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

**FIRST APPEAL NO. 256 OF 2003
WITH
CIVIL APPLICATION NO. 4569 OF 2002
IN
FIRST APPEAL NO. 256 OF 2003**

Shri Bhagyachandra Shamrao Sukhtankar
Age about 52 years,
R/a. 412, Vardhaman Market, Plot No.75,
Sector No.17, Vashi,
Navi Mumbai – 400 705.

... Appellant/Applicant
(Org. Opponent)

Versus

1. Mangala Yeshwant Kewale
W/o late Dr. Yashwant Sitara Kewale,
Hindu adult Indian Inhabitant,
aged about 45 years.
2. Kumari Neeta Yeshwant Kewale
D/o late Dr. Yashwant Sitara Kewale,
Hindu adult Indian Inhabitant,
aged about 15 years.
3. Master Ninad Yeshwant Kewale
S/o late Dr. Yashwant Sitara Kewale,
Hindu and adult Indian Inhabitant,
aged about 12 years.

All are residing at F/10, Prathamesh
Housing Society, Mahakala Nagar, Mulund (E),
of the Motor Accident Claims Tribunal,
Mumbai – 400 081.

4. Shri Sitaram Nagnath Kewale
Aged about 70 years,
Father of the deceased.
5. Mrs. Kalawati Sitaram Kewale
Aged about 68 years,
Mother of deceased.

Both residing at Chunabhatti Sangadyachi
Chawl, Room No.3, Hill Road,
Bombay – 400 070.

... Respondents
(Org. Applicants)

**WITH
CIVIL APPLICATION NO. 836 OF 2014
WITH
CIVIL APPLICATION NO. 3386 OF 2014
IN
FIRST APPEAL NO. 256 OF 2003**

1. Mangala Yeshwant Kewale
W/o late Dr. Yashwant Sitara Kewale,
Hindu adult Indian Inhabitant,
aged about 45 years.
2. Kumari Neeta Yeshwant Kewale
D/o late Dr. Yashwant Sitara Kewale,
Hindu adult Indian Inhabitant,
aged about 15 years.
3. Master Ninad Yeshwant Kewale
S/o late Dr. Yashwant Sitara Kewale,
Hindu and adult Indian Inhabitant,
aged about 12 years.
4. Mrs. Kalawati Sitaram Kewale
Aged about 68 years,
Mother of deceased.

All are residing at F/10, Prathamesh
Housing Society, Mahakala Nagar, Mulund (E),
of the Motor Accident Claims Tribunal,
Mumbai – 400 081.

... Applicants

IN THE MATTER BETWEEN :-

Shri Bhagyachandra Shamrao Sukhtankar
Age about 52 years,
R/a. 412, Vardhaman Market, Plot No.75,
Sector No.17, Vashi,
Navi Mumbai – 400 705.

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Versus

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Mother of deceased.
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Chawl, Room No.3, Hill Road,
Bombay – 400 070.

... Respondents
(Org. Applicants)

.....

Mr. P.A. Pol a/w Mr. Sharad S. Suryawanshi and Mr. Ranjit S. Hatkar for
the Appellant.

Mr. Anil S. Kadam for the Respondent Nos.1 to 3.

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CORAM : R.D. DHANUKA, J.

RESERVED ON : 17th JANUARY, 2020

PRONOUNCED ON : 28th JANUARY, 2020

JUDGMENT :

. By this First Appeal filed under Section 173 of the Motor Vehicles Act, 1988, the appellant (original opponent) has impugned the judgment and award dated 24th March, 2000 passed by the Motor Accident Claim Tribunal, Mumbai (hereinafter referred to as “M.A.C.T., Mumbai” for short) allowing the Application No. 1153 of 1992 filed by the respondent nos. 1 to 5 and directing the appellant to pay sum of Rs.9,30,000/- with interest @ 12% p.a. from the date of the said application till the date of realization. Some of the relevant facts for the purpose of deciding this First Appeal are as under :-

2. The appellant herein was the opponent in the Application No. 1153 of 1992 and the respondents herein were the original applicants before the M.A.C.T., Mumbai. It was the case of the respondents that the husband of the respondent no.1, who was father of the respondent nos.2 and 3 and son of the respondent nos. 4 and 5, Shri Yashwant Sitara Kewale was riding his scooter bearing registration no.MHL-7559 on Mankhurd – Ghatkopar Link Road at about 6:30 p.m. When he was opposite O.N.G.C. Quarters at Govandi, car bearing registration no. MGR-8524 (hereinafter referred to as “said offending vehicle” for short) being driven by the appellant in a rash and negligent manner violently dashed the said scooter driven by the said deceased who died on the spot. The said offending vehicle was not insured with any insurance company. The said deceased was a medical practitioner

with MBBS degree and was working in that capacity with the Bombay Municipal Corporation. He was also a Writer and a Photographer.

