

Dusane/Sonali

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
FIRST APPEAL NO. 463 OF 2020

1. **NAMRATA ANIL YADAV,**
(Widow of Deceased)
Age 39 Years, Occu-Housewife,
2. **ASHIKA ANIL YADAV,**
(Daughter of the Deceased)
Age 13 Years, Occu-Student,
3. **CHANDRABHUSHAN SADHU SINGH,**
(Father of the Deceased),
Age 73 Years, Occu-Retired,
4. **MEERA CHANDRABHUSHAN YADAV,**
(Died on 16/12/2016),
(Mother of the Deceased)
Age 63 Years, Occu-Housewife,

Applicant No.2 being Minor hence
claiming through her Mother i.e.
Applicant No.1 as N.F.)
All R/at 2/9, Hasthdeep CHS Ltd.,
Plot No. 85, Shiv Ganga Nagar,
Ambernath (East), Dist-Thane.

...Appellants

~ versus ~

1. **BHUPENDRA MANOHAR BHOIR,**
2, Bhoir Guruji Chawl, Nr Water Tank,
Village-Kongaon, Tal. Bhiwandi,

Dist-Thane 421 308.
(Owner of Motor Tempo No.
MH-08-H-3533).

- 2. ICICI LOMBARD GENERAL
INSURANCE CO LTD,**
Pensula Bldg, 4th Floor, DN Road,
Near Handloom House, Fort,
Mumbai – 400 034.
(Insurer of Motor Tempo No.
MH-08-H-3533)
And presently having address at
Meher House Second Floor,
Opposite Akbarally,
Opposite High Court,
Mumbai – 400 032.

...Respondents

APPEARANCES

FOR THE APPELLANTS Mr Sandeep Mishra.

FOR RESPONDENT NO. 2 Mr Rajesh Kanojia, *i/b RES Juris.*

**CORAM : G.S.Patel &
 Madhav J Jamdar, JJ**

JUDGMENT RESERVED ON : 29th March 2022

JUDGMENT PRONOUNCED ON : 13th April 2022

JUDGMENT (Per Madhav J Jamdar, J):-

1. The Appellants, who are the original claimants, have by way of this First Appeal filed under Section 173 of the Motor Vehicles Act, 1988 challenged the legality and validity of the Judgment and Award dated 19th October 2016 passed by the learned Chairman, MACT, Thane in MACP No. 933/11 seeking an enhancement in the

compensation awarded. At this stage only, it is to be noted that although the amount of compensation determined by the learned Tribunal was Rs.2,58,44,336/-, however, only Rs. 1,03,38,144/- was granted, as the learned Tribunal returned a finding of contributory negligence. The Tribunal apportioned the contributory negligence between the deceased and the driver of the offending tempo as 60% and 40% respectively.

2. The Appellants have challenged the said finding of the Tribunal that the accident had occurred due to 60% negligence of the deceased. According to the Appellants, there was no negligence of the deceased and the accident had occurred solely due to the rash and negligent driving of the driver of the offending tempo.

3. It is also significant to note that the said Judgment and Award dated 19th October 2016 is not challenged by the Respondents including Respondent No. 2, i.e. the Insurance Company. Thus the Respondents have accepted the computation of compensation and the finding that the accident had taken place at least due to 40% negligence of the driver of the offending tempo.

4. Heard Mr Sandeep Mishra, learned counsel appearing for the Appellants, and Mr Rajesh Kanojia for Respondent No.2. None appears for Respondent No. 1, i.e. the owner of the offending tempo though served.

5. Mr Mishra submitted that the finding recorded by the learned Tribunal regarding 60% negligence of the deceased and 40%

negligence by the offending tempo is contrary to the evidence of Vikas Kisan Kuthale (AW-2) and Amit Venugopal Nayar (AW-3). He relied on the spot Panchanama (Exhibit “32”) dated 2nd February 2021. He submitted that the evidence on record clearly shows that the accident had taken place solely due to the rash and negligent driving by the driver of the offending tempo and therefore the Appellants are entitled to 100% compensation. It is to be noted that Mr Mishra, the learned counsel of the Appellants advanced only these submissions and none else.

6. On the other hand, Mr. Rajesh Kanojia, learned counsel for the Respondents, submitted that the said alleged eye witnesses namely, Vikas Kisan Kauthale (AW-2) and Amit Venugopal Nair (AW-3), are not mentioned as eye witnesses in the Police record. He submitted that therefore they cannot be considered as eye witnesses and their evidence cannot be relied on. He submitted that the Police have filed FIR against the deceased under Sections 279, 337, 338, 304-A and 427 of the Indian Penal Code, 1860 read with Section 184 of the Motor Vehicles Act, 1988. He therefore submitted that there is no substance in the contention that there is no contributory negligence by the deceased. He further submitted that the learned Tribunal has rightly held that there is 60% negligence of the deceased and therefore it has been rightly held that the Appellants are entitled only to 40% of the computed compensation. He submitted that therefore no interference in the impugned judgment and award is warranted.

7. We have heard the arguments on 3rd January 2022 and while preparing draft of this Judgment, we noticed some decisions on the question of contributory negligence and quantum of compensation that will be relevant to decide this Appeal. Therefore we passed the following order on 17th March 2022:

“1. We reserved the judgment in this matter on 3rd January 2022. When draft has been prepared, we noted some decisions on the question of contributory negligence and quantum of compensation that will be relevant. The relevant citations are noted below:

1. *Dulcina Fernandes vs Joaquim Xavier Cruz* ((2013) 10 SCC 646).
2. *Bimla Devi and Ors vs Himachal RTC & Ors* ((2009) 13 SCC 530).
3. *Pramodkumar Rasikbhai Jhaveri vs Karmasey Kunvargi Tak & Ors* ((2002) 6 SCC 455).
4. *Municipal Corporation of Greater Bombay vs Laxman Iyer & Anr* ((2003) 8 SCC 731).
5. *Mohammed Siddhique & Anr vs National Insurance Company Ltd & Ors* (AIR 2020 SC 520: AIR Online 2020 SC 29).
6. *United India Insurance Company vs Shila Datta & Ors* ((2011) 10 SCC 509).
7. *New India Assurance Company Limited vs Somwati & Ors* ((2020) 9 SCC 644).

8. *Sarla Verma (SMT) & Ors vs Delhi Transport Corporation & Anr ((2009) 6 SCC 121).*

9. *United India Insurance Company Ltd vs Satinder Kaur alias Satwinder Kaur & Ors ((2020) SCC Online SC 410).*

2. We request both sides to consider these and make their supplementary submissions on these decisions on the next date. For this purpose, we list the matter on 24th March 2022 at 2.30 pm.

3. We request both sides to prepare their short propositions on submissions on the question of law.”

8. On 24th March 2022, we heard both the sides. On 24th March 2022 the Respondent No.2 submitted supplementary submissions in compliance with order dated 17th March 2022. The learned Advocate of the Appellant sought some more time to file supplementary submission and filed the same on 29th March 2022. On 29th March 2022, we reserved the judgment.

