

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

FIRST APPEAL NO.1794 OF 2010

Smt. Anjali Singh Chaudhary @
Anjali Punit Chaudhary & Anr.

.. Appellants

V/s.

Raju Sopan Bhogale & Ors.

.. Respondents

Mr. Kamlesh Mali for the Appellant.

Mr. Devendra Joshi for the Respondent No.3.

CORAM	: K. K. TATED, & N.J.JAMADAR, JJ.
RESERVED ON	: 19th NOVEMBER 2018
PRONOUNCED ON	: <u>12th DECEMBER, 2018</u>

JUDGMENT (PER : N.J.JAMADAR,J.):

1. This Appeal is directed against a Judgment and Award passed by the Motor Accident Claims Tribunal, Pune in Claim Petition No. 355 of 2007, on 5th August 2010 whereby the application filed by the Applicants/Appellants under Section 166 of the Motor Vehicles Act, 1988 (hereinafter referred to as 'the Act') came to be partly allowed.

2. For the sake of clarity and convenience, the parties are hereinafter referred to in the capacity in which they were arrayed before the Tribunal.

3. The brief facts which led to this Appeal can be summarized

as under:

- a) Punit Chaudhari (hereinafter referred to as 'the deceased'), the husband of Applicant No.1, the father of Applicant No.2, and the son of opponent Nos. 4 and 5, was working as the Vice President, Global Business in Kinetic Engineering Limited, Pune. On 8th February 2006, the deceased was on his way to home by car bearing registration No. HR-03-C-9004 from Wagoli. When the deceased reached near Chandan Nagar Dargah at Pune Nagar Road, opposite National Garage at about mid-night, the tempo bearing registration No. MWQ-7479, driven by opponent No. 2, owned by opponent No.1, and insured with opponent No.3 came in a very high speed from the opposite direction. The said tempo was proceeding towards Ahmednagar. The opponent No.2 drove the said tempo in a rash and negligent manner. The opponent No.2 gave a violent dash to the car driven by the deceased. The impact was so violent that car was smashed beyond recognition and the deceased sustained fatal injuries. The deceased was pronounced dead, on being shifted to Sasoon Hospital.
- b) The Applicants filed above numbered Application with the averments that the deceased was a highly qualified

business executive. The deceased, within a short span, rose to the position of Vice President of Global Business of Kinetic Engineering Limited, Pune. His total emoluments were Rs.2,75,225/- per month, including the salary, benefits, perquisites and incentives. The deceased had a very bright prospect to further rise in his professional career. The applicants, thus, suffered a huge personal and financial loss on account of untimely death of the deceased. Hence, the applicants claimed a sum of Rs.6,00,41,000/- by way of compensation.

c) The opponent No.2, driver of the offending tempo, did not appear before the Tribunal. Hence, the application proceeded *ex-parte* against the opponent No.2.

d) The opponent No.1, owner of the offending tempo, resisted the claim. The substance of the resistance was that the collision occurred due to the sole negligence of the deceased as the deceased drove the car in an excessive speed and collided with the tempo which was being driven in an orderly manner by the opponent No.2 on the correct side of the road. The claim of the applicants was stated to be excessive, exorbitant and unsustainable.

e) The opponent No.3, insurer, also contested the claim.

The contractual relationship between the opponent No.1 and opponent no.3 as the insured and insurer was not put in contest. The opponent No.3, however, contended that the driver of the offending tempo was not at fault. The accident occurred due to the sole negligence of the deceased as he could not control the car which was being driven in a very high speed unmindful of the fact that the deceased was negotiating the curve at the spot, where the collision occurred. The insurer also contested the income of the deceased, the claim based on future prospects and the corresponding loss of dependency. In the alternative, it was asserted that the case was one of contributory negligence and thus liability of the insurer be reduced proportionate to the negligence of the deceased.

f) In the backdrop of aforesaid pleadings, the learned Member of the Tribunal framed issues (Exh.31). The learned Member recorded the evidence of Applicant No.1 Smt. Anjali Chaudhari (PW-1); Premsingh Negi (PW-2), a Senior Manager in Kinetic Engineering Pune, Pawan Kumar Jain (PW-3), the Chartered Accountant of the deceased, for the claimants, and Shri. Milind Shinde (DW-1), the Insurance Investigator, and Malik @ Babu Manjur

Majalapure (DW-2), the opponent no.2-driver of the offending tempo, for the insurer. Learned Member considered documents tendered in support of the claim and in opposition thereto.

g) After appraisal of the evidence and upon consideration of the material on record, the Tribunal was persuaded to partly allow the application, by the impugned Judgment and Award, *inter alia*, holding that it was a case of contributory negligence of the deceased as well as the opponent No.2 and the negligence was apportionable in the ratio of 50:50, and thereby awarded a sum of Rs.67,68,917/- along with interest @ of 7% per annum from the date of the application, to be paid by the opponent Nos.1 and 3 jointly and severally.