3. The respondents filed an application before the said Tribunal under Section 166 of the Motor Vehicles Act, 1988 *inter-alia* praying for compensation against the appellant in the sum of Rs.10 lakhs with interest @ 18% p.a. from the date of the said application. The said application was resisted by the appellant by filing written statement. The said Tribunal framed 4 issues. The respondents examined the respondent no.1 as one of the witness. They also examined an Administrative Officer from Public Health Department of Bombay Municipal Corporation (PW-3). The respondents examined Mr. Laluram Omkar (PW-2) who was a Police Constable and who was then working at Deonar Police Station. The appellant also examined himself and another witness. All these witnesses were cross-examined by the advocate appearing for the other side. By a judgment and award dated 24th March, 2000, the Tribunal directed the appellant to pay a sum of Rs.9,30,000/- with interest @ 12% p.a. from the date of the said application till realization. The appellant filed this appeal impugning the said judgment and award dated 24th March, 2000.

4. Mr. P.A. Pol, learned counsel for the appellant invited my attention to the pleadings and evidence annexed to the paper book and the findings rendered by the Tribunal. He also invited my attention to the panchanama

forming part of the record before the Tribunal and also a sketch which was drawn by his client and was produced before the Tribunal. It is submitted by the learned counsel that his client was driving the said offending vehicle by Mankhurd – Ghatkopar link road at Govandi in normal speed and all of a sudden a scooter driven by the said deceased came on the wrong side and dashed against his client's car and as a result thereof, the front left mudguard and number plate of the said offending vehicle sustained heavy damage. The said deceased had not used his spectacles nor had put on his headlamps and also was not wearing helmet.

5. It is submitted by the learned counsel for the appellant that his client was acquitted by the learned Metropolitan Magistrate in the complaint filed against the appellant under Section 304-A of the Indian Penal Code by a judgment and order dated 7th October, 1992. He submits that the said deceased was solely responsible for the said accident. He died due to his own rash and negligent driving and thus no compensation could be awarded by the Tribunal against the appellant.

6. It is submitted by the learned counsel that no eye witness was examined by the respondents. The PW-1 did not have any personal knowledge of the accident. The PW-2 i.e. Mr. Laluram Omkar who was the Police Constable also was not an eye witness and thus his evidence ought to have been discarded by the Tribunal. It is submitted by the learned counsel

that thought the evidence of the appellant corroborated the sketch drawn by him (Exh. 24), the Tribunal has totally discarded the said sketch produced by the appellant showing the exact position of the road on which the said accident had taken place. There was no residential locality on either side of the road. He submits that if the said motor vehicle was intending to proceed from Ghatkopar to Mankhurd it had to take a diversion near the diversion point and then further re-diversion at the point where R.C.C. pipes were lying. The width of the motorable road was twenty feet and there were no lights on the road. At the time of accident, there was regular traffic on both the side of the road.

7. It is submitted by the learned counsel that the said deceased was proceeding on his scooter from opposite direction i.e. from Ghatkopar to Mankhurd and had dashed against his car hitting the front left side light and had gone over the body of his car with the scooter and had fallen on the road on the rear side of his car at a distance. It is submitted that the Tribunal did not consider the evidence of Dr. Mahale (DW-2) on the basis that in his cross-examination, the said witness had deposed that he had not seen as to how the accident had occurred. The said witness was sitting by the left side of the appellant in the car at the material time. The said witness had deposed that there was a traffic on both flanks of the road.

