IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
FIRST APPEAL NO.826 of 2023

1	**Oriental Insurance Company Limited** Kalyan Divisional Office, Murbad Road, Kalyan (W), Thr. Claims Hub MRO-2, SBI Building, Annexe, 3rd Floor, Bank Street, Fort, Mumbai – 400 023.	]	….Appellant
	Versus		
1	**Suchitra Bablua @ Babulal Nayak @ Naik** Age-32 years, Occ : Housewife	]	
2	**Aditi Babula @ Babulal Nayak @ Naik** Age : 11 years, Occ : Nil	]	
3	**Mr.Rajendra Narayan Nayak @ Naik** Age-60 years, Occ : Nil	]	
4	**Kiran Rajendra Nayak @ Naik** Age : 55 years, Occ : Nil All Residing at A-13, Dongre Usman Chawl, Own Row House, Mohili village, Near Laxmi Narayan Mandir, Saki Naka, Mumbai-400 072.	]	
5	**Mr.Dattatray Baburao Dalvi** Residing at Ward No.8, Kopargaon, District-Ahmednagar	]	….Respondents

Ms.S.S. Dwivedi, Advocate for the Appellants.
Mr.Yogendra Pendse along with Mr.Amit Chaudhary, Advocate for Respondent Nos.1 to 4.

CORAM : SHIVKUMAR DIGE, J.

DATE : 19th DECEMBER, 2023.

ORAL JUDGMENT :

1. The issue involved in this appeal is contributory negligence of deceased and income of deceased is considered on higher side.

2. It is contention of learned counsel for the appellant-Insurance Company that deceased gave dash to the offending truck from backside when the driver of the offending truck had slowed the speed of the truck due to speed breaker but this fact is not considered by the Tribunal. Learned counsel further submitted that the claimants had earlier filed claim petition No.65 of 2014. In the said petition, the income of deceased was shown around Rs.3,000/- per month and thereafter, fresh claim petition was filed and the income of deceased was shown as Rs.35084/- but this fact is not considered by the Tribunal. Though no evidence was produced on record to show the income of deceased was Rs.35084/- per month, on that basis, the Tribunal has awarded compensation, which is erroneous. Hence, requested to allow the appeal.

3. It is the contention of learned counsel for respondent Nos.1 to 4/claimants that no witness was examined by the appellant-insurance company to prove the negligence of the deceased. Learned counsel further submitted that deceased was working with Kelium Silk and was drawing salary of Rs.35084/- per month. A witness was examined to

prove the income of the deceased. Considering the evidence on record, the Tribunal has considered monthly income of deceased, which is proper. Hence, requested to dismiss the appeal.

4. I have heard both learned counsel, perused the judgment and order passed by Motor Accident Claims Tribunal, Kalyan (for short "the Tribunal").

5. It is the claimant's case that on 26th December 2009, deceased Babula @ Babulal Nayak @ Naik was traveling in Indica Car, near Umbermali-village, at about 3.30 a.m., one motor lorry bearing No.MH-17/K-7659 which was ahead of his car, suddenly applied brakes, due to which, the Indica Car dashed the rear wheel of the lorry. The lorry driver did not give any signs or signals before applying the brake. The deceased and other occupants in the Indica Car sustained injuries. The deceased succumbed to injuries while taking treatment.

6. It is the contention of learned counsel for the appellant that the accident occurred due to sole negligence of the deceased. While dealing with the issue of negligence, the Tribunal has observed that the spot panchanama shows that the accident took place before rumbler/speed breaker. As per the claimants' case, the offending truck was in high speed and suddenly the driver of the offending truck applied brake. The offending truck did not have any signs or signals behind it. Learned counsel for appellant-Insurance Company did not raise defense of negligence of the deceased during the cross -examination of Witness

No.1 - Suchitra. Thus, it is unrebutted that the truck was driven in high speed and without giving proper signals urgently braked before the Indica Car and thus the Indica Car dashed the truck from behind and caused the accident.

7. To prove the negligence of the offending truck driver, the claimants examined claimant No.1 – Suchitra Nayak @ Naik. She was occupant in the car at the time of accident. She has stated that on 26th December 2009, when she was going with deceased in the Indica Car, at about 3.30 am, the offending truck was proceeding ahead of their car and the said truck was in high and excessive speed avoiding all traffic rules and without giving any indicator or signals, the driver of the offending truck suddenly and abruptly applied brakes and slowed down its speed on the speed breaker, without giving any proper signal. As a result of which, the driver of the Indica car applied urgent brakes, however, could not avoid the dash and as a result, collided with the said truck. She further stated that the police visited the incident spot and after investigating, registered an offence against the driver of the offending truck. Nothing elicited in her cross-examination to prove the contributory negligence of deceased. Considering the evidence on record, the Tribunal has considered that the accident occurred due to sole negligence of the driver of the offending truck. I do not find any infirmity in it.

Moreover to prove the negligence of deceased, driver of the offending truck did not step into witness box. Without any defense on record, this Court cannot consider negligence of the deceased.

8. In respect of the issue of the income of the deceased, to prove the income of deceased, the claimants have examined – Suchitra Nayak @ Naik, wife of deceased. She has stated that deceased was working with Kelium Silk, Powai, Chandivali, Mumbai and was earning Rs.35084/- per month. To support the evidence of PW-1, claimants have examined Daktara Pandi, Manager of Kelvin Silk Mills at 'Exhibit-36'. He has stated that deceased was employed in Kelvin Silk Mills and he was getting a salary of Rs.35084/- per month and his salary used to be deposited directly in his bank account with Bank of India. In cross-examination, this witness admitted that he has not filed attendance register of the deceased. Considering the evidence on record and bank accounts produced on record, the Tribunal has considered monthly income of deceased at Rs.35084/-. I do not find infirmity in it.

9. It is the contention of learned counsel for the appellant-insurance company that earlier the claimants had filed claim petition for getting compensation. In the said claim petition, the claimants had mentioned monthly income of deceased at Rs.3,000/- but later on, a fresh claim petition was filed, in which, the income of deceased was mentioned at Rs.35084/- per month. While dealing with this issue, in paragraph 12 of the order, the Tribunal has observed that the claimants have filed certified copy of Exhibit 1 and MACP No.65 of 2014 which was filed

earlier and withdrawal application in MACP No.65 of 2014. The certified copy of the application is at “Exhibit-35”. The previous application was prayed to be withdrawn as the income of the deceased was more than Rs.40,000/-. The earlier application was filed under Section 163-A of the Motor Vehicles Act, 198, as income of the deceased was more than Rs.40,000/-, the application was withdrawn and liberty was granted to file fresh application. I do not find any merit in the contention of learned counsel for the appellant that in previous application, the income of deceased was shown as Rs.3,000/- per month, hence his income should not have been considered at Rs.35084/-. In my view, when it has come on record that the deceased was earning Rs.35084/- per month, hence, his considered income is proper.

10. Considering the above reasons, I pass following order :

O R D E R

1. The appeal is dismissed. No order as to cost.
2. Respondent Nos.1 to 4/claimants are permitted to withdraw the deposited amount along with accrued interest thereon.
3. The statutory amount be transmitted to the Tribunal along with accrued interest thereon. The parties are at liberty to withdraw it as per Rule.

11. Pending applications, if any, stand disposed of.

(SHIVKUMAR DIGE, J.)