IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

**17 FIRST APPEAL NO.2074 OF 2012**

The National Insurance Company Ltd.,
Throgh Its Divisional Manager,
Hazari Chamber, Station Road,
Aurangabad Dist. Aurangabad. ...Appellant.

VERSUS

1) Arunabai wd/o. Maharu Bhoi,
Age 32 years, Occupation Household,

2) Ku. Ashabai Maharu Bhoi,
Age 12 years, Occupation Education,

3) Ku. Punam Maharu Bhoi,
Age 11 years, Occupation Education,

4) Ishwar Maharu Bhoi,
Age 09 years, Occupation Education,

5) Sagar Maharu Bhoi,
Age 05 years, Occupation Education,

6) Akash Maharu Bhoi,
Age 05 years, Occupation Education,
Respdt.No.1 for herself and on behalf
of Respondents No.2 to 6 as their
Guardian.

7) Narmadabai Soma Bhoi,
Age 59 years, Occupation Household,

All Resident Of Dharangaon, Bhoi
Galli Tq. Dharangaon Dist. Jalgaon.

8) Radhakrishna Raghoji...
Age Major, Occupation Truck Owner,

C/o. Raghoji Cement Agency, Opposite
T.V.Center, Humnabad Rd. Gulbarga
(Karnataka State). ...Respondents.

...

Advocate for Appellant : Mr. Soman D.v.
Advocate for Respondents No.1 to 7 : Mr. V. B. Patil.
Advocate for Respondent No.8 : Mr. M. M. Bhokarikar.

...

**CORAM : SMT.VIBHA KANKANWADI, J.**
**DATE : 13-08-2019.**

**ORAL ORDER** :

1. Present appeal has been filed by the Insurance Company/ original respondent No.2, challenging the Judgment and award passed by learned Member MACT, Jalgaon in Motor Accident Claims Petition No.142 of 2003, dated 29-06-2011, whereby the petition filed under Section 166 of Motor Vehicles Act by the present respondents/ claimants was allowed with proportionate cost.

2. The claimants are the wife, children and mother of deceased Maharu Soma Bhoi. He was aged 35, selling fruits and an agriculturists, thereby earning Rs.12,000/- per month. He died in motor vehicular accident on 16-03-2002 which had occurred at 8.45 a.m. He was proceeding on motorcycle bearing No.KA-32/H-9120 driven by his brother-in-law Nana Luka Bhoi. The accident had occurred in Shahabad in Karnataka State. Their vehicle was dashed

by truck bearing No.MPE-4598. The truck driver in the process of overtaking had given dash to the motorcycle from back side. As a result of which both the riders of the motorcycle fell down and deceased Maharu who was the pillion rider, succumbed to the injuries when he was being shifted to civil hospital. It was stated that, the truck was driven by the driver under employment of respondent No.1 and the said truck was insured with respondent No.2. The claimants had claimed in all amount of Rs.8,00,000/-.

3. The petition was resisted by respondent No.1 as well as by respondent No.2 by filing their separate written statements. They have denied all the contentions in the claim petition. They have denied the age, occupation and income of the deceased. They have also denied that, the involvement of the vehicle as well as the allegations about negligence on the part of the truck driver. The Insurance Company has taken statutory defence.

4. Taking into consideration the rival contentions, issues were framed. Only the claimants led oral as well as documentary evidence. Taking into consideration the evidence on record, the learned Tribunal has held that, the claimants have proved that the accident had taken place due to the sole negligence on the part of

truck driver. The Insurance Company has failed to prove the statutory defence, and therefore, by holding the Insurance Company liable to pay compensation jointly and severally with respondent No.1, compensation of Rs.4,57,500/- has been awarded together with interest @ of 7.5 % per annum. This Judgment and award has been challenged by the Insurance Company on three counts;

(1) That the learned Tribunal do not consider contributory negligence on the part of the motorcycle rider,

(2) The owner was not made party to that proceeding, so also the brother-in-law who was riding the said motorcycle was not made party, and

(3) The income based in absence of evidence was not considered properly.

5. Heard learned Advocate for Appellant Mr. Soman D.V., learned Advocate for Respondents No.1 to 7 Mr. V. B. Patil and Advocate for Respondent No.8 Mr. M. M. Bhokarikar. In order to cut short it can be said that, both the learned advocates have made submissions in support of their respective contentions.

6. Unless the Insurance Company proves contributory negligence, it cannot be said that, there was a necessity to have the brother-in-

law i.e. rider of the motorcycle as well as the owner of the motorcycle are necessary party. perusal of the written statement that has been filed on behalf of the Insurance Company, it can be definitely said that, a specific contention about the contributory negligence was not taken by the Insurance company, on the contrary it was tried to be submitted that, the accident had occurred due to the sole negligence. Though it was tired to be contended in the written statement that, there was combined negligence of the brother-in-law of the deceased, again it was tried to be stated that the accident had taken place due to his fault only. Taking into consideration that defence, no issue was framed in respect of contributory negligence and it appears from the record that the Insurance Company never tried to get that issue framed. Secondly, the Insurance Company has not led any independent evidence to bring on record the elements required for considering contributory negligence. No doubt in some cases the Insurance Company can rely on the documents and the other evidence that has been adduced by the applicants in order to show that there was contributory negligence. However, in this case as it appears from the spot panchanama that a map of the place was not drawn, the contents are also not clear as regards the spot, however in the spot panchanama itself the statement of the eye witness has been included which shows that the accident had taken place due to the negligence and rashness on the part of the truck driver. Under such circumstance, though the widow of the deceased who has been examined on behalf of all the applicants was not an eye witness and eye witness was not examined, yet the certified copy of the spot panchanama contends the statement of the eye witness can be taken as proof of evidence to support the contention of the claimants that the accident had taken due to the sole negligence on the part of the truck driver. There was no hurdle for the Insurance Company to lead any independent evidence if they wanted to canvass the point of contributory negligence.

7. When the Insurance Company failed to prove the contributory negligence, there was no question of having the driver, owner and Insurance Company of the two wheeler party to the proceeding.

8. As regards the last point that is, no evidence of earning of the deceased was led by the claimants, yet it is to be noted that, with that background no evidence regards the income has been led, the learned Tribunal has assess the income on the basis of notional income i.e. Rs.3000/- per month and no fault can be found in the

same. Under such circumstance, there is no merit in the present appeal, it deserves to be dismissed and accordingly it is dismissed. No order as to costs.

9. It is to be submitted that the entire decreetal amount has been deposited by the Insurance Company in this case under such circumstance the original claimants are entitled to withdraw the said amount together with interest amount.

**(SMT. VIBHA KANKANWADI)**
**JUDGE**

*vjg/-.*