representative of the deceased was entitled to payment of compensation from the respondents No.1 to 3 being driver, owner and insurer of the offending vehicle jointly and severally.

(5) The Tribunal held the deceased to be aged about 22 years, assessed his income as Rs.5,157/-, added 50% towards future prospects, deducted 50% towards personal expenses and by applying the multiplier of 11 as per the age of the claimant assessed loss of dependency as Rs.5,01,600/- and by adding amount of Rs.10,000/- towards loss of estate and funeral expenses arrived at total compensation of Rs.5,11,600/-. However, the Tribunal deducted amount of Rs.2,53,469/- received by the claimant from employer of the deceased and held the claimant to be entitled for a sum of Rs.2,58,131/- with costs and interest at the rate of 7.5% per annum.

(6) Feeling aggrieved, the claimant has filed the present appeal for enhancement of the compensation.

(7) I have heard arguments addressed by learned Counsel for the parties and have gone through the material on record.

(8) Mr.Raj Kapoor Malik, learned Counsel for the appellant has argued that amount of Rs.2,53,469/- could not be deducted out of the compensation amount payable on account of death of deceased-Rakesh Kumar and the Tribunal erred in deducting the same. The Tribunal awarded meager amount towards funeral expenses and loss of estate and did not award any amount towards loss of filial consortium. The Tribunal awarded lesser rate of interest. Therefore, the award may be modified and the compensation awarded may be enhanced.

(9) On the other hand, Mr. Ashwani Talwar and Mr. Jagjit Singh Chatrath, learned Counsel for respondent No.3-Insuance Company have argued that the Tribunal wrongly assessed the income of the deceased as Rs.5,157/- on the basis of computer generated salary sheets which were not duly proved and income ought to have been assessed on the basis of minimum wages payable to unskilled labourer. Further, the Tribunal erred in making addition of 50% instead of 40% towards future prospects as the deceased was not having permanent job. The amount of Rs.2,53,469/- received by the claimant from employer of the deceased was liable to be deducted from the amount of compensation payable for his death and the claimant is not entitled to enhancement of the compensation which is liable to be reduced. Therefore, with modification of the award by reduction of the compensation, the appeal may be dismissed.

(10) In the present case, the Tribunal assessed income of the deceased on the basis of salary sheets Ex.P-1 to Ex.P-3 proved by PW-1 Sh.Sharad Sandeep, Assistant Manager (HR & Admin), Yutaka Autoparts India Private Ltd., Bhiwadi (Rajasthan) authorized vide authority letter Ex.P-4 to depose before the Tribunal. The Tribunal held that in view of the educational qualifications of the deceased who had passed 10+2 examination and trade test as a regular candidate in the trade of turner vide certificates Ex.P-17 and Ex.P-16 there was no ground to disbelieve the employment of the deceased and range of salary drawn by him. In view of this oral and documentary evidence, which had gone virtually un-rebutted and unchallenged, the findings of the Tribunal as to employment and salary of the deceased cannot be faulted so as to warrant interference therewith. However, in view of the observations made by Hon'ble Supreme Court in Para No.61(iv) of the

its judgment in ***National Insurance Company Ltd.*** versus ***Pranay Sethi and others***[1]and the fact that the deceased was not having any permanent job and was merely a contractual employee, the Tribunal ought to have added 40% instead of 50% of his salary to his income towards future prospects. Since, the deceased was a bachelor, the Tribunal rightly assessed the dependency of the claimant on him to be 50% of his annual income by deducting 50% towards his personal expenses as per observations of Hon'ble Supreme Court in para No.15 of its judgment in ***Smt. Sarla Verma and others*** versus ***Delhi Transport Corporation and Anr***[2]**.**

(11) Hon'ble Supreme Court in its judgment ***National Insurance Company Ltd.*** versus ***Pranay Sethi and others***[3]observed that the age of the deceased should be the basis for applying the multiplier and the view as to application of multiplier on the basis of the age of the deceased or claimants or parents, whichever is higher, stands overruled.