9. Mr. Mishra, the learned counsel for the Appellant relied on paragraph 7 of *Dulcina Fernandes vs Joaquim Xavier Cruz (supra)*, paragraph 15 of *Bimla Devi vs Himachal RTC (supra)*, paragraphs 7, 8 and 10 of *Pramodkumar Rasikbhai Jhaveri vs Karmasey Kunvargi Tak (supra)*, paragraph 6 of the judgment in *Municipal Corporation of Greater Mumbai vs Laxman Iyer & Anr (supra)* and paragraph 14 of the judgment of *Mohammed Siddhique & Anr vs National Insurance Company Ltd & Ors. (supra)*.

10. He submitted that these judgments support the case of the Appellant. He submitted that in *Bimla Devi & Ors* (supra) the Supreme Court shifted the burden of proof as per Section 106 of the Indian Evidence Act, 1872 on the Respondents as claimants were not present at the place of the occurrence. He submitted that the facts narrated by the claimants are supported by eye witnesses i.e. AW-2 and AW-3. He submitted that the finding regarding contributory negligence was recorded by the Tribunal only on the basis of damage caused to the front portion of the car as recorded in the panchanama. He submitted that the Supreme Court in paragraph 11 of *Pramodkumar Rasikbhai Jhaveri vs Karmasey Kunvargi Tak* (supra) have not appreciated to rely on the opinion of expert evidence based on the observation of the damaged parts of the two vehicles.

11. As far as quantum of compensation, he relied on *United India Insurance Company vs Shila Datta & Ors*. (supra) and *New India Assurance Company Limited vs Somvati & Ors* (supra). He relied on paragraphs 43 and 44 of the said judgment. He submitted that the Respondents have not filed appeal challenging the correctness of the amount awarded under the Head "Loss of love and affection" and therefore the same cannot be reduced. He relied on paragraphs 38 and 39 of *New India Assurance Co Ltd V Somvati & Ors*. He submitted that as per the said judgment, loss of consortium will be as follows:

a) Spousal consortium : Rs.40,000/-

b) Parental Consortium : Rs.40,000/- x 3 = 1,20,000/-

12. He relied on *Sarla Verma (Smt) & Ors v Delhi RTC & Anr* (supra) and submitted that the Tribunal has rightly added 50% of the actual salary towards future prospect, rightly arrived at multiplier and rightly considered the deductions. He also relied on *United India Insurance Co Ltd Vs. Satinder Kaur alias Satwinder Kaur & Ors* (supra), as well as *United India Insurance Co Ltd Vs. Shila Datta & Ors* (supra) and submitted that as regards award of compensation towards loss of love and affection and for future prospect, no appeal has been filed by the Respondents and therefore the said findings be not disturbed. He submitted that the Appellant has filed First Appeal for enhancement, mainly on the point of contributory negligence and submitted that in this case, there is no contributory negligence and the accident had occurred solely due to the rash and negligent driving by the driver of the offending tempo.

13. Mr Rajesh Kanojia, learned counsel for the Respondent No.2 submitted that *Bimla Devi & Ors v Himachal RTC & Ors*, *Dulcinea Fernandes v. Joaquim Xarier Cruz and United India Vs Shila Datta* (supra), all supports the case of the Insurance Company. He submitted that none of the Police documents viz FIR statement, statement recorded by police, spot panchanama and inquest panchanama suggest the negligence on the part of the insured vehicle i.e. tempo but only point out to the sole negligence on the part of the deceased. He submitted that *Pramodkumar Rasikbhai Jhaveri v Karamasey Kunvargi Tak & Ors* and *Municipal Corporation of Greater Mumbai v Laxman Iyer & Anr* (supra) are not applicable to the present case, as the facts of the said case are totally different. He submitted that in *Pramod Kumar Jhaveri (supra)*, there was collision between truck and the car, whereas in the present case, the car

driven by the deceased was behind the offending tempo. Another distinguishing factor is that the crime was registered only against the deceased who was driving the car and not against the tempo driver. He submitted that tempo was driven with very slow speed as there were two speed breakers and the distance between them was approximately 25 ft. He submitted that *Mohammed Siddiqui & Anr v National Insurance Co Ltd & Ors* is not applicable to the present case as the facts in the said case were totally different. On the point of compensation, he submitted that loss of consortium, loss of care and guidance and funeral expenses were awarded as per judgment of *Rajesh & Ors v Rajbir Singh & Ors*¹. He submitted that the decision in the case of *Rajesh & Ors* is not binding precedent. Therefore, the said amounts needs to be re-assessed by considering the authority of *National Insurance Co Ltd v Pranay Sethi & Ors*². He submitted that as per *National Insurance v Pranay Sethi* judgment, the future prospects applicable shall be 40% and Conventional heads shall be as follows:

Consortium	:	Rs.40,000/-
Funeral expenses	:	Rs.15,000/-
Loss of estate	:	Rs.15,000/-

14. He also relied on *New India Assurance Company Ltd V. Somvati & Ors & United India Insurance Company Ltd Vs Satinder Kaur alias Satiwinder Kaur & Ors*. He submitted that the Tribunal awarded higher amounts under the heads of loss of consortium and loss of care and guidance. It is submitted that at the most,

1 (2013) 9 Supreme Court Cases 54

2 (2017) 16 Supreme Court Cases 680

Rs.80,000/- could have been awarded considering Spousal Consortium of Rs.40,000/- to Appellant No.1 and Parental Consortium of Rs.40,000/- to Appellant No.2. He submitted that there is no question of granting any Filial Consortium to Appellant Nos. 3 and 4 as the same is granted only in cases where the claimants have lost their minor child, unmarried son or daughter. Relying on *Sarla Varma (Smt)*, he submitted that the Tribunal has rightly applied multiplier of 16 and personal deduction (1/4th).

15. We have considered evidence on record as well as examined the contentions raised by both the parties.

16. As far as the oral evidence is concerned, the eye witnesses to the incident who have been examined as witnesses are AW-2-Vikas Kisan Kauthale, AW-3-Amit Nair and the driver of the offending vehicle (the Tempo involved in the accident), namely Babu Pandhari Pidge, who has been examined as witness of the Opponent No.2.

17. The evidence of AW-2, Vikas Kisan Kauthale, shows that he has a travel business and on 1st February 2011 he was coming from Pune in his Sumo car just behind the deceased's car. On 1st February 2011, at about 11.50 PM, the deceased was driving his Motor Car. AW-2 was driving his Sumo car, which was just behind the motor car of the deceased. It is further deposed by AW-2 that the deceased was driving very slowly and with moderate speed. Said motor tempo bearing No. MH-08 H-3533 was going with high and excessive speed and in a rash and negligent manner and suddenly the Tempo stopped in the middle of the road due to a speed breaker,

took a right turn without any warning signal or turning indicator, and dashed into a tree on the other side of the road. Due to the sudden stoppage of tempo, the motor car of the deceased collided with the Tempo. As a result of the said accident, the deceased sustained a head injury as well as other grievous injuries. He was taken to Shivaji Hospital by the Police, but due to his grievous injuries, he died on 2nd February 2011. AW-2 further deposed that, due to said accident, he stopped his Sumo car on the side of the road and rushed to the spot and pulled out the injured from the car with the help of other people gathered there. At that time, the deceased was alive and told the persons gathered there to take him to a private hospital. Within a few minutes, the police arrived on the scene and took the injured person. AW-2 deposed that at that time he gave his mobile number to police. He had taken the cell number of the father of the deceased from the cell phone of the deceased. AW-2 had called the deceased's father from AW-2's cell phone. He deposed that the police never called him for giving a statement.