4. Being aggrieved by and dissatisfied with the aforesaid award, the applicants have preferred this Appeal. The applicants have assailed the legality, propriety and correctness of the Award on the following three principal grounds.

i) Tribunal committed a grave error in recording a finding that it was a case of contributory negligence sans any legal evidence and thereby diminishing the amount of compensation by 50%.

ii) The Tribunal erred in assessing the actual income of the deceased, on a lower side, by unjustifiably excluding perquisites, benefits and bonus paid to the deceased, while computing the income of the deceased.

iii) The Tribunal further erred in deducting 1/3rd amount towards the personal and living expenses of the deceased despite having found that there were four dependents i.e. the applicant Nos. 1 and 2 and opponent Nos. 4 and 5, upon the deceased, and thus in accordance with the prescription in the case of ***Sarla Verma and others v/s Delhi Transport Corporation and Anr***¹, the proper deduction should have been 1/4th.

5. We have heard the learned Counsel for the Appellants-applicants and the Respondent No.3-Insurer at some length. We have also perused the evidence and material tendered before the Tribunal, carefully.

6. *In the light of the grounds of appeal and the rival submissions canvassed across the bar, the following points arise for our consideration. We have recorded our findings against each of them for the reasons to follow:*

Points

1 *Whether the Tribunal was justified in recording the finding that it was the case*

Findings

In the negative

¹ (2009) 6 SCC 121

of “contributory negligence”?

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| <p>2 Whether the Tribunal had determined the
 . “multiplicand” correctly?</p> <p>3 Are the appellants-applicants entitled to
 . enhanced compensation under
 “conventional heads”?</p> <p>4 Whether any interference is warranted in
 . the impugned judgment and award?</p> <p>5 What order?
 .</p> | <p><i>In the
affirmative</i></p> <p><i>In the
affirmative</i></p> <p><i>In the
affirmative</i></p> <p><i>Appeal stands
partly allowed in
terms of final
order</i></p> |
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REASONS

Point No.1:

7. In the light of the exceptions to the impugned award on the grounds enumerated above, we deem it in the fitness of things to deal with the question as to whether the Tribunal was justified in recording a finding that it was a case of contributory negligence and the blame was apportionable in the ratio of 50:50 between the deceased and opponent No.2, at the first instance as, in the context of the appeal, this question has significant bearing upon the entitlement of the applicants.

8. It may be apposite to note few undisputed facts, which emerge from the evidence and material on record. It is incontestable that the deceased was at the wheel of Opel car bearing No. HR-03-C-9004. The deceased was on his way to Pune

from Wagholi, by Pune-Nagar road. The opponent No.2 was driving the tempo bearing MWQ-7479. He was proceeding towards Wagoli. The impact occurred on Pune-Nagar road at a spot opposite National Garage at about midnight. It is indisputable that there was a curve at the spot where vehicles collided with each other. There was no eye-witness to the occurrence, apart from the opponent No.2 and another occupant of the offending tempo.

9. In the light of these facts, the Tribunal was of the view that the case was covered by the Principle of '*res ipsa locuiture*' and on the basis of the nature of the accident and the attendant circumstances, it was justifiable to draw an inference that the deceased as well as the opponent No.2's negligence contributed to the accident. It is interesting to note that the Tribunal was not prepared to place reliance upon the testimony of Malik Majlapure (DW-2), the driver of the offending tempo, and Milind Shinde (DW-1), the insurance investigator, who were examined by the insurer to bolster up its defence that the negligence of the deceased was the cause of the accident. The Tribunal, however, on the basis on the situation noted in the panchnama of the spot of accident (Exh. 43) and the site map prepared by the police, and the condition of the vehicles post the accident, came to the

conclusion that it was a case of contributory negligence.

10. The learned Counsel for the Appellants strenuously urged that aforesaid approach of the Tribunal was totally erroneous. Once the testimony of the opponent No.2, Majlapure (DW-2) was disbelieved, there was no reason for the Tribunal to record the finding of contributory negligence based on surmises and conjectures, urged the learned Counsel for the Appellants. It was further urged that the Tribunal lost sight of the fact that the car which the deceased drove was damaged beyond recognition, and the situation of the vehicles post impact is not decisive in drawing inference regarding the manner in which the accident could have occurred. The learned Counsel for the Appellants would further urge that as the opponent No.2, admittedly, drove a relatively heavy vehicle and the car which the deceased drove had suffered extensive damage, the Tribunal ought to have held that such a huge impact could not have occurred unless the opponent No.2 drove the tempo in a very high and excessive speed and in a rash manner, throwing caution to the wind.