8. Learned counsel for the appellant invited my attention to the

panchanama (Exh. 19) and would submit that the said panchanama did not indicate that the appellant was present when the said panchanama was prepared. He submits that the Tribunal has committed an error to hold that the said panchanama showed that it was the appellant who had shown the place of accident to the Police. The said panchanama did not indicate the name of the appellant at all. The PW-2 who was examined by the respondents as one of the witness also confirmed in his cross-examination that the name of the appellant was not shown in the said panchanama. He submits that though the appellant had proved by drawing a sketch that both the flanks of the road were open to the traffic at the spot of the accident and one flank was closed at a distance of 1 k.m. from the spot of the accident and that the said deceased had proceeded to wrong side without taking the re-diversion, the Tribunal ignored this crucial fact and allowed the compensation against the appellant. He submits that the speed of car of the appellant at 60-70 k.m.p.h. was a normal speed and could not be considered as rash and negligent driving on the part of the appellant. It is submitted that the finding of the Tribunal that the appellant had contributed negligence to the extent of 75% is *ex-facie* perverse.

9. In so far as the quantification of the claim awarded by the Tribunal is concerned, it is submitted that the witness examined by the respondents to prove the salary of the said deceased, could not prove the salary of the said deceased in the sum of Rs.10,013/- p.m. He submits that in any event

considering the age of the said deceased as 41, the Tribunal could not have applied the multiplier of 15 but at the most could have applied the multiplier of 14. He submits that the respondents had not produced any other source of income of Rs.3,000/- to Rs.4,000/- p.m. of the said deceased. The Tribunal however considered the said income also while awarding compensation in favour of the respondents. He submits that the said scooter driven by the said deceased was driven in high speed and thus after the said scooter dashed the said offending vehicle, it fell on the back side of the said offending vehicle and that also at the distance.

10. Mr. Kadam, learned counsel for the respondent nos. 1 to 3 on the other hand invited my attention to various portion of the oral evidence led by parties and also to the documents produced by those witnesses. It is submitted by the learned counsel that in the examination-in-chief of the appellant, the appellant admitted that his motor vehicle bearing registration no. MGR-8524 was involved in the said accident which occurred on 2nd October, 1991. Dr. Mahale was sitting left to his side. In his examination-in-chief, he admitted that he was driving his motor vehicle in the speed of 60-70 k.m.p.h. At the time of accident there was regular traffic on both the sides of the road. The motor vehicle of the appellant was two feet away from the central divider. The said deceased was proceeding on his scooter from the opposite direction from Ghatkopar to Mankhurd and dashed against his motor car and hit the front left side light and went above his car with his

scooter and fell on the road at the back of his motor car.

11. Learned counsel for the respondent invited my attention to the cross-examination of the appellant and would submit that in his cross-examination the appellant had admitted that pipes were lying at certain point on the road, there where some vehicles behind his car. He had not counted the number of those vehicles behind his car. At the time of accident, there was a regular traffic on both flanks on the said road. It is submitted that the appellant had admitted in his evidence that at the time of accident he was looking ahead and he had not seen any vehicle coming from the opposite direction. One vehicle was proceeding ahead of him in the same direction. There were 2 rows in half of the road. There were no marks to that effect. There were 4 to 5 vehicles behind his car and two vehicles ahead of him. There was one vehicle to the left of his side of his car.

12. In so far as sketch produced by the said witness is concerned, it is submitted that the said witness admitted that the said sketch had been prepared by him for his convenience. There was a road divider at the centre of the road two feet away from his car towards the right side. The height of the said road divider was one feet approximately. It is submitted by the learned counsel that the said sketch relied upon by the appellant even otherwise could not have been considered by the Tribunal as authentic.

13. Insofar as the evidence of the DW-2 led by the appellant is concerned, it is submitted by the learned counsel that the said evidence was totally inconsistent with the evidence of the appellant. The said witness had admitted in the cross-examination that he had not seen as to how the accident had occurred. He submits that his evidence thus even otherwise could not have been considered by the Tribunal and would not prove the case of the appellant.

14. Learned counsel for the respondents invited my attention to the cross-examination of the appellant and would submit that it was an admitted position that the road repairing work was going on and one side of the road was closed. Only one side of the road was open for traffic. He relied upon the panchanama produced as one of the document in evidence and would submit that the said panchanama indicated the name of the appellant present at the time of drawing the said panchanama. The appellant however did not raise any objection as to how his name was recorded in the panchanama. If according to him he was not present at the time of panchanama and his name was wrongly recorded.

15. It is submitted by the learned counsel that since it was an admitted position that several pipes were lying on the road, that itself clearly indicated that the repairing of the road was going on and thus the appellant could not have driven his vehicle in the speed of 60-70 k.m.per hour. The appellant

had also admitted in his evidence that he saw for the first time the said deceased only after the accident had taken place and the said deceased felt beyond 24 feet of the offending vehicle. It is submitted that it is thus clear that the offending vehicle and the said scooter drawn by the said deceased were on the same side of the road where both the vehicles were plying in view of the fact that only one side of the road was open for traffic. There was gross negligence on the part of the appellant in driving the offending vehicle.