18. The evidence of AW-2 is not shaken in the cross-examination conducted on behalf of the Respondent No.2. The said cross examination is reproduced herein below for ready reference:-

“Police have not recorded my statement about the accident. It is not true to say that I have no any knowledge about the accident. It is not true to say that I am not eye witness of the accident, and from the people I came to know about the accident. I have not brought with me any document in respect of my occupation. It is not true to say that I am deposing falsely that I am doing travelling business. It is not true to say that contents of para No.3 of

my evidence on affidavit are false. It is not true to say that due to speed breaker, tempo was proceeding in slow speed, but car came in high speed and gave dash to tempo. It is not true to say that I am deposing falsely that I have given my contact number to the police. It is not true to say that I have no knowledge about the accident, but I am deposing falsely.”

A perusal of the cross-examination of AW-2 shows that except for bare denials, nothing is extracted and therefore, the evidence of AW-2 has not been shaken in the cross-examination and nothing is brought on record in his cross-examination to discredit this witness.

19. As far as the evidence of AW-3, Amit Nair, is concerned, he has deposed that he was driving his motorcycle behind the motor car of the deceased on the left side of the road. The deceased was going at a very slow and moderate speed with full care and caution behind the said Tempo, which was being driven at a high and excessive speed and in a rash and negligent manner. AW-3 has also deposed that suddenly the Tempo stopped in the middle of the road due to a speed breaker and took right turn without any warning signal or turning indicator and dashed into a tree on the other side of the road. Due to this, the motor car of the deceased collided with the motor tempo and as a result the said accident took place. After the said accident, AW-3 immediately stopped his motorcycle on the side of the road and rushed to the spot. He also helped to pull out the deceased from the car with the help of others. The deceased was alive at that time. AW-3 and told the people gathered there to take him to any nearby private hospital. After few minutes, the police arrived over and took the injured to the hospital. Police took the

mobile number of AW-3, but never called him for giving a statement. His cross-examination is on the lines similar to that of AW-2. Thus, it is clear that the evidence of AW-3 has also remained unshaken in the cross-examination.

20. An analysis of the evidence of AW-2 and AW-3 shows that they are strangers to each other. Neither was connected with the deceased or his family. Both are chance witnesses and can safely be said to be independent witnesses. Importantly, they are the eye witnesses to the incident. The evidence of each is consistent with that of the other and nothing adverse has been brought in their cross-examination. Their evidence has remained intact.

21. It is significant to note at this stage that the learned Tribunal has also accepted their evidence. The observations of the learned Tribunal regarding evidence of AW-2 and AW-3 are very relevant and are reproduced hereinbelow for ready reference:-

“Both A.W.2 & A.W.3 are independent eye witnesses and nothing is found in favour of opponent No.2 in cross-examination of both the witnesses and nothing is brought on record in the course of cross-examination of these witnesses as to why they are deposing in favour of the applicants and against the opponents. It appears that both the witnesses are independent and in any manner they are not related either to the deceased or the applicants. It is true that police have not recorded statements of these witnesses about the accident. It is also true that their names are not specifically mentioned in the application for compensation stating that they have witnessed the

accident. However, it is pleaded in para-14 (b) of the application that after the accident, the deceased was taken to Shivaji Hospital by one friend, who was going behind the car of the deceased with police. Thus, on the basis of direct evidence of A.W.2 and A.W.3 an inference can be drawn that at the relevant time of the accident, at the speed breaker on the road offending Tempo was suddenly stopped and it took right turn without giving signal and the car of the deceased was colluded with Tempo from behind.”

(Emphasis added)

22. The evidence of AW-1 and AW-2 is corroborated by the spot panchnama (Exhibit “32”). The relevant portion of the said spot panchnama is reproduced hereinbelow:-

“आता आम्ही पंचानी व पोलीसांनी दिलरूबा हॉटेल समोर पडलेगाव, गतीरोधक येथे उभी असलेली कार नं. **MH05 A3509** हिचे निरीक्षण केले असता सदर कारचा पुढील संपूर्ण भाग आत दबून इंजिन एडीएटर आत दबून नुकसान झालेले. बोनेट पत्रा पुढील दोन्ही बाजूचे दरवाजे दबून नुकसान झालेले. तसेच समोरील काच, साईट आरसे दोन्ही दरवाजे यांचे काच फूटून नुकसान झालेले. स्टेरींग आतील बाजूस दबलेली दिसत आहे. सदर ठिकाणी काचेचे तुकडे पडलेले दिसत आहे.

त्याचप्रमाणे अपघातील टेम्पो नं. **MH08 H 3533** हा कल्याण शिळ रोड प्रविण हॉटेल समोरील एका झाडावर आदळलेले दिसत असून सदर टेम्पोचे पुढील बोनेट, पत्रा, एडीएटर आत दबलेले कॅबीनचा वरील पत्रा आत दबलेला उजवेबाजूचा दरवाजा दबलेला दिसत आहे. तसेच समोरील काच फुटलेली दिसत आहे. तसेच टेम्पोचा पाठीमागील भाग लोखंडी अँगल आत दबून नुकसान झालेले

पाठीमागील दोन्ही चाकांचे शॉकपसर तुटलेले दिसत आहे.
अपघातामध्ये कार नं. MH05 AJ 504 या गाडीचे पुढील
चाकांचे एक्सल तुटलेले दिसत आहे. कारचा पुढील भागाचा
संपूर्ण नुकसान झालेले दिसत आहे.”

The above relevant portion of spot panchanama (Exh 32) is translated in English for ready reference as follows:

“Now, we, the Panchas and the Police have inspected the car bearing no. MH05 A3509 stationary at the speed breaker opposite Dilruba Hotel at Padlegaon, and we found that, the entire front portion of the said car has got pressed inside, the engine radiator is got pressed inside and have been damaged. Bonnet tin-sheet and both the front side doors are got pressed and damaged. Similarly, front glass and side mirrors and the glasses of both the doors are broken and have been damaged. The steering wheel is seen to be pressed from inside and the pieces of broken glass are seen to be lying at the said place.

Similarly, the Tempo No. MH08 H 3533 involved in the accident is found to have been dashed against one tree in front of Hotel ‘Pravin’ on Kalyan-Shil road and the front bonnet, tin-sheet, radiator of the Tempo are found to have been got pressed inside, the tin-sheet on the top of the cabin is found to have been got pressed inside and right side door is also found to have been got pressed inside. Similarly, front glass is seen to be broken. Moreover, the rear side portion of the Tempo and iron angle are got pressed inside and the same have been damaged. The shock absorbers of both rear side wheels are seen to be broken. The axles of front wheels of car No. MH 05 AJ 504 involved in the accident, is found to be broken. It is seen that the front portion of the car has got completely damaged.”