(12) Hon'ble Supreme Court observed in para No.21 of its judgment in ***Smt. Sarla Verma's*** Case (Supra) as under:-

> "We therefore hold that the multiplier to be used should be as mentioned in column (4) of the Table above (prepared by applying Susamma Thomas, Trilok Chandra and Charlie), which starts with an operative multiplier of 18 (for the age groups of 15 to 20 and 21 to 25 years), reduced by one unit for every five years, that is M-17 for 26 to 30 years, M-16 for 31 to 35 years, M-15 for 36 to 40 years, M-14 for 41 to 45 years, and M-13 for 46 to 50 years, then reduced by two units for every five years, that is, M-11 for 51 to 55 years, M-9 for 56 to 60 years, M-7 for 61 to 65 years and M-5 for 66 to 70 years."

(13) Since, the deceased was aged about 22 years at the time of his death, the Tribunal was required to apply multiplier of 18 instead of 11 for assessment of the amount of compensation.

(14) It is well settled that ex-gratia amount received by dependents of victim from his employer is not liable to be deducted from the compensation payable under the M.V. Act for his death. Reference in this regard may be made to the decision of this Court in

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[1] 2017 (4) R.C.R. (Civil) 1009
[2] 2009 (3) R.C.R. (Civil) 77
[3] 2017 (4) R.C.R. (Civil) 1009

Municipal Corporation and another versus ***Smt. Ajit Kaur and others***[4] and decision of Hon'ble Supreme Court in ***Sebastiani Lakra and others*** versus ***National Insurance Company Limited and another***[5]Consequently, the Tribunal must be held to have committed material irregularity in deducting the amount of Rs.2,53,469/- received by the claimant from employer of the deceased out of the compensation payable to the claimant.

(15) The Tribunal merely awarded amount of Rs.10,000/- towards funeral expenses and loss of estate and did not award any amount towards filial consortium.

(16) In ***Pranay Sethi's*** case (Supra) in para No.61 (viii) of its judgment, Hon'ble Supreme Court observed that reasonable figures on conventional heads, namely, loss of estate, loss of consortium and funeral expenses should be Rs.15,000/-, Rs.40,000/-and Rs.15,000/- respectively.

(17) *In* ***Pranay Sethi's*** case (Supra) Hon'ble Supreme Court further observed that the aforesaid amounts should be enhanced at the rate of 10% in every three years. As a corollary to above observation of Hon'ble Supreme Court for enhancement of the figures on conventional heads at the rate of 10% in every three years for assessment of compensation in cases arising in future, the figures on conventional head will be liable to reduction at the rate of 10% for every three years for assessment of compensation in cases which have arisen in the past.

(18) In ***Magma General Insurance Company Limited*** versus ***Nanu Ram @ Chuhru Ram and others***[6] Hon'ble Supreme Court clarified that in legal parlance 'consortium' is compendious term which encompasses 'spousal consortium', 'parental consortium' and 'filial consortium' and awarded compensation of Rs.40,000/- each for loss of filial consortium to father and sister of the deceased. However, the Bench observed in para No.8.7 of its judgment that the amount of compensation to be awarded for loss of consortium will be governed by the principles of awarding compensation under 'Loss of Consortium' as laid down in ***Pranay Sethi's*** case (Supra).

(19) In view of the observations made in ***Magma General Insurance Company'*** case (Supra) and principles of awarding

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[4] 2008 (3) RCR (Civil) 29
[5] 2018 (4) RCR (Civil) 837
[6] 2018 (4) R.C.R. (Civil) 333

compensation under conventional heads as laid down by Hon'ble Supreme Court in ***Pranay Sethi's*** case (Supra) referred to above, the claimant-father of the deceased will be entitled to award of compensation of Rs.32,000/- towards loss of filial consortium and Rs.12,000/- towards funeral expenses and Rs.12,000/- towards loss of estate.

(20) Accordingly, compensation payable to the claimant on account of death of Rakesh Kumar is re-worked out as under:-

Sr. No	Head	Compensation
1	Monthly income of the deceased	Rs.5157/- per month
2	Income after addition of future prospect at the rate of 40%	Rs.5157+Rs.2063=Rs.7220/-
3	Deduction of 1/4th on account of personal expenses	
4	Loss of Dependency	Rs.3610*x12x18=7,79,760/-
6	Funeral expenses	Rs.12,000/-
7	Compensation payable for loss of spousal ,parental and filial consortium	Rs.32,000/-
8	Loss of estate	Rs.12,000
	Total Compensation	Rs.8,35,760

(21) In the present case, the Tribunal directed the payment of compensation amount with interest at the rate of 7.5% per annum from the date of filing of the claim petition till realization of the whole amount which is challenged to be inadequate and the question which arises is as to what would be the appropriate rate of interest.