16. Learned counsel for the respondent nos. 1 to 3 invited my attention to the affidavit in lieu of examination-in-chief filed by the Administrative Officer from Public Health Department who produced the records of the Municipal Corporation to prove the gross salary of the said deceased at the time of accident and deposed that there used to be two revision of the salary every five years. The said deceased would have retired on 15th December, 2007. He submits that insofar as the pay scale of the said deceased produced on record by the said witness (PW-2) is concerned, there was no cross-examination of the said deposition of the said witness by the appellant's advocate. He submits that though the said witness had proved that the said deceased would have earned gross salary of Rs.10,030/-, the Tribunal considered salary of Rs.6,024/- per month only. The said deceased was medical practitioner and was employed with the Bombay Municipal Corporation.

17. Insofar as the contributory negligence of the said deceased found by the said Tribunal is concerned, it is submitted that the said deceased was not at all negligent and was driving in a slow and moderate speed. The Tribunal thus could not have deducted any amount from the gross compensation by the Tribunal on that ground and ought to have allowed the entire claim of Rs.12 lacs to the respondent nos. 1 to 3. He submits that the Tribunal has considered the salary of Rs.10,000/- per month on the basis of the prevailing salary on the date of evidence of the PW-3 and not by considering the subsequent period. The Tribunal ought to have given the benefit of the two increment which the said deceased would have been paid before his retirement in view of their being revision of salary every five years.

18. Learned counsel for the respondents placed reliance on the judgment of the Supreme Court in case of ***State of Punjab vs. Bakshish Singh in Civil Appeal No.4212 of 1997*** dated 8th September, 1998 in support of his submission that though the respondents have not filed any separate appeal or cross objections, this court has ample power to grant additional compensation or to allow the compensation which is either not allowed by the Tribunal in the claim filed by his client or partly rejected.

19. Mr.P.A.Pol, learned counsel for the appellant in rejoinder strongly placed reliance on the panchanama and the sketch forming part of the evidence before the Tribunal. He submits that the evidence of PW-2 relied

upon by the respondents was inconsistent with the case of the respondents before the Tribunal. He submits that according to the evidence of the PW-2, both the vehicles were being driven on the same side of the road and in the same direction. He submits that if the evidence of the PW-2 would have been considered in right perspective, the said scooter would not have dashed the offending vehicle from the front side.

20. It is submitted by the learned counsel that the documents produced by the appellant did not show that one side of the road was closed. He submits that the appellant did not examine any eye witness to prove that the appellant was solely responsible for the said accident or that his driving was rash and negligent. He submits that it was not the case of the respondents that there was any opportunity to the appellant to save the said deceased and no such care was taken by the appellant.

21. Insofar as the quantum of the claim awarded by the Tribunal is concerned, it is submitted that the said witness (PW-3) had produced the salary certificate of the said deceased showing the gross salary of Rs.6176.40 per month. The respondent no.1 who entered the witness box had produced the salary certificate of Rs.6042.40. He submits that the said PW-3 was recalled for further re-examination by the respondents. Upon his further examination-in-chief, the said witness deposed that the total salary of the said deceased on 25th July, 1995 was Rs.10,030/-. However in his cross-

examination, he admitted that the said amount of Rs.10,030/- was gross salary and not the net salary of the said deceased.

22. Insofar as the multiplier applied by the Tribunal on the loss of dependency is concerned, considering the age of the said deceased as 41, the Tribunal could not have applied the multiplier of 15 and ought to have applied for multiplier only of 14 by applying the principles laid down by the Supreme Court in case of ***Sarla Varma (Smt) & Ors. vs. Delhi Transport Corporation and another, (2009) 6 SCC 121.***

REASONS AND CONCLUSION

23. It was the case of the respondents that the said deceased was driving his scooter from Mankhurd to Ghatkopar Link Road when the offending vehicle was being driven in a rash and negligent manner and violently had dashed against the said scooter causing the death of the said deceased on the spot. The said offending vehicle was not insured with any insurance company. The said deceased was a medical practitioner with MBBS degree and was working in that capacity with the Bombay Municipal Corporation. He was also a Writer, Photographer and a Good Hyker. The said deceased was 41 years old at the time of his death. The said application was filed by the father and mother of the said deceased and also by the widow and two children for seeking compensation of Rs.10,00,000/-. The respondent nos. 1

to 3 had examined the respondent no.1 i.e. his widow who was cross examined by the appellant. In her cross-examination, she deposed that the said deceased was not wearing spectacles while driving the scooter. He was using the said spectacles only for the reading purpose.