The contents of spot panchnama dated 2nd February 2011 (Exhibit “32”) clearly corroborates the deposition of AW-2 and AW-3 regarding the manner in which the accident in question had taken place.

23. The contention raised by the learned counsel appearing for the Respondent No.2 that the names of AW-2 and AW-3 are not appearing in the police record and therefore, they cannot be termed as eye witnesses is entirely without merit. Although it has come in the evidence of AW-2 and AW-3 that there were many persons gathered at the spot of incident, the police papers produced on record do not show the same. Both AW-2 and AW-3 have specifically deposed that they had given their cell numbers to the police but the police had never contacted them. We have already observed that AW-2 and AW-3 were not known to the deceased or his family members and that they are just chance witnesses and independent witnesses. It is also significant to note that inspite of service, the owner of the offending Tempo, i.e. Opponent No.1/Respondent No.1, failed to appear before the learned Tribunal as well as in this Court.

24. It is further significant to note that Respondent No.2, i.e. Opponent No.2-Insurance Company, has examined the driver of the offending truck, Babu Pandhari Pidge, as witness No.1 for Opponent No.2. His evidence shows that his duty hours were from 9.00 a.m. to 10.00 p.m. He was residing at Kongaon at the house of the owner of the Tempo. On 1st February 2011, after loading goods in the Tempo at Kongaon, Bhiwandi, he proceeded in the Tempo towards

Sanpada, Vashi, where the tempo was unloaded. Thereafter, the Tempo driver began the return journey to Kongaon, Bhiwandi to the house of owner of the tempo. The accident took place between 11.00 p.m. and 11.30 p.m. Pidge deposed that at the spot of the incident there were two speed breakers at a distance of 100 ft on the road and speed of the Tempo was 30-35 kms. per hour. After the Tempo crossed the first speed breaker and as it was about to cross the second speed breaker, the deceased's car came from behind at great speed and dashed the tempo from behind. This caused the Tempo to dash against the divider and it then went off the road and dashed into the tree. He further deposed that, thereafter, the driver-side door of the Tempo was flung open due to the force of the impact and he fell out of the Tempo and sustained a head injury. He was taken to a hotel near the spot of the incident and owner of the Tempo, Bhupendra Bhoir, was informed about the accident. The owner of the Tempo came to the scene and Pidge was taken to the hospital. At that time, Pidge was unconscious. On the next day, in the evening, he was taken to the police station to record his statement. In the cross-examination, he admitted that his duty hours were 9.00 a.m. to 10.00 p.m. and the accident took place at about 11.00 p.m. to 11.30 p.m. He further admitted that he had not produced any record to show that he sustained any injuries on account of the accident.

25. Pidge was cross examined on various aspects, including the following: (1) that as everybody in the vicinity was knowing the owner of the Tempo, the owner got the crime falsely registered against the driver of the car with the help of police; (2) the driver of the Tempo and the owner of the Tempo failed to give any assistance

to the accident victim and left the spot; (3) the incident took place at about 11.50 p.m., and as he was late he was driving in excessive speed; and (4) there were three labourers also riding in the Tempo.

26. Thus, the examination in chief and cross examination of the driver of the offending Tempo clearly establish the following aspects:

- I. The duty hours of the tempo driver were from 9.00 a.m. to 10.00 p.m.
- II. On the day of the incident, i.e. on 1st February 2011, after loading the goods in the Tempo, the Tempo driver took the tempo from Kongaon, Bhiwandi to Sanpada, Vashi and unloaded the same at Sanpada and thereafter the Tempo was returning to Kongaon, Bhiwandi. The loading and unloading was done by three labourers. The Tempo driver was working from 9.00 am till the accident took place at about 11.50 p.m., i.e. beyond his duty hours.
- III. Although the owner of the tempo came to the spot of the accident, he as well as the driver of the offending Tempo had not taken care to take the deceased to a hospital.

IV. Although three labourers were in the Tempo, they were not examined and they are not even referred to in the police record.

27. All the above factors, read with the evidence of AW-2 and AW-3, clearly show that the preponderance of probability is that the accident had taken place as the Tempo was driven at high speed; that, perhaps due to the speed breaker, the Tempo suddenly stopped without any warning; and that due to the sudden stoppage of the Tempo, the car driven by the deceased collided with the Tempo.

28. It is significant to note that although several persons had gathered at the spot of the incident, the Respondent No.2-Insurance Company only examined the driver of the vehicle, who is clearly an interested witness.

29. The record before us indicates a very strange set of facts. The FIR in question was not lodged by the driver or the owner of the vehicle. It was lodged by one Pramod Vitthal Megal, i.e. a constable of the Shil-Daighar police station. The police failed to record the statement of the persons who were present at the time of the incident. AW-2 and AW-3 have specifically deposed that they were at the spot when the accident took place. They gave their contact numbers to the police. However, police never called them. The police did not record their statements. The spot panchnama also shows that the Panchas, too, were not eye-witnesses to the accident. PC Vitthal Megal's statement at Exhibit "30" is the basis on which the FIR was registered. In this, Megal claims that he was on

patrolling duty with one police constable Shri Patil, and while they were proceeding towards Desai Naka by Sheel-Kalyan Road, they saw the car of the deceased colliding with the Tempo from behind, when the speed of the offending Tempo was reduced at or near the speed breaker at the accident spot. But this statement of PC Mengal is in direct conflict with the station diary. This is the finding returned by the Learned Tribunal on this aspect of the evidence:

“Exh.80 certified copy of the station diary shows that information of the accident was given to the police station officer on phone in the police station by some unknown person and there upon ASI Shinde informed them (the informant P.C. Shri Mengal) about the accident on phone and then immediately alongwith staff they reached at the spot of incidence and shifted injured to Shivaji Hospital at Kalwa. The above said contents of the station diary particularly contents that unknown person on phone in the police station informed about the accident to the PSO creates doubt whether P.C. Mengal has witnessed the accident as claimed by him in FIR Exh. 30. Therefore, merely because crime was registered against the deceased as per FIR Exh.30 and then final report of abated summary was submitted in the Court against the deceased, when there is direct evidence of A.Ws. 2 and 3 as referred above, FIR Exh. 30 is not sufficient to attribute sole negligence to the deceased as claimed by the opponent No.2.”

(Emphasis added)

30. Three aspects emerge from this: *first*, that the version of the police constable Megal is entirely contradicted by the police’s own document, the station diary and in unworthy of credence. Second,

that there is some substance to the contention that the FIR was got up or engineered at the instance of the vehicle owner for reasons that are immediately obvious. *Third*, that the only two parties affected by this finding, viz., the insurer and the vehicle owner have not even in arguments before us (let alone in any formal Cross Objections) assailed this finding. We are not assessing the FIR in this judgment. Yet, it is now clear that the only purpose of introducing this factual element (about PC Megal being on patrol duty) was to raise the claim of negligence on the part of the deceased, the victim of the accident. That this was the intent behind the FIR is evident from the last line of the impugned order emphasized above, viz., the rejection of the submission that the accident was solely due to the negligence of the deceased.

