IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD.

FIRST APPEAL NO.976 OF 2004

The United India Insurance Company Limited,
through its Branch Manager,
Dhule Branch, Dhule ..**Appellant**
(Original Respondent No.3)

Versus

1. Smt. Purnima Anand Phatak
Age : 47 years, Occu : Household

2. Kum. Neeta Anand Phatak
Age : 24 years, Occu : Education

3. Kum. Deepa Anand Phatak
Age : 22 years, Occu : Education

4. Chetan Anand Phatak
Age : 20 years, Occu : Education

All residents of Sathe Chawl,
Bhide Bang, Deopur, Dhule,
Taluka & Dist. Dhule (Respondent nos.1 to 4/
Original petitioners)

5. Pappu Rama Ramis
Age : 41 years, Occu : Motor Driver,
Resident of Chote Bijasan,
Highway Road, Sendhawa,
Madhya Pradesh

6. Mehabub Abdul Rehman (deleted)
(Respondents No.5 & 6 /
Original respondents
No.1 & 2)

.. **Respondents**

....

Mr Soman, Advocate for appellant
Mr. Mukul Kulkarni, Advocate for respondents no.1 to 4
....

CORAM : P.R. BORA, J.
DATE : JULY 5, 2017.

ORAL JUDGMENT :

1. The present appeal is filed against the Judgment and Award passed by the Motor Accident Claims Tribunal at Dhule on 17.10.2003 in Motor Accident Claim Petition No.105/1998.

2. The aforesaid claim petition was filed by the present respondent nos.1 to 4 claiming compensation on account of the death of one Anand Phatak alleging that, he died as a result of injuries caused to him in a vehicular accident happened on 07.11.1997 having involvement of a truck bearing registration no. MP/09/KA/8860 (hereinafter referred to as the 'offending truck') insured with the appellant/Insurance Company. It was the case of the respondent nos.1 to 4 (hereinafter referred to as the 'claimants') that deceased Anand Phatak while proceeding on his Bajaj M-80 motorcycle was dashed by the offending truck and in the accident so happened deceased Anand Phatak died on the spot.

3. The claimants had alleged that, the accident happened

because of negligence on the part of the driver of the offending truck. As was contended in the petition, deceased Anand Phatak was aged about 47 years at the time of his death and was serving in Maharashtra State Electricity Board. Deceased Anand Phatak was getting monthly salary of Rs.8,684/-. The learned tribunal after having assessed the oral and documentary evidence brought before it held the claimants entitled for the total compensation of Rs.8,49,000/- inclusive of the NFL amount and held the owner and insurer of the offending truck liable to pay the amount of compensation. Being aggrieved by the judgment and award, the appellant/Insurance Company has preferred the present appeal.

4. Shri. Soman, the learned Counsel appearing for the appellant / Insurance Company assailed the impugned award on various grounds. The learned Counsel submitted that, though a specific plea was raised by the appellant / Insurance Company alleging negligence on the part of deceased Anand Phatak also and as such though it was the case of contributory negligence, the learned tribunal has altogether ignored the said objection and has failed in appreciating the evidence on the said count.

5. The learned Counsel for the appellant / Insurance

Company further submitted that, had deceased Anand Phatak driven his motorcycle with due diligence at the relevant time, perhaps the accident could not have taken place. The learned Counsel submitted that having regard to the circumstances in which the alleged accident had happened, the driver of the offending truck cannot be held solely responsible for occurrence of the accident and hundred percent negligence cannot be attributed to him. The learned Counsel submitted that, the tribunal while scrutinizing the evidence on record has failed in considering these aspects. The learned Counsel further submitted that, the circumstances on the spot show that, deceased Anand Phatak was equally negligent in driving his vehicle. The learned Counsel further submitted that, while determining the amount of compensation also, the tribunal has committed an error in not determining the amount of compensation on the take home salary of deceased which in fact was the amount which deceased was spending for the welfare of his dependents. The learned Counsel therefore, submitted that, the award needs to be modified on the aforesaid two grounds.

6. Shri. Mukul Kulkarni learned Counsel appearing for the claimants supported the impugned Judgment and award. The learned Counsel submitted that, when a plea was taken by the

Insurance Company alleging negligence on the part of the deceased, the burden was on the Insurance Company to prove the said defence by adducing positive evidence in that regard. The learned Counsel submitted that, the Insurance Company has admittedly not adduced any oral or documentary evidence. The learned Counsel further submitted that, the police papers clearly reveal that, deceased Anand Phatak while proceeding on his M-80 motorcycle was dashed from his behind by the offending truck and in the accident so happened, he died on the spot. The learned Counsel submitted that, considering the situation on the spot and the manner in which the alleged accident had happened, no negligence was liable to be attributed on the part of the deceased and the tribunal has rightly held the driver of the offending truck solely responsible for occurrence of the alleged accident.

7. I have carefully considered the submissions advanced by the learned Counsel appearing for the respective parties. I have perused the impugned Judgment and the evidence on record. It is the first objection raised by the appellant that, though present was the case of contributory negligence, the tribunal has held the driver of the truck insured with the appellant solely responsible for causing the accident in question. As was submitted by the learned Counsel

for the appellant there was evidence on record showing that, in occurrence of the alleged accident negligence on part of deceased motorcyclist was also responsible. The contention so raised by the learned Counsel cannot be accepted in view of the evidence on record. I have carefully perused the spot panchanama revealing the situation on the spot. The evidence on record clearly reveals that, deceased motorcyclist was dashed by the offending truck from his behind. No evidence has been adduced on behalf of the Insurance Company to substantiate its contention that, the deceased motorcyclist was plying his motorcycle in rash and negligent manner so as to attribute some negligence on part of the deceased motorcyclist. When a specific plea was raised by the Insurance Company alleging negligence on the part of the deceased motorcyclist, it was incumbent on the part of the Insurance Company to substantiate the defence so raised by it by adducing proper evidence therefor. In absence of any such evidence and having regard to the evidence existing on record, there appears no substance in the objection so raised by the appellant. I therefore reject the said objection.

8. The second objection raised by the Insurance Company is as about the quantum of compensation. It is the contention of the

appellant that, the tribunal must have determined the amount of dependency compensation on the basis of the take home salary of deceased and not on the basis of his gross salary. The contention so raised is also liable to be rejected at the threshold in view of the settled legal position in this regard. The claimants had sufficiently proved that, the monthly salary of deceased was Rs.8,684/-. After deducting the amounts of Provident Fund contribution, LIC premium, society, debt etc., the net take home salary of deceased was Rs.4,297/-. However the deductions towards PF contribution, LIC premium were not liable to be deducted from the gross salary of deceased while computing the amount of compensation payable to his dependents. The amount of Professional Tax, Income Tax, if any, and the amount paid to deceased for his personal convenience were only liable be deducted from his gross salary. In the circumstances the tribunal has rightly assessed the amount of compensation by holding the salary of deceased to the tune of Rs.8,500/- per month after having deducted permissible amounts from his gross salary of Rs.8,684/-. I, therefore, do not see any infirmity in the amount of compensation as has been determined by the tribunal.

9. After having considered the entire material on record, it does not appear to me that, the appellant has made out any ground

for causing interference in the impugned Judgment and Award. The appeal being devoid of any merit deserves to be dismissed and is accordingly dismissed, however without any order as to the costs.

[P.R. BORA]
JUDGE

ggp