11. In opposition of this, the learned Counsel for the Respondent No.3 stoutly submitted that the finding recorded by the Tribunal is borne out by the evidence and material on record. It was urged that the case was not one of head on collision. It

was further urged that, the Tribunal ought not to have disbelieved the witnesses examined by the insurer. The learned Counsel for the Respondent No.3 went a step ahead and submitted that the material on record would even justify a finding that the sole negligence of the deceased led to the accident. However, since Respondent No.3 has not filed any cross objection, it would not pursue the said point.

12. The begin with, it has to be seen whether the Tribunal was justified in discarding the testimony of Milind Shinde (DW-1), Insurer Investigator, and Malik Majlapure (DW-2), the opponent No.2. The testimony of Milind Shinde was disbelieved on the count that he had prepared the report (Exh. 106) at a much later point of time and the averments therein were contrary to the situation noted at the spot, immediately after the accident. Secondly, Milind Shinde (DW-1) endeavoured to impress upon the Tribunal that the deceased was under the influence of the liquor. This factually incorrect assertion, according to the Tribunal, eroded the creditability of the testimony of Milind Shinde as well as report (Exh. 106) prepared by him.

13. We are of the view that Tribunal was totally justified in jettisoning away the testimony of Milind Shinde (DW-1). From the very nature of his evidence, i.e. assessment of situation post

occurrence, it is inherently of weak character. It does not command any probative value in drawing inferences regarding mode and manner accident. The further endeavour of Milind Shinde (DW-1) to demonstrate that the deceased was under the influence of liquor, which was proved to be factually incorrect, completely dents creditability of his testimony.

14. The Tribunal was not prepared to place reliance upon the testimony of Malik Majlapure (DW-2) as it was elicited in his cross-examination that he had not given instructions while preparing his affidavit of examination-in-chief, and went on to admit that the owner of the offending vehicle had explained the contents of the affidavit to him. Thus, the Tribunal was of the view that the evidence of Malik Majlapure (DW-2) was influenced by the intervention of opponent No.1. The Tribunal, therefore, concluded that Shri. Malik Majlapure (DW-2) has not given a true picture of the accident. This conclusion of the Tribunal does not seem to be vitiated. Nonetheless, we propose to appraise the testimony of Malik Majlapure (DW-2) afresh from the point of view of ascertaining as to whether there was contributory negligence on the part of the deceased.

15. Before adverting to deal with the said issue, it is necessary to note that in arriving at the finding that it was a case of

contributory negligence, the learned Member of the Tribunal made a reference to the Judgment of the Supreme Court in the case of ***T.O. Anthony v/s. Karvarnan***² wherein the distinction between the concepts of 'composite negligence' and 'contributory negligence' was explained. The Tribunal extracted the following observations in para No.6 of the aforesaid judgment.

“6. 'Composite negligence' refers to the negligence on the part of two or more persons. Where a person is injured as a result of negligence on the part of two or more wrong doers, it is said that the person was injured on account of the composite negligence of those wrong-doers. In such a case, each wrong doer, is jointly and severally liable to the injured for payment of the entire damages and the injured person has the choice of proceeding against all or any of them. In such a case, the injured need not establish the extent of responsibility of each wrong-doer separately, nor is it necessary for the court to determine the extent of liability of each wrong-doer separately. On the other hand where a person suffers injury, partly due to the negligence on the part of another person or persons, and partly as a result of his own negligence, then the negligence of the part of the injured which contributed to the accident is referred to as his contributory negligence. Where the injured is guilty of some negligence, his claim for damages is not defeated merely by reason of the negligence on his part but the damages recoverable by him in respect of the injuries stands reduced in proportion to his contributory negligence.”

2(2008) 3 SCC 748

16. The Tribunal, however, did not advert to the following observations of the Supreme Court in the succeeding para i.e. para No.7.

“7. Therefore, when two vehicles are involved in an accident, and one of the drivers claims compensation from the other driver alleging negligence, and the other driver denies negligence or claims that the injured claimant himself was negligent, then it becomes necessary to consider whether the injured claimant was negligent and if so, whether he was solely or partly responsible for the accident and the extent of his responsibility, that is his contributory negligence. Therefore where the injured is himself partly liable, the principle of 'composite negligence' will not apply nor can there be an automatic inference that the negligence was 50:50 as has been assumed in this case. The Tribunal ought to have examined the extent of contributory negligence of the appellant and thereby avoided confusion between composite negligence and contributory negligence. The High Court has failed to correct the said error.”

(emphasis added)

17. The learned Member of the Tribunal, without adverting to the aforesaid observations went on to record a finding that there was contributory negligence and drew the automatic inference that negligence was 50-50, as had been assumed in the case of T.O. Anthony (supra), by the Tribunal below.