31. The Supreme Court in the case of *Dulcina Fernandes vs Joaquim Xavier Cruz*³ as well as in *Bimla Devi vs Himachal RTC*⁴ held that the Claimants are not in a position to establish conclusively by strict proof the manner in which accident had taken place. The Claimants were merely to establish their case on the touchstone of preponderance of probability. The standard of proof beyond reasonable doubt could not have been applied. What is necessary is to take holistic view of the matter. The plea of negligence is required to be decided by the learned Tribunal on the touchstone of the preponderance of probabilities and certainly not on the basis of proof beyond reasonable doubt.

3 (2013) 10 SCC 646

4 (2009) 13 SCC 530

32. We are satisfied that there is high probability that the accident had taken place solely due to rash and negligent driving of the driver of the offending Tempo. We are recording this finding in view of following aspects:-

- I. The evidence of eye witnesses i.e. Vikas Kisan Kauthale (AW-2), Amit Venugopal Nayar (AW-3) clearly shows that the deceased was going very slowly and with moderate speed and said motor Tempo was going with high and excessive speed and with rash and negligent manner and suddenly the motor Tempo stopped on the middle of the road, due to speed breaker and took right turn without any signal and dashed on tree on the other side of the road. Due to this, motor car of the deceased collided and suddenly dashed on the motor Tempo due to sudden stoppage of Tempo.
- II. Contents of Spot panchnama (Exhibit “32”) corroborate with the evidence of AW-2 and AW-3.
- III. Although owner of the offending Tempo and the driver were available, the FIR by taking false contention that the accident took place due to negligence of the deceased was lodged by the police constable Pramod Vithal Mengal.

- IV. The learned Tribunal by giving cogent reasons have come to the conclusion that said police constable Pramod Vithal Mengal was not the eye witness and false FIR was lodged by the police.
- V. There are strong reasons to believe that as the owner and driver of the offending Tempo are the local residents, due to pressure of local people false FIR was lodged against the deceased for helping the said owner and the driver.
- VI. The contents of FIR, spot panchnama and other police record clearly show that false record is created to support the contention that the accident had taken place due to the negligence of the deceased.
- VII. The evidence of the driver of the offending Tempo namely Babu Pandhari Pidge show that there were three labourers in the offending Tempo. They were not examined.
- VIII. The Respondent No.2 failed to examine any independent witness. The Respondent No.2 only examined driver of the offending vehicle. However, he is interested witness and his evidence is not trustworthy.

Thus, we hold that the accident had taken place solely due to rash and negligent driving of the Tempo driver.

33. It is to be noted that the learned Tribunal has recorded contradictory findings. The learned Tribunal has specifically accepted the evidence of AW-2 and AW-3 and accepted their version regarding manner in which the accident had taken place. The learned Tribunal specifically recorded finding that the police constable who lodged the FIR against the deceased was not the eye witness and false FIR was lodged. While recording this finding the learned Tribunal has made specific reference to the evidence of AW-2 and AW-3. In this background, the learned Tribunal recorded finding of 60% contributory negligence of the deceased and 40% of the driver of the offending Tempo on the basis of spot panchnama (Exhibit 32). The learned Tribunal accepted the evidence of AW-2 and AW-3 and they have deposed in detail about the manner in which accident had taken place. Their evidence clearly show that the accident had taken place solely due to rash and negligent driving of the driver of the offending Tempo. We have already discussed hereinabove that the situation as emerging from spot panchnama is consistent with the evidence of AW-2 and AW-3. Thus, the accident had taken place entirely due to rash and negligent driving of the driver of the offending Tempo. The finding recorded by the learned Tribunal regarding contributory negligence is contrary to the evidence on record.

34. As learned Tribunal has recorded finding regarding contributory negligence, we deem it appropriate to make reference to the legal position concerning the same.

34.1 In *Pramodkumar Rasikbhai Jhaveri vs Karmasey Kunvargi Tak & Ors*,⁵ the Supreme Court has held that contributory negligence arises when there has been some act or omission on the claimant's part, which has materially contributed to the damage caused, and is of such a nature that it may properly be described as 'negligence'. Negligence ordinarily means breach of a legal duty to care, but when used in the expression "contributory negligence" it does not mean breach of any duty. It only means the failure by a person to use reasonable care for the safety of either himself or his property, so that he becomes blameworthy in part as an "author of his own wrong". In paragraph 9 and 10 of *Pramodkumar Rasikbhai Jhaveri vs Karmasey Kunvargi Tak & Ors (Supra)* it has been held as follows:

"9. Subject to non-requirement of the existence of duty, the question of contributory negligence is to be decided on the same principle on which the question of defendant's negligence is decided. The standard of a reasonable man is as relevant in the case of plaintiff's contributory negligence as in the case of defendant's negligence. But the degree of want of care which will constitute contributory negligence, varies with the circumstances and the factual situation of the case. The following observation of the High Court of Australia in *Astley Vs. Austrust Ltd.* (1999) 73 ALJR 403 is worthy of quoting:

5 (2002) 6 Supreme Court Cases 455

“A finding of contributory negligence turns on a factual investigation whether the plaintiff contributed to his or her own loss by failing to take reasonable care of his or her person or property. What is reasonable care depends on the circumstances of the case. In many cases, it may be proper for a plaintiff to rely on the defendant to perform its duty. But there is no absolute rule. The duties and responsibilities of the defendant are a variable factor in determining whether contributory negligence exists and, if so, to what degree. In some cases, the nature of the duty owed may exculpate the plaintiff from a claim of contributory negligence; in other cases, the nature of the duty may reduce the plaintiff's share of responsibility for the damage suffered; and in yet other cases the nature of the duty may not prevent a finding that the plaintiff failed to take reasonable care for the safety of his or her person or property. Contributory negligence focuses on the conduct of the plaintiff. The duty owed by the defendant, although relevant, is one only of many factors that must be weighed in determining whether the plaintiff has so conducted himself that it failed to take reasonable care for the safety of its person or property.”

10. It has been accepted as a valid principle by various judicial authorities that where, by his negligence, if one party places another in a situation of danger, which compels that other to act quickly in order to extricate himself, it does not amount to contributory negligence if that other acts in a way, which, with the benefit of hindsight, is shown not to have been the best way out of

the difficulty. In *Swadling Vs. Cooper* [1931] A.C. 1 at page 9, Lord Hailsham said:

“Mere failure to avoid the collision by taking some extraordinary precaution does not in itself constitute negligence: the plaintiff has no right to complain if in the agony of the collision the defendant fails to take some step which might have prevented a collision unless that step is one which a reasonably careful man would fairly be expected to take in the circumstances.”

34.2 In *Municipal Corporation of Greater Bombay vs Laxman Iyer & Anr*,⁶ it has been held that contributory negligence is applicable solely to the conduct of a plaintiff.