(22) In ***Puttamma and others*** versus ***K.L. Narayana Reddy and another***[7] Hon'ble Supreme Court observed in para 60 as under:-

> "This Court in ***Abati Bezbaruah*** versus ***Deputy Director General, Geological Survey of India and another (2003) 3 SCC 148*** noticed that varying rate of interest is being awarded by the Tribunals, High Courts and this Court. In the said case, this Court held that the rate of interest must be just

[7] 2014 (1) R.C.R. (Civil) 443

and reasonable depending on the facts and circumstances of the case and should be decided after taking into consideration relevant factors like inflation, change in economy, policy being adopted by the Reserve Bank of India from time to time, how long the case is pending, loss of enjoyment of life etc."

(23) In ***Supe Dei and others*** versus ***National Insurance Company Ltd. and another***[8] Hon'ble Apex Court held that 9% per annum would be the appropriate rate of interest to be awarded in Motor Accidents Claims compensation cases. In ***Sube Singh and another*** versus ***Shyam Singh (Dead) and others***[9] rate of interest of 6% per annum awarded by the Motor Accidents Claims Tribunal was modified by Hon'ble Supreme Court of India to 9% per annum.

(24) In view of the observations in above referred judicial precedents, mercantile rate of interest prevalent, rate of interest allowed by Nationalized Banks on fixed deposit receipts and other relevant factors, it will be appropriate to modify the rate of interest of 7.5% per annum awarded by the Tribunal to 9% per annum.

(25) Mr. Ashwani Talwar and Mr. Jagjit Singh Chatrath, learned Counsel for respondent No.3-Insruance Company have argued that the deceased was driving the motorcycle with two pillion riders and was guilty of contributory negligence in causing the accident. The Tribunal ought to have apportioned the compensation in the ratio of 50:50. The question of apportionment of compensation due to contributory negligence of the deceased can be adjudicated upon by this Court in exercise of powers conferred by Order 41 Rule 33 of the Code of Civil Procedure, 1908 even in the absence of appeal or cross-objection by respondent No.3. In view of the contributory negligence on the part of the deceased due to carrying of three persons on his motorcycle, the award may be modified by apportionment of the compensation.

(26) On the other hand, Mr. Raj Kapoor Malik, learned Counsel for the appellant has argued that the respondent No.3 did not file any appeal or cross-objection and in the absence thereof questions of contributory negligence on the part of the deceased due to carrying of two pillion riders and apportionment of compensation in view of the same can not be adjudicated upon by exercise of powers under Order 41 Rule 33 of the CPC. In support of his arguments learned Counsel for

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[8] 2009 (4) SCC 513

[9] 2018 (2) R.C.R. (Civil) 131 (SC)

the appellant has placed reliance on the observations in ***Ranjana Prakash and others*** versus ***Divisional Manger and another***[10]

(27) Learned Counsel for the appellant has further argued that even otherwise, triple riding on two wheeler does not by itself constitute contributory negligence though the same may constitute an offence under the M.V. Act warranting penal consequences. The respondents did not produce any evidence to prove that driving of the motorcycle by the deceased with two pillion riders contributed to the accident in any manner. Therefore, in the absence of proof of contributory negligence on the part of the deceased, the question of apportionment of compensation did not arise.

(28) In the present case, the respondent No.3 has not filed any appeal or cross-objections on the ground of contributory negligence on the part of the deceased due to carrying of two pillion riders on his motorcycle seeking consequent apportionment of compensation payable for his death.