18. Properly understood the question of contributory negligence, in the context of involvement of two vehicles in an accident, arises for consideration when either the driver of one

of the vehicles or the dependents of one of the drivers (when the driver succumbs to the injuries sustained in the said accident) claim compensation from the driver of the other vehicle, and the later claims that the injured driver or the deceased, as the case may be, was negligent. This aspect becomes significant as the defence of negligence or for that matter contributory negligence on the part of injured driver/deceased is in the nature of a standard form defence when the collision involves two vehicles. It would be an over-simplistic way of determining the claims for compensation in such cases by assuming that the drivers of both the vehicles were negligent as two vehicles were involved. It would also be against the fundamental proposition that an award by the Tribunal is not an adversarial adjudication between litigating parties, but a statutory determination of compensation on the occurrence of an accident.

19. It is trite that an inference of contributory negligence has to be drawn on the basis of positive and cogent evidence and reliable material. Merely because two vehicles are involved in an accident and compensation is claimed by one of the injured drivers or the dependents of the deceased driver, the inference that there was contributory negligence cannot be automatic. Nor can the apportionment of negligence be equal, *de hors* the

facts of the case and evidence in support thereof. These aspects require critical consideration in the cases, like the case at hand, where the accident occurs on a highway at the dead of the night leading to the death of one of the drivers (against whom contributory negligence is alleged) and there is no eye-witness, apart from the driver of the offending vehicle.

20. A profitable reference, in this context can be made to a ruling of the Supreme Court in the case of ***Sudhir Kumar Rana v/s. Surinder and Others***³ wherein the Supreme Court defined and explained the concept of 'contributory negligence' in the following words:

“6. A contributory negligence may be defined as negligence in not avoiding the consequences arising from the negligence of some other person, when means and opportunity are afforded to do so. The question of contributory negligence would arise only when both parties are found to be negligent.

7. The question is negligence for what? If the complainant must be guilty of an act or omission which materially contributed to the accident and resulted in injury and damage, the concept of contributory negligence would apply.”

21. In the backdrop of the aforesaid legal position, it has to been seen whether the finding of contributory negligence is sustainable by the evidence and material on record. As indicated above, a brief recourse to the testimony of Malik

³ (2008) 12 SCC 436

Majlapure (PW-2) would be apposite for arriving at a legitimate finding on this contentious issue.

22. The crux of the testimony of Malik Majlapure (DW-2) was that the impact occurred on the curve. Two-way traffic was moving at the place of occurrence. There was no divider. When he was about to negotiate the turn, the deceased came from the opposite direction in a very high speed and collided with his tempo from driver side. Due to the dash, the engine of the tempo, right side door and right wheel were damaged.

23. It was brought out in the cross-examination of Malik Majlapure (DW-2) that though the make of the vehicle he drove was tempo, but it was just like a truck. The weight of his vehicle was much more than that of the car. He conceded that he has been prosecuted for having caused death of the deceased by driving the vehicle in a rash and negligent manner. He went on to admit that he had not lodged any grievance claiming that the allegations levelled against him in the said criminal case were false. He was candid enough to concede that his vehicle was 20 years old and, therefore, its break system was not like a new vehicle.

24. It is evident that Malik Majlapure (DW-2) endeavoured to

impress upon the Tribunal that it was not a case of head-on collision. This endeavour was actuated with a design to demonstrate that the car collided with the tempo as it came on the other flank of the road. However, the fact that the engine, the right door and right wheel of the tempo were damaged, works out retribution of this claim. This fact leads to a legitimate inference that front right portion of the tempo collided with the car.

25. The fact that Malik Majlapure (DW-2) came to be prosecuted for having caused the death of the deceased in the said accident, is indisputable. The investigation papers revealed that, after investigation, the police machinery found that the opponent No.2's rash and negligent act caused the death of the deceased. In the backdrop of the nature of the proceeding, this factor is required to be considered in conjunction with the other attended circumstances.

26. The Tribunal was much impressed by the situation at the spot delineated in the panchnama of spot of accident (Exh. 43) and the site map prepared by the police. It was noted that the offending vehicle had halted at a distance about 60 feet from the spot of accident. The width of the road was around 30 feet. The learned Member of the Tribunal further noted that in the site

map some portion of the car was shown beyond the center line of the road and the offending vehicle was shown to the left side of the said center line. Lastly, the fact that both the vehicles were extensively damaged weighted with the Tribunal in holding that drivers of both the vehicles were negligent.

27. In the light of aforesaid view of the Tribunal, the pivotal question that wrenches to the fore is whether the aforesaid approach of the Tribunal is justifiable and could the Tribunal legally base its conclusion on aforesaid material?