24. Insofar as the salary slip of the said deceased produced by the respondent no.1 (PW-1) showing the monthly salary for the month of July 1991 at Rs.6042.40 is concerned, there was no cross-examination of the PW-1 by the appellant on that part of the evidence.

25. In the examination-in-chief of Mr.Laluram Onkar Narawane (PW-2) who was police constable employed with the Deonar Police Station deposed that on 2nd October,1991, he was on night duty and was attached to Deonar Police Station. The body of the said deceased was identified by the appellant. In the presence of panchas, a panchanama was drawn. Thereafter PW-2 went to the place of the accident. He deposed that in the presence of the appellant, a panchanama of the place of the accident was drawn. There was a divider on the road. One side of the road was closed for traffic as some repairing work was going on. South side of the road was closed. The accident spot was near the divider. The scooter was found in a damaged condition. The scooter was proceeding on the left side from west to east means from Mankhurd to Ghatkopar side.

26. The said PW-2 however in his cross-examination admitted that the presence of the appellant was not mentioned in the panchanama. In the panchanama, it was written that one person pointed out the place of the accident. According to the PW-2, the appellant was present in the custody and he was the same person.

27. Insofar as the evidence of Mr.Ramchandra Dagdu Gaikwad, PW-3 is concerned, he was working with the Bombay Municipal Corporation in Public Health Department as an Administrative Officer in-charge of service section. The said witness deposed that the said deceased was working in Mulund General Hospital as a Assistant Medical officer. For the month of September 1991, the salary of the deceased was 6176.40. On the date of the recording evidence, if the said deceased would have been alive, his salary would be Rs.10,000/- approximately. Every five years there was a revision in the pay scale of the Municipal Corporation employees. The age of superannuation being 58 years, the said deceased would have retired on 15th December,2007.

28. In his cross-examination, the said witness deposed that he was willing to produce the written statement to give the break up of the salary. He had received break up of the salary of Rs.10,013/-. In his cross-examination, he deposed that there was revision of the salary every five years in the employment of the Municipal Corporation. Earlier the revision was in the

year 1985. The said witness was directed to produce the written statement of pay scale as on the date of the said evidence. The said witness was re-examined by the respondent nos. 1 to 3. In further examination-in-chief, the said witness produced a statement indicating the total salary of Rs.10,013/- of the said deceased as on 25th July, 1995. However, in his cross-examination, he admitted that the said amount of Rs.10,013/- would not have taken home salary.

29. Insofar as the evidence of the appellant (DW-1) is concerned, a perusal of the said evidence clearly indicates that the appellant himself admitted in the examination-in-chief that his vehicle was involved in the accident on 2nd October, 1991. At the time of his driving the said offending vehicle his cousin Dr.Nitin Shrikrishna Mahale was with him in the said car. He had prepared the said sketch on 11th October, 1995. He further admitted that the electric poles were erected but there were no lights. The R.C.C. pipes were lying on the said road. He had further deposed that at the centre of the said road, there was a road divider. The width of the said road divider was about 4 ft. and height was 1 ft. The distance between the spot of accident and the culvert was about 45 ft. The distance between the point of diversion and re-diversion was about 25 ft. The distance between the spot of accident and re-diversion was about 1 k.m.

30. The said witness admitted in his examination-in-chief that he saw the

deceased for the first time when he was lying on the said road after the accident. At the time of the accident, the speed of his motor car was 60 or 70 km. per hour. He also admitted that at the time of accident, there was regular traffic on both the sides of the road. The speed of those vehicles were same at about 60 to 70 k.m.per hour. Some of the motor vehicles were behind his motor car at the time of the accident. His car was to the left side of the central road divider. He was driving his motor car in Mankhurd to Ghatkopar direction. His motor car was two feet away from the central divider.