(29) In ***Ranjana Prakash's*** Case (Supra) it was observed by Hon'ble Supreme Court in para No.8 of its judgment as under:-

> "Where an appeal is filed challenging the quantum of compensation, irrespective of who files the appeal, the appropriate course for the High Court is to examine the facts and by applying the relevant principles, determine the just compensation. If the compensation determined by it is higher than the compensation awarded by the Tribunal, the High Court will allow the appeal, if it is by the claimants and dismiss the appeal, if it is by the owner/insurer. Similarly, if the compensation determined by the High Court is lesser than the compensation awarded by the Tribunal, the High Court will dismiss any appeal by the claimants for enhancement, but allow any appeal by owner/insurer for reduction. The High Court cannot obviously increase the compensation in an appeal by owner/insurer for reducing the compensation, nor can it reduce the compensation in an appeal by the claimants seeking enhancement of compensation."
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> (emphasis supplied).

[10] 2011 (4) RCR (Civil) 218

(30) In the absence of such appeal/cross-objections the questions of contributory negligence and consequent apportionment of compensation cannot be adjudicated upon and the compensation payable to the claimant cannot be reduced by re-course to Order 41 Rule 33 of the CPC.

(31) Even otherwise the question which arises is whether carrying of two pillion riders by itself constitutes contributory negligence or not. In view of the provisions of Section 128 (1) of the M.V. Act prohibiting the driver of a two-wheeled motor cycle from carrying more than one person in addition to himself, carrying of two pillion riders on the motor cycle constitutes an offence punishable under Section 177 of the M.V. Act. However, the question as to whether the same constitutes contributory negligence is not free from controversy. In ***FAO No.3760 of 2011 titled Oriental Insurance Company*** versus ***Baljinder Singh decided on 26.05.2011*** an Hon'ble Coordinate Bench of this Court took the view that triple riding on two wheeler did not constitute contributory negligence. However, in ***FAO No. 6550 of 2010 titled Angrejo Devi and Others*** versus ***Jai Parkash and others decided on 23.05.2012*** an Hon'ble Coordinate Bench of this Court took the view that triple riding by itself constitutes contributory negligence. In view of this conflict of views of Hon'ble Coordinate Benches of this Court, the matter was referred to larger Bench by an Hon'ble Coordinate Bench of this Court vide order dated 07.03.2014 passed in ***FAO No.2218 of 2012 (O&M) titled Sona Devi and others*** *versus* ***Ramesh Kumar and others***. However, the decision of the present appeal cannot be deferred due to pendency of the reference to larger Bench and the appeal has to be decided on the basis of legal position prevalent as per the doctrine of stare decisis. The view taken in ***FAO No.3760 of 2011 titled Oriental Insurance Company*** versus ***Baljinder Singh decided on 26.05.2011*** will constitute the binding precedent till the same is overruled by a larger Bench and triple riding on two wheeler will not by itself constitute contributory negligence. On a similar question in respect of driving without driving licence raised in ***Saraswati Palariya*** versus ***New India Assurance Company Ltd. 2019 ACJ 42*** Hon'ble Supreme Court has held that the driving without a valid driving licence may expose driver to penal liability but no inference of contributory negligence can be arrived on that basis.

(32) In the present case, admittedly the deceased was carrying two pillion riders Vikram and Tarsem on his motorcycle. However, PW-5 Vikram, one of the pillion riders on the motorcycle specifically

deposed that respondent No.1 was driving Mahindra Pick-up in a rash and negligent manner and hit their motorcycle by coming to wrong side of the road and respondent No.1 alone was responsible for causing the accident. The respondents did not lead any evidence to prove that the deceased, who was driving the motorcycle, had contributed to the accident in any manner. In these circumstances, the mere fact three persons were travelling on the motorcycle, does not by itself warrant/justify the inference that deceased-Rakesh Kumar, driver of the motorcycle was guilty of contributory negligence in causing of the accident which occurred solely due to rash and negligent driving of Mahindra Pick-up by respondent No.1.

(33) It follows from the above discussion that the claimant is entitled to payment of compensation of Rs.8,35,760/- by the respondents No.1 to 3 jointly and severally with costs and interest at the rate of 9% per annum from the date of filing of the petition till realization. The amount of Rs.2,58,131/- awarded to the claimant by the Tribunal shall be liable to be deducted from the amount calculated as above. The directions of the Tribunal as to manner of disbursement of compensation amount to the claimant shall also apply to disbursement of enhanced compensation

(34) The present appeal is allowed with the above said modifications in the award dated 08.08.2011 passed by the Tribunal.

Shubhreet Kaur