28. The learned Counsel for the Appellants urged that the aforesaid observations of the Tribunal are in the realm of surmises and conjectures. A finding of contributory negligence could not have been arrived at, on the basis of position of the vehicles after the accident, as noted in the spot of accident panchnama and the site map, urged the learned Counsel for the Appellants. To lend support to this submission, the learned Counsel for the Appellants placed reliance on a judgment of the Supreme Court in the case of ***Jiju Kuruvilla and other and Kunjujamma Mohan and Others***⁴ wherein the Supreme Court had held that the Tribunal and the High Court erred in attributing the contributory negligence to the deceased on the

4 (2013) 9 SCC 166

basis of the position of the vehicles, after the accident, shown in the spot of accident panchnama. The Supreme Court had observed as under:

“20.5 The mere position of the vehicles after accident, as shown in a Scene Mahazar, cannot give a substantial proof as to the rash and negligent driving on the part of one or the other. When two vehicles coming from opposite directions collide, the position of the vehicles and its direction etc. depends on number of factors like speed of vehicles, intensity of collision, reason for collision, place at which one vehicle hit the other, etc. From the scene of the accident, one may suggest or presume the manner in which the accident caused, but in absence of any direct or corroborative evidence, no conclusion can be drawn as to whether there was negligence on the part of the driver. In absence of such direct or corroborative evidence, the Court cannot give any specific finding about negligence on the part of any individual.

20.6

21. In view of the aforesaid, we, therefore, hold that the Tribunal and the High Court erred in concluding that the said accident occurred due to the negligence on the part of the deceased as well, as the said conclusion was not based on evidence but based on mere presumption and surmises”.

29. A useful reference can also be made to another ruling of the Supreme Court in the case of ***Kumari Kiran through her father Harinayaran v/s. Sajjan Singh and Others***⁵ wherein a finding of contributory negligence was recorded against the claimant on the premise that the collision had occurred on the

5 (2015) 1 SCC 539

middle of the road. The Supreme Court made a reference to the aforesaid judgment in the case of Jiju Kuruvila (supra), and observed as under:

“The observations made by this Court in the case of Juju Kuruvila (supra) surely apply to the fact situation on hand. Upon thorough examination of the facts and legal evidence on record in the present case, it cannot be said that the Appellant-father was rash and negligent just on the assumption made by the Tribunal that the collision occurred in the middle of the road since the two vehicles were approaching from opposite directions of the road. However, the only aspect of the case on hand that we can reasonably assume is that the Appellant-father would have taken sufficient caution while riding the motorcycle since he was travelling with his two minor children (Appellant-minors). Further, upon examining the evidence produced on record, there is no proof showing negligence on the part of the Appellant-father. Thus in our view, the contributory negligence apportioned by the High Court at 25% on the Appellant-father and 75% on the driver of the offending tractor is erroneous keeping in view the legal principles laid down by this Court on this aspect in the above referred case. Thus, we are of the firm conclusion that the negligence is wholly on the part of the driver of the offending tractor since he was driving the heavier vehicle. Therefore, we set aside the 25% contributory negligence on the part of the Appellant-father as apportioned by the High Court.”

30. An advantageous reference can also be made to judgment of the Supreme Court in the case of **Ashwinbhai Jayantilal Modi v/s. Ramkaran Ramchandra Sharma**⁶ wherein the finding of contributory negligence on the part of the deceased,

6 (2015) 2 SCC 180

recorded by the Tribunal, was negatived, with the following observations:

“14. From the evidence produced on record, the two-wheeler of the deceased was dragged up to a stretch of about 20-25 feet on the road after the collision with the offending truck. We are of the considered view, that to be able to create this kind of enormous effect on the two-wheeler of the deceased, the offending truck must have been travelling at a fairly high speed and that its driver did not have sufficient control over his vehicle. The driver of the offending truck should have been aware that he was driving the heavy motor vehicle and taken sufficient caution. We do not see any direct evidence that shows negligence on the part of the deceased that led to the accident. Therefore, as per the principles laid down by this Court in the case referred to above in this aspect, the contributory negligence apportioned by the courts below on the part of the deceased is set aside”.

31. A recent pronouncement of the Supreme Court in the case of ***Mangala Ram v/s. Oriented Insurance Company Limited and others***⁷ seals the issue. The Supreme Court considered the question, whether the Tribunal was justified in recording a finding of contributory negligence based on the site map only. The Supreme Court answered the question in the negative. Para Nos. 31 and 32 of the said Judgment are relevant and thus extracted below:

“31. Be that as it may, the next question is whether the Tribunal was justified in concluding that the Appellant was also negligent and had contributed equally, which

⁷ (2018) 5 SCC 656

finding rests only on the site map (Exh. 2) indicating the spot where the motorcycle was lying after the accident?