6. ... It means that there has been an act or omission on the part of the plaintiff which has materially contributed to the damage, the act or omission being of such a nature that it may properly be described as negligence, although negligence is not given its usual meaning. (See *Charlesworth on Negligence*, 3rd Edn. Para 328). It is now well settled that in the case of contributory negligence, courts have power to apportion the loss between the parties as seems just and equitable. Apportionment in that context means that damage are reduced to such an extent as the court thinks just and equitable having regard to the claim shared in the responsibility for the damage. But in a case where there has been no contributory negligence on the part of the victim, the question of apportionment does not arise. Where a person is injured without any negligence on his part but as a result of combined effect of the negligence of two other persons, it is not a case of contributory negligence in that sense. It is a case of what has been styled

6 (2003) 8 Supreme Court Cases 731

by Pollock as injury by composite negligence. (See Pollock on Torts, 15th Edn. P.361).

7. ... The sample test is what was the cause or what were the causes of the damage. The act or omission amounting to want of ordinary care or in defiance of duty or obligation on the part of the complaining party which conjointly with the other party's negligence was the proximate cause of the accident renders it one to be the result of contributory negligence.

34.3 In *Mohammed Siddhique & Anr vs National Insurance Company Ltd & Ors*⁷, the Supreme Court was considering the effect of violation of traffic rules by the driver of the vehicle who suffered the accident and whether he will be guilty of contributory negligence. The relevant portion of the said judgment is reproduced hereinbelow for ready reference:

“13. But the above reason, in our view, is flawed. The fact that the deceased was riding on a motor cycle along with the driver and another, may not, by itself, without anything more, make him guilty of contributory negligence. At the most it would make him guilty of being a party to the violation of the law. Section 128 of the Motor Vehicles Act, 1988, imposes a restriction on the driver of a two wheeled motor cycle, not to carry more than one person on the motor cycle. Section 128 194-C inserted by the Amendment Act Amendment Act 32 of 2019, prescribes a penalty for violation of safety measures for motor cycle drivers and pillion riders. Therefore, the fact that a person was a pillion rider on a motor cycle along with

7 AIR 2020 Supreme Court 520:AIR Online 2020 SC 29

the driver and one more person on the pillion, may be a violation of the law. But such violation by itself, without anything more, cannot lead to a finding of contributory negligence, unless it is established that his very act of riding along with two others, contributed either to the accident or to the impact of the accident upon the victim. There must either be a causal connection between the violation and the accident or a causal connection between the violation and the impact of the accident upon the victim. It may so happen at times, that the accident could have been averted or the injuries sustained could have been of a lesser degree, if there had been no violation of the law by the victim. What could otherwise have resulted in a simple injury, might have resulted in a grievous injury or even death due to the violation of the law by the victim. It is in such cases, where, but for the violation of the law, either the accident could have been averted or the impact could have been minimized, that the principle of contributory negligence could be invoked. It is not the case of the insurer that the accident itself occurred as a result of three persons riding on a motor cycle. It is not even the case of the insurer that the accident would have been averted, if three persons were not riding on the motor cycle. The fact that the motor cycle was hit by the car from behind, is admitted. Interestingly, the finding recorded by the Tribunal that the deceased was wearing a helmet and that the deceased was knocked down after the car hit the motor cycle from behind, are all not assailed. Therefore, the finding of the High Court that 2 persons on the pillion of the motor cycle, could have added to the imbalance, is nothing but presumptuous

and is not based either upon pleading or upon the evidence on record. Nothing was extracted from PW3 to the effect that 2 persons on the pillion added to the imbalance.

14. Therefore, in the absence of any evidence to show that the wrongful act on the part of the deceased victim contributed either to the accident or to the nature of the injuries sustained, the victim could not have been held guilty of contributory negligence. Hence the reduction of 10% towards contributory negligence, is clearly unjustified and the same has to be set aside.”

35. Following principles are emerging from the above judgments of the Supreme Court.

(i) The contributory negligence arises when there is some act or omission on the claimant's/deceased's part, which has materially contributed to the damage caused. It means failure by a person to use reasonable care for the safety of either himself or his property.

(ii) A finding of contributory negligence is to be arrived at by appreciating the evidence on record regarding the aspect whether the claimant or deceased contributed to his or her own loss by failing to take reasonable care of his or her person or property. What is reasonable care depends on the circumstances of the case.

(iii) If one party places another in a situation of danger by his negligence, which compels that other party to act quickly in order to extricate himself, failure of taking those quick actions does not amount to contributory negligence.

(iv) Mere failure to avoid the collision by taking some extraordinary precaution does not in itself constitute negligence, unless that step is one which a reasonably careful man would fairly be expected to take in the circumstances.

36. We have already recorded a finding by appreciating the evidence on record that the accident had taken place entirely due to rash and negligent driving of the driver of the offending Tempo. Even if the evidence on record is analysed in the light of above principles, then also, it is clear that this is not a case where deceased had contributed to the accident. The evidence of AW-2 and AW-3 i.e. eye witnesses of the accident, which has been accepted by the learned Tribunal and which has been discussed in detail by us in earlier part of this Judgment clearly show that the accident had taken place entirely due to rash and negligent driving of the driver of the offending Tempo. In this case, there is no negligence which can be attributed to the deceased due to which the accident had taken place. Therefore, there is no question of contributory negligence.

37. As we have come to the conclusion that the accident had taken place solely due to rash and negligent driving of the driver of the offending Tempo, the finding recorded by the learned Tribunal that the accident took place due to contributory negligence of the

deceased and the driver of the offending Tempo and the proportion of the negligence of the deceased and the driver of the offending Tempo was respectively 60% and 40% is required to be quashed and set aside. In view of our finding that the accident had taken place entirely due to the negligence of the driver of the offending Tempo, the Claimants i.e. Appellants are entitled for the compensation to the extent of 100%.

38. The next question is the quantum of compensation to which the Appellants are entitled. In the Appeal memo, grounds are raised regarding some of the aspects concerning quantum of compensation but during submission, no arguments were advanced with respect to the same. However, as noted above while preparing draft of this judgment, we noted some decisions on the question of contributory negligence and quantum of compensation. Therefore, for giving fair opportunity to both the parties, we again heard the matter on 17th March 2022, 24th March 2022 and 29th March 2022. The submissions made by both the parties were noted in the earlier part of this judgment. Before considering the said aspects, it is necessary to set out legal position as emerging from various judgments of the Supreme Court.

39. The Supreme Court in the matter between *United India Insurance Company vs Shila Datta & Ors* ⁸ has held that an award by the Tribunal cannot be seen as an adversarial adjudication between the litigating parties to a dispute, but a statutory determination of compensation on the occurrence of an accident, after due enquiry,

8(2011) 10 SCC 509

in accordance with the statute. The said legal position is reiterated by Supreme Court in *Dulcina Fernandes & Ors vs. Joaquin Xavier Cruz & Anr.*⁹ The said principles are also applicable to the appeal challenging the award passed by the learned Tribunal. Thus as the present proceedings are not adversarial in nature but statutory determination of the compensation after due enquiry in accordance with the statute, we deem appropriate to examine the evidence on record for arriving at just compensation. However, we will also consider the submission of the Appellants that the Respondents have not filed their Appeal and therefore findings recorded by the learned Tribunal are binding on him and in any case should not be disturbed.