31. The said witness in his examination-in-chief deposed that before the actual accident occurred, the deceased was proceeding on his scooter from the opposite direction from Ghatkopar to Mankhurd and dashed against his motor car and hit the front left side light and went above his car with his scooter and fell on the road at the back of his motor car. However, the said appellant in his cross-examination admitted that he had not taken the measurement while preparing the said rough sketch tendered by him in evidence. He also admitted that even in the said rough sketch, he had shown that the pipes were lying at certain point on the said road as shown in the said sketch. There were some vehicles behind his car. He has not counted the same. He deposed that at the time of accident, there was a regular traffic on both flanks on the said road. He further admitted that he was looking ahead at the time of the accident and had not seen any vehicle coming from

the opposite direction. There were two rows in half of the road. There were no marks to that effect.

32. The witness admitted that in half of the road through which he was driving his car, two vehicles were ahead of him and there were about four to five vehicles behind his car. There was one vehicle to the left of his side of his car. He admitted that he had drawn the said sketch on 11th October, 1995. He admitted that the said sketch was prepared by him for his convenience. He denied the suggestion that there was sufficient time at the time of the accident. He denied that he was present at the time of drawing the panchanama. He admitted that the diversion and re-diversion shown in the sketch plan prepared by him was due to the lying of the pipes on the said road. He deposed that he did not know when those diversions and re-diversions were removed from the said road though he was passing by the said road usually. The appellant did not establish that the said deceased was not wearing helmet at the time of accident.

33. A perusal of the evidence led by the witness Dr. Niteen Shrikrishna Mahale (DW-2) examined by the appellant clearly indicates that in his examination-in-chief, he deposed that he was sitting at the left side of the appellant who was driving motor car along Mankhurd Ghatkopar Link Road. The said motor car was being driven by the left side of the said road at the time of the accident. The speed of the said motor car was about 50 k.m. per

hour at the time of the accident. He saw the deceased for the first time in the hospital when he was admitted therein after the accident. He could not see the deceased in the said motor car. In his examination-in-chief he admitted that he had contact lenses because of which the blood between the lens and eye, he was unsighted. He was also bleeding from different wounds around his left eye.

34. The said witness in his examination-in-chief admitted that at the time of the accident, there was a traffic on the both flanks of the road. He did not remember whether there were cement pipes lying on the said road. He admitted that he had not seen as to how the accident had occurred. The said witness was not re-examined by the appellant. The Tribunal considered the evidence of PW-2 who had stated that as the road repairing work was in progress, the road falling on one side was closed for traffic and it was the southern side of the road that was closed. The Tribunal also rendered a finding that DW-2 who was allegedly sitting by the left side of the appellant admitted that he has not seen as to how the accident had occurred and thus his evidence was of no use to the appellant.

35. The Tribunal thereafter also considered the oral evidence, FIR and panchanama produced on record in evidence. The panchanama recorded that it was the appellant who had shown the place of accident to the police. The PW-2 examined by the respondent had deposed that only one flank of

the road was motor road and the road was under repairs. In my view the Tribunal rightly held that when there were no electric lights burning on the road though electric poles were erected and only one flank of the road was open for traffic, the appellant ought to have driven the vehicle carefully and ought not to have driven in the speed of 60-70 k.m. per hour. Those documents produced by the respondents were not disputed by the appellant. In any event, the contents thereof were proved. There is thus no merit in the submission of the appellant that no eye witness was examined by the respondents.

36. In my view there is no merit in the submission of the learned counsel for the appellant that the Tribunal ought to have held the said deceased solely negligent for rash and negligent driving. On the contrary, the finding rendered by the Tribunal that the said deceased was responsible to the extent of 25% is contrary to the evidence on record. The appellant was solely responsible for the said accident.

37. Considering the fact that one side of the road was under repairing and several pipes were led on the road and there being no electricity light burning on the road, in my view the appellant ought to have reduced his speed. In these circumstances driving of the vehicle at the speed of 60-70 k.m. per hour admittedly would amount to rash and negligent driving on the part of the appellant. The sketch produced by the appellant was drawn by

him for his own convenience and was produced after four years of the accident. The appellant had not even taken any measurement while preparing the said sketch. Be that as it may, the said sketch prepared by the appellant was contrary to his own evidence and the evidence led by the DW-2. In my view, the evidence of the witness DW-2 even otherwise could not have been considered by the Tribunal on the ground that he had admitted that he had not seen as to how the accident had occurred.