32. We find substance in the criticism of the Appellant that the spot where the motor vehicle was found lying after the accident cannot be the basis to assume that it was driven in or around that spot at the relevant time. It can be safely inferred that after the accident of this nature in which the Appellant suffered severe injuries necessitating amputation of his right leg above the knee level, the motorcycle would be pushed forward after the collision and being hit by a high speeding jeep. Neither the Tribunal nor the High Court has found that the spot noted in the site map, one foot wrong side on the middle of the road was the spot where the accident actually occurred. However, the finding is that as per the site map, the motorcycle was found lying at that spot. That cannot be the basis to assume that the Appellant was driving the motorcycle on the wrong side of the road at the relevant time. Further, the Respondents did not produce any contra evidence to indicate that the motorcycle was being driven on the wrong side of the road at the time when the offending vehicle dashed it. In this view of the matter, the finding of the Tribunal that the Appellant contributed to the occurrence of the accident by driving the motorcycle on the wrong side of the road, is manifestly wrong and cannot be sustained. The High Court has not expressed any opinion on this issue, having already answered the issue about the non-involvement of the offending vehicle in favour of Respondent Nos. 2 & 3".

32. In the light of the aforesaid exposition of the legal position as regards the utility of the position of the vehicles, indicated in the site map and/or spot of accident panchnama, in arriving at a finding regarding the contributory negligence, re-adverting to the facts of the case, it becomes evident that finding of the

Tribunal is based on surmises and conjectures. The material and the circumstances which weighed with the Tribunal do not constitute the foundation for a legally sustainable finding that negligence of the deceased also contributed to the accident.

33. It is pertinent to note that the Tribunal lost sight of the fact that the vehicle of the deceased was smashed and damaged to such an extent that it defied recognition. The deceased had suffered multiple fatal injuries. There are statements recorded by the Investigating Officer to the effect that the car which the deceased drove was dragged by the offending vehicle to a certain distance. It is evident that such a huge and fatal impact could not have occurred had the offending vehicle been driven in a moderate speed, as claimed by the opponent No.2.

34. The learned Counsel for the Respondent No.3 attempted to salvage the position by putting forth a submission that the claimants did not examine any eye-witness to the occurrence. The said submission is required to be noted to be repelled. The learned Member of the Tribunal has recorded that there was no eye-witness to the occurrence. Again, the nature of the proceeding cannot be lost sight of. The predicament in which the claimants/dependents find themselves when they lose bread winner family member in a vehicular accident and are called

upon to establish that the deceased was not negligent, is required to be appreciated.

35. The approach delineated by the Supreme Court in the case of *Dulcina Fernandes v/s. Joaquim Xavier Cruz*⁸ illuminates the path. In this case, the dependents of the deceased were non-suited for not examining the pillion rider of the motorcycle driven by the deceased. The driver of the offending pick-up van examined himself before the Tribunal and claimed that the deceased had rammed into the pick-up van, which was parked on the extreme left side of the road. The Tribunal had held that there was no reason to doubt the testimony of the said driver and the non examination of pillion rider was construed to be a fatal and fundamental flaw in the claimants case. The Supreme Court overturned the finding of the Tribunal, which was affirmed by the High Court, and held that the accident had occurred due to the rash and negligent driving of the pick-up van by its driver. Para No. 10 of the aforesaid judgment is relevant. It is extracted below.

“10. The cases of the parties before us will have to be examined from the perspective of the principles and propositions laid down in Bimla Devi case and Shila Datta. While it is correct that the pillion rider could have best unfolded the details of the accident what cannot be lost sight of is the fact that while the

8 (2013) 10 SCC 646

accident occurred on 29.06.1997 the evidence before the Tribunal was recorded after seven years i.e. in the year 2004. Keeping in view the nature of the jurisdiction that is exercised by a Claims Tribunal under the Act we do not think it was correct on the part of the learned Tribunal to hold against the claimants for their failure or inability to examine the pillion rider Rosario Antao as a witness in the case. Taking into account the hapless condition in which the claimants must have been placed after the death of their sole breadwinner and the sufficiently long period of time that has elapsed in the meantime, the learned Tribunal should not have treated the non-examination of the pillion rider as a fatal and fundamental law to the claim made before it by the Appellant”.

36. The facts of the aforesaid case are broadly akin to the facts of the instant case. The principle laid down therein applies with full force.

37. We are of the view that each of the aforesaid circumstances ascribed by the Tribunal to arrive at the conclusion of contributory negligence on the part of the deceased, falls through, on the touchstone of the principles enunciated in aforesaid pronouncements. They are, at best, surmises and conjectures. The Tribunal thus fell in error in resting its finding on surmises and conjectures rather than on surer foundation of legal evidence.

38. Conversely, even if the evidence of Malik Majlapure (DW-2) is taken into account and given due weight, yet it does not

support the finding that the negligence on the part of the deceased was the sole or partial cause of the accident. As observed earlier, the enormity of the impact its fatal consequences qua the deceased and the mangled remains into which the car driven by the deceased was turned into, coupled with prosecution of the opponent No.2 for causing death of the deceased in the said accident, justify an inference that the rash and negligent driving on the part of the opponent No.2 was the cause of the accident.