40. Before considering the evidence on record regarding quantum of compensation to which the Appellants are entitled, it is necessary to set out the legal position.

40.1. The Supreme Court in the matter between *New India Assurance Company Limited vs Somwati & Ors*¹⁰ held as follows:

“The claimant in a claim for award of compensation under Section 166 of Motor Vehicles Act, 1988, is entitled for just compensation. The just compensation has to be equitable and fair. The loss of life and limb can never be compensated in an equal measure but the statutory provisions under Motor Vehicles Act is a social piece of legislation which has been enacted with intent and object to facilitate the claimants to get

9(2013) 10 SCC 646

10(2020) 9 SCC 644

redress for the loss of the member of family, compensate the loss in some measure and to compensate the claimant to a reasonable extent.”

40.2 The Supreme Court in the matter between *Sarla Verma (SMT) & Ors vs Delhi Transport Corporation & Anr*¹¹, in paragraph No.18 held as follows:

“Basically only three facts need to be established by the claimants for assessing compensation in the case of death :

- (a) age of the deceased;
- (b) income of the deceased; and
- (c) the number of dependents.

The issues to be determined by the Tribunal to arrive at the loss of dependency are:

- (i) additions/deductions to be made for arriving at the income;
- (ii) the deduction to be made towards the personal living expenses of the deceased; and
- (iii) the multiplier to be applied with reference of the age of the deceased.

If these determinants are standardized, there will be uniformity and consistency in the decisions. There will lesser need for detailed evidence. It will also be easier for the insurance companies to settle accident claims without delay.”

11(2009) 6 SCC 121

40.3 The Supreme Court in the matter between *United India Insurance Company Ltd vs Satinder Kaur alias Satwinder Kaur & Ors*¹² by making reference to various judgments of the Supreme Court reiterated the principles for assessment of compensation in case of death as involved by judicial dicta from paragraphs 33 to 66. The relevant paragraphs are reproduced hereinbelow:

“33. Relevant principles for assessment of compensation in cases of death as evolved by judicial dicta.

36 In order to provide uniformity and consistency in awarding compensation, the following steps are required to be followed :-

“Step 1 (*Ascertaining the multiplicand*)

The income of the deceased per annum should be determined. Out of the said income a deduction should be made in regard to the amount which the deceased would have spent on himself by way of personal and living expenses. The balance, which is considered to be the contribution to the dependent family, constitutes the multiplicand.

Step 2 (*Ascertaining the multiplier*)

Having regard to the age of the deceased and period of active career, the appropriate multiplier should be selected. This does not mean ascertaining the number of years he would have lived or worked but for the accident. Having regard to several imponderables in life and economic factors, a table of multipliers with reference to the age has been identified by this

12(2020) SCC OnLine SC 410

Court. The multiplier should be chosen from the said table with reference to the age of the deceased.

Step 3 (Actual calculation)

The annual contribution to the family (multiplicand) when multiplied by such multiplier gives the 'loss of dependency' to the family. Thereafter, a conventional amount in the range of Rs. 5,000/- to Rs. 10,000/- may be added as loss of estate. Where the deceased is survived by his widow, another conventional amount in the range of 5,000/- to 10,000/- should be added under the head of loss of consortium. But no amount is to be awarded under the head of pain, suffering or hardship caused to the legal heirs of the deceased.

The funeral expenses, cost of transportation of the body (if incurred) and cost of any medical treatment of the deceased before death (if incurred) should also added.”

(Emphasis added)

(a) Deduction for personal and living expenses

37. The personal and living expenses of the deceased should be deducted from the income, to arrive at the contribution to the family. In *Sarla Verma* (supra) (paras 30, 31 and 32), this Court took the view that it was necessary to standardize the deductions to be made under the head personal and living expenses of the deceased.

38. Accordingly, it was held that :

where the deceased was married, the deduction towards personal and living expenses should be 1/3rd if the number of dependent family members is two to three;

1/4th if the number of dependent family members is four to six; and

1/5th if the number of dependent family members exceeds six.

(b) Determination of Multiplier

41. With respect to the multiplier, the Court in *Sarla Verma* (supra), prepared a chart for fixing the applicable multiplier in accordance with the age of the deceased, after considering the judgments in *General Manager, Kerala S.R.T.C., Trivandrum v. Susamma Thomas & Ors.*, *U.P.S.R.T.C. & Ors. v. Trilok Chandra & Ors.*, and *New India Assurance Co. Ltd. v. Charlie & Ors.*

42. The relevant extract from the said chart i.e. Column 4 has been set out hereinbelow for ready reference :-

Age of deceased	Multiplier (Column 4)
Upto 15 years	-
15 to 20 years	18
21 to 25 years	18
26 to 30 years	17
31 to 35 years	16
36 to 40 years	15
41 to 45 years	14
46 to 50 years	13
51 to 55 years	11
56 to 60 years	9
61 to 65 years	7

Above 65 years	5
----------------	---

(d) Future Prospects

50. In the wake of increased inflation, rising consumer prices, and general standards of living, future prospects have to be taken into consideration, not only with respect to the status or educational qualifications of the deceased, but also other relevant factors such as higher salaries and perks which are being offered by private companies these days. The dearness allowance and perks from which the family would have derived monthly benefit, are required to be taken into consideration for determining the loss of dependency.

59. In view of the aforesaid analysis, we proceed to record our conclusions:

...

59.3. While determining the income, an addition of 50% of actual salary to the income of the deceased towards future prospects, where the deceased had a permanent job and was below the age of 40 years, should be made. The addition should be 30%, if the age of the deceased was between 40 to 50 years. In case the deceased was between the age of 50 to 60 years, the addition should be 15%. Actual salary should be read as actual salary less tax.

59.4. In case the deceased was self-employed or on a fixed salary, an addition of 40% of the established income should be the warrant where the deceased was below the age of 40 years. An addition of 25% where the deceased was between the age of 40 to 50 years and 10% where the deceased was between the age of 50 to 60 years should be

regarded as the necessary method of computation. The established income means the income minus the tax component."

(Emphasis added)

(e) Three Conventional Heads

53. In *Pranay Sethi (supra)*, the Constitution Bench held that in death cases, compensation would be awarded only under three conventional heads *viz.* Loss of estate, loss of consortium and funeral expenses.

54. The Court held that the conventional and traditional heads, cannot be determined on percentage basis, because that would not be an acceptable criterion. Unlike determination of income, the said heads have to be quantified, which has to be based on a reasonable foundation. It was observed that factors such as price index, fall in bank interest, escalation of rates, are aspects which have to be taken into consideration. The Court held that reasonable figures on conventional heads, namely, loss of estate, loss of consortium and funeral expenses should be Rs.15,000/-, Rs. 40,000/- and Rs.15,000/- respectively. The Court was of the view that the amounts to be awarded under these conventional heads should be enhanced by 10% every three years, which will bring consistency in respect of these heads."