38. Insofar as panchanama strongly relied upon by Mr.Pol, learned counsel for the appellant is concerned, the contents of the said panchanama were proved by the PW-2 before the Tribunal. The appellant could not demonstrate before the Tribunal as well as before this court as to how the said panchanama could not have been relied upon by the Tribunal. The said finding and conclusion drawn by the Tribunal apportioning contributory negligence in the ratio of 75:25 % deserves to be set aside and to be substituted by the finding that the appellant was solely responsible for the said accident and his driving was rash and negligent and causing death of the said deceased. Mere acquittal of the appellant in criminal case arising out of the said accident would not assist the case of the appellant.

39. Insofar as the salary considered by the Tribunal for the purpose of allowing the claim in favour of the respondents is concerned, it is not in dispute that the respondent had examined PW-3 who was working with the

Municipal Corporation to prove the salary of the said deceased who was also working with the Municipal Corporation. The said witness had produced the proof in respect of the salary paid to the said deceased at the time of his death. On the deposition of the said witness that he would have been paid Rs.10,000/- approximately per month if he would have been alive from the date of the evidence and that he would have retired on 15th December,2007 with two revision of pay scale, there was no cross-examination of the said witness by the appellant.

40. In his further examination-in-chief, the said witness produced the written statement indicating the total salary of Rs.10,013/- of the deceased as on 25th July, 1995. The said deceased had expired on 2nd October,1991. The Tribunal has considered the entire evidence on this issue and has held that in course of time the said deceased would have earned more than Rs.10,013/- per month towards his salary and thus it would be just and appropriate to hold that the gross income of the said deceased was Rs.10,000/- per month. The deceased was 41 years old at the time of his accident. The Tribunal however considered the age of the said deceased at the time of his accident as 42 years in paragraph (10) of the impugned judgment and award and accordingly applied the multiplier of 15 and arrived at the figure of Rs.18,00,000/-. The Tribunal deducted 1/3rd of the amount towards personal expenses and arrived at the figure of Rs.12,00,000/-. Out of the amount of Rs.12,00,000/-, the Tribunal deducted 1/4th by arriving at the

finding that the said deceased was negligent at the rate of 25% and arrived at the figure of Rs.9,00,000/-. The Tribunal allowed additional amount of Rs.30,000/- comprising of Rs.5,000/- each towards loss of love and affection and Rs.10,000/- each towards loss of consortium.

41. Since this court is of the view that the appellant was solely responsible for the rash and negligent driving which caused accident of the said deceased, the deduction of 1/4th amount towards alleged contributory negligence of the said deceased deserves to be set aside. Since the age of the said deceased was 41 years at the time of his death, applying the principles of law laid down by the Supreme Court in case of **Sarla Varma (Smt) & Ors.** (surpa), the Tribunal ought to have applied the multiplier of 14 and not 15. After applying the multiplier of 14 on the yearly income, the amount would come to Rs.14,20,000/-. 1/3rd of the personal expenses is required to be deducted out of the said amount. After such deduction, the amount comes to Rs.9,46,666.66 (considered as Rs.9,46,667/-). In addition to the said amount, the respondent would be also entitled to compensation at the rate of Rs.10,000/- each towards loss of consortium and Rs.5,000/- towards love and affection as awarded by the Tribunal in the year 2000.

42. I therefore pass the following order :-

- (a) The respondent nos. 1 to 3 are entitled to recover a sum of Rs. 9,76,667/- from the appellant with interest at the rate of 12%

per annum from the said date of application till realization along with cost after deducting the amount already withdrawn by the respondent nos. 1 to 3, if any, and Rs.25,000/- already paid under section 140 of the Motor Vehicles Act, 1988.

- (b) If there is any shortfall in the payment of decretal amount out of the amount deposited by the appellant, the amount of shortfall shall be deposited by the appellant with the Motor Accident Claim Tribunal, Mumbai within two weeks from the date of such computation of the shortfall by the Tribunal.
- (c) If the Tribunal finds any surplus amount deposited by the appellant, such surplus amount after payment of the decretal amount to the respondent nos. 1 to 3 shall be returned to the appellant.
- (d) First Appeal No.256 of 2003 is disposed of on the aforesaid terms. No order as to costs.
- (e) In view of the disposal of the First Appeal, all pending civil applications are also disposed of.
- (f) Operative part of the Judgment and Award dated 24th March, 2000 is modified in aforesaid terms.
- (g) The parties as well as the Tribunal to act on the authenticated copy of this order.

(R.D. DHANUKA, J.)