39. We are, therefore, persuaded to hold that the Tribunal committed an error in arriving at the conclusion that the accident was the result of the contributory negligence and further apportioning the negligence 50:50. Consequently, the deduction in the admissible compensation on the basis of the said contributory negligence, made by the Tribunal, becomes unsustainable. We, therefore, hold that there shall be no abatement of the compensation on the score of contributory negligence. Point No.1 is thus, answered in the negative.

Point No.2:

40. This propels us to the next challenge regarding computation of the income of the deceased based on exclusion of

certain emoluments and bonus, which the deceased was allegedly drawing. The learned Counsel for the Appellants mounted a two fold challenge to the impugned judgment, as regards non consideration of the emoluments and bonus as part of the income of the deceased. One, the deceased was entitled to annual special bonus of Rs.2,50,000/-. Two, the Tribunal did not consider the other allowances and benefits like LTA (Rs.4,117/-), incentives (Rs.10,000/-), medical allowance (Rs.1,250/-), Maintenance of Car and driver charges (Rs.10,000/-), telephone/mobile facilities (Rs.7,500/-) and Rs.40,000/- for bungalow.

41. The Tribunal considered the salary slips (Exh. 69 and 70) of the deceased for the month of December 2005 and January 2006 wherein the gross salary of the deceased was shown Rs.1,16,217.00 The Tribunal further considered an explicit admission of Smt. Anjali (PW-1), that the total salary of the deceased was Rs. 1,16,217.55 per month. The Tribunal was persuaded to place reliance upon the income tax returns filed by the deceased, for the Financial Year 2004-2005, wherein total income from salary was shown Rs.16,92,060/- and the total tax paid thereon was, Rs.5,35,609/-. On the basis of income tax return (Exh.81), the Tribunal computed the income of the

deceased.

42. The claim that the deceased was entitled to special bonus was rested on a communication dated 24th July 2004 (Exh. 65) wherein it was mentioned that the deceased would be paid one time bonus of Rs.2.5 lakhs at year end, and the deceased would also be entitled to incentives, under an Incentive Scheme, wherein the earning potential was;

a) On recovery, upto Rs. 10 lakhs.

b) On sales, upto Rs. 2 lakhs.

Another communication (Exh.71) dated 6th January 2009 was also pressed into service to show that the employer of the deceased had paid a sum of Rs.5,41,666/- for the period December 2003 to January 2006 under Special Annual Bonus Scheme, at the time of final settlement in the year 2006.

43. It is imperative to note that the applicants do not dispute that the afore-claimed Special Bonus was never paid during the life time of the deceased. Premsingh Negi (PW-2) admitted in clear and explicit terms that the deceased was not entitled to statutory bonus. Premsingh Negi (PW-2) expressed his inability to state as to whether deceased was paid special bonus at any time prior to December 2003. Nor, it is contested that the said payment is not reflected in any of the income tax returns of the

deceased. It does not stand to reason that the corporate entity would have made payment of Special Annual Bonus without any document to vouch for the same. The communication dated 06th January 2009 (Exh.71), therefore, does not advance the cause of the applicants.

44. As regards the non-inclusion of the various benefits and allowances, mentioned above, the Tribunal was of the view that all those payments were included in the income, reported under Income Tax Returns (Exh. 81 and Exh.82). The Tribunal drew support to the aforesaid view from the evidence of Mr. Pavan Kumar (Pw-3), the Chartered Accountant of the deceased, who affirmed that the gross amount reported in the Income Tax return was inclusive of salary plus bonus and perks. He further affirmed that bonus is part of salary, and taxable.

45. The aforesaid approach of the Tribunal appears justifiable for reasons more than one. From the perusal of the Income Tax return (Exh. 82), it becomes evident that the salary and the value of perquisites were indicated therein, distinctly. Secondly, if the annual salary which the deceased drew is computed on the basis of salary slips (Exh. 69 and 70) it comes to Rs.13,94,604/-. Whereas, the income reported by the deceased under the Income Tax Return (Exh. 81) was Rs.16,92,060/-. Thus, the annual

income reported by the deceased was substantially more than the aggregate yearly salary, computed on the basis of salary slips (Exh. 69 and 70) only. We are, therefore, impelled to hold that the Tribunal rightly computed the income of the deceased on the basis of the income, reported in the Income Tax return for the financial year 2004-2005.

46. The learned Counsel for the appellant further urged that the Tribunal committed an error in deducting 1/3rd amount towards the personal and living expenses of the deceased as there were four dependents i.e. applicant Nos. 1 and 2 and opponent Nos. 4 and 5. The learned Counsel for the Appellants drew our attention to the observations of the Supreme Court in the case of *Sarla Varma (supra)*, especially the guidelines in paragraph No. 32 as regards the deductions for personal and living expenses of the deceased, namely, the deduction should be 1/3rd where the number of dependent family member is 2 to 3, 1/4th where the number of dependent family members is 4 to 5 and 1/5th where the number of dependent family members exceeds six.

47. We are afraid to accede to this submission on behalf of the appellant. It is true that the Tribunal directed that out of the compensation ordered to be paid, an amount of Rs.10 lakhs be

paid to the opponent Rs.4 and 6 i.e. Shri. Tilakraj and Smt. Santosh Tilakraj Chaudhari, the parents of the deceased. However, this fact by itself is not sufficient to draw an inference that there were four dependents upon the deceased, so as to warrant 1/4th deduction towards the living and personal expenses. It is pertinent to note that in the case of ***Sarla Varma (supra)*** itself, Supreme Court had observed that even if the deceased is survived by parents and siblings only the mother would be considered to be a dependent. Of course, the aforesaid observations were in the context of a bachelor deceased. In the case at hand, it was elicited in the cross-examination of Smt. Anjali (PW-1) that Shri. Tilakraj, her father-in-law, was serving under Haryana State Government and he might be drawing pension. As against this, no evidence was led before the Tribunal to establish that Shri. Tilakraj (opponent No.4), was also dependent upon the deceased. In the absence of such evidence, it would be impermissible to draw an inference that there were four dependents upon the deceased and, therefore, the deduction towards personal and living expenses ought to have been at a reduced rate.

48. In view of the above, the multiplicand arrived at by the Tribunal i.e. Rs.9,64,131/- after deducting tax from salary, as

reflected in Income Tax returns (Exh.81), and adding 30% towards the future prospects and, thereafter, deducting 1/3rd towards personal and living expenses of the deceased, was appropriate. There is no qualm over application of multiplier i.e. 14, as the deceased was 43 years of age. The loss of dependency thus comes to Rs.1,34,97,834/-. We, therefore, answer point no.2 in the affirmative.

Point No.3:

49. It was lastly urged that the Tribunal awarded very nominal amount under the conventional head i.e. Rs.5,000/- towards loss of estate, Rs.5,000/- towards funeral expenses and Rs.10,000/- towards loss of consortium. The controversy as to what should be the compensation under conventional heads has been set at rest by the Constitution Bench Judgment of the Supreme Court in the case of ***National Insurance Company Limited V/s. Pranay Sethi***⁹. The Supreme Court has determined the amounts to be awarded under conventional heads as under:-

“61.

61 (viii) Reasonable figures on conventional heads, namely, loss of estate, loss of consortium and funeral expenses should be Rs.15,000/-, Rs.40,000/- and

⁹ AIR 2017 SC 5157

Rs.15,000/- respectively. The aforesaid amounts should be enhanced at the rate of 10% in every three years.”

50. In view of the aforesaid prescription, we are inclined to appropriately enhance the compensation under the conventional heads. Having regard to the fact that a sum of Rs. 20,000/- only was awarded towards loss of love and affection, we do not intend to tinker with the same on the ground that the said does not form part of the compensation under conventional heads. Point No.3 is accordingly answered in the affirmative.

Point Nos.4 and 5:

51. The upshot of the aforesaid findings is that the dependents of the deceased are entitled to compensation under the following heads:

- | | | |
|------|----------------------------|--------------------|
| i) | Loss of dependency | - Rs.1,34,97,834/- |
| ii) | Loss of estate | - Rs. 15,000/- |
| iii) | Loss of Consortium | - Rs. 40,000/- |
| iv) | Funeral Expenses | - Rs. 15,000/- |
| v) | Loss of love and affection | - Rs. 20,000/- |

Total = Rs. 1,35,87,834/-

52. For the forgoing reasons and findings on point nos.1 to 3, interference is warranted in the impugned judgment and award.

Thus, the appeal deserves to be partly allowed. Hence, we pass the following order.

ORDER

i) The Appeal stands partly allowed with proportionate costs.

ii) The impugned award stands modified as under:

A) The opponent Nos. 1 to 3 do jointly and severally pay, and deposit in the Tribunal, an additional sum of Rs.68,18,917/- (Rs. Sixty eight lakhs eighteen thousand nine hundred and seventeen only) towards the compensation with interest @ 7% per annum from the date of the application till realisation.

B) If the amount of additional compensation is realised:

a) Rs.15,00,000/- (Rs. Fifteen lakhs only) be paid to the opponent No.5 Smt. Santosh Chaudhrari.

b) The applicant Nos. 1 and 2 are entitled to share the rest of the amount of compensation equally.

c) An amount equivalent to 50% of the share of the applicant Nos. 1 and 2 each, be deposited in any nationalised bank, initially for a period of three years, with liberty to them to withdraw quarterly interest accrued thereon, and rest of the amount be paid to the applicant Nos. 1 and 2.

(N.J.JAMADAR,J.)

(K.K. TATED, J.)