41. We will apply the above principles to the facts of the present case.

42. The evidence of Appellant No.3 i.e. Applicant No.3-father of the deceased shows that the deceased was serving as Senior Captain in Starship Maritime Services Pvt Ltd and he was earning US\$ 10,500 per month i.e. Rs.5,00,000/- approximately per month. The said evidence is corroborated by AW-4- Sandesh Jivaji Desai (Exhibit “46”), working in the said company since 2005 as Office Assistant. He has stated that the deceased was working for said Starship Maritime Services Pvt Ltd as a Senior Captain and he was drawing wages of about US \$ 10,500 per month i.e. approximately Rs. 4,75,000 per month. In the cross-examination he stated that for the post of Senior Captain, Marine Rank Master work is available for four months in a year. On the basis of this evidence the learned Tribunal rightly arrived at the annual income of Rs.18,00,000/- by calculating income of Rs.4,53,000/- per month for four months and assuming the same to be the annual income. There is no illegality in the said findings.

43. As held in *Sarla Verma (Smt) & Ors Vs. Delhi RTC & Anr* (supra) only three facts are required to be established by the claimants for assessing compensation in case of death. In this case, the said facts are established in the following manner:

- (i) Age of the deceased – 32 years,
- (ii) Income of the deceased – Rs.18,00,000/- per annum,
- (iii) Number of dependents – 4

It is also significant to note that the learned advocate appearing for the Respondents has not raised any contention regarding the age of

the deceased and the number of the dependents. However, he has raised contention regarding addition of income towards future prospects and regarding compensation towards loss of consortium, funeral expenses. We will consider the said submissions hereinafter.

44. The learned Tribunal has arrived at total compensation of Rs.2,58,45,336/-, however awarded only Rs.1,03,38,134.40 due to finding of contributory negligence. The learned Tribunal has discussed the manner in which the said compensation was arrived at in paragraphs Nos. 27 to 29. The factors taken into consideration by the learned Tribunal and the corresponding amount is set out hereinbelow in tabular form for ready reference:

Sr. No.	Particulars	Amount (in Rs.)
1.	Annual Income	18,00,000/-
2.	(-) Income Tax	3,74,148/-
3.	(-) Professional Tax	2500/-
4.	Net Income	14,23,352/-
5.	(+)50% towards future prospects (Age of deceased=32 years)	21,35,028/-
6.	(-) $\frac{1}{4}$ Amount towards personal expenses	16,01,271/-
7.	Loss of dependency (Multiplier=16)	2,56,20,336/- (16,01,271 x 16)
8.	Loss of consortium (Appellant No.1)	1,00,000/-
9.	Loss of Care and Guidance (Appellant No.2)	1,00,000/-
10.	Funeral Expenses	25,000/-
Total		2,58,45,336/-

Only 40% awarded due to contributory negligence	1,03,38,134.40
---	----------------

45. The learned Advocate for the Respondents submitted that if the compensation arrived at by the learned Tribunal is examined on the basis of the aforesaid principles for assessment of compensation in cases of death as evolved by Supreme Court then compensation granted with respect to funeral expenses and loss of consortium is not in conformity with the same. He also submitted that only 40% income is required to be added towards future prospects and not 50% as awarded by the learned Tribunal.

46. Before considering the above submission, it is absolutely necessary to consider the submission of the learned Advocate for the Appellants that the Respondents have not filed any appeal challenging the award of compensation to the Appellants and therefore decree passed by the learned Tribunal with respect to same be not disturbed. He submitted that the appeal has been filed by claimants mainly on the point of contributory negligence, as the learned Tribunal has committed grave error in holding that the deceased was guilty of the contributory negligence. We have elaborately discussed the said aspect and specifically held that the deceased is not responsible for the contributory negligence.

47. Thus, in view of above submissions of the rival parties, what is required to be considered is whether adverse finding; can be recorded in the appeal filed by the Appellants i.e. the claimants without any appeal filed by the Respondents. This aspect is required to be considered as the appeal has been filed mainly with respect to

the aspect of the contributory negligence. In this behalf, it is significant to note that the impugned judgment and award is dated 19th October 2016. The Respondents have not filed appeal challenging the award of compensation. Thus, there is substance in the contention of the learned Advocate for the Appellants that in his appeal i.e. appeal filed by the claimants, no adverse order can be passed against the Appellants-claimants. To support his submission that no adverse order be passed against the Appellants, he has rightly relied on the judgment in the matter of *New India Assurance Co. Ltd v. Somwati & Ors* (supra). Paragraphs 43 and 44 of the said judgment are reproduced hereinbelow for ready reference:

"43. We may also notice one more three-Judge Bench judgment of this Court in *M.H. Uma Maheshwari v. United India Insurance Co Ltd.* decided on 12-6-2020. In the above case, the Tribunal had granted the amount of rupees one lakh towards loss of consortium to the wife and rupees three lakhs for all the appellants towards loss of love and affection. The High Court in the above case had reduced the amount of compensation in the appeal filed by the insurance company. The High Court held that by awarding the amount of rupees one lakh towards loss of consortium to the wife, the Tribunal had committed error while awarding rupees one lakh to the first appellant towards the head of "loss of love and affection". Allowing the appeal filed by the claimant, this Court maintained the order of MACT.

44. In the above judgment although rendered by the three-Judge Bench, there was no challenge to award of compensation of rupees one lakh towards the consortium and rupees three lakhs towards the loss of love and

affection. The appeal was filed only by the claimants and not by the insurance company. The Court did not pronounce on the correctness of the amount awarded under the head "loss of love and affection."

(Emphasis added)

Thus as the Respondents have not filed any appeal, and the Appellants i.e. claimants have filed appeal mainly on the point of contributory negligence and in any case restricted their appeal regarding aspect of contributory negligence, the contentions raised by the Respondents cannot be considered.

48. Apart from above aspect on merits also, it is significant to note that the deceased was serving as Senior Captain and due to the nature of his duties, i.e. Senior Captain, Marine Rank Master, he was to work only for four months in a year and therefore for all practical purposes, it has to be held that the deceased was having permanent job. Thus, the learned Tribunal has rightly added 50% income towards future prospects.

49. As regards other contentions regarding parental consortium and filial consortium, the learned Advocate for the Appellants have rightly relied on following paragraphs of *New India Assurance Co Ltd v. Somwati & Ors* (supra):

" 37. The learned counsel for the appellant has submitted that *Pranay Sethi* has only referred to spousal consortium and no other consortium was referred to in the judgment of *Pranay Sethi*, hence, there is no justification for allowing the parental consortium and filial

consortium. The Constitution Bench in *Pranay Sethi* has referred to amount of Rs.40,000/- to the "loss of consortium" but the Constitution Bench had not addressed the issue as to whether consortium of Rs.40,000/- is only payable as spousal consortium. The judgment of *Pranay Sethi* cannot be read to mean that it lays down the proposition that the consortium is payable only to the wife.

38. The three-Judge Bench in *United India Insurance Co Ltd.* has categorically laid down that apart from spousal consortium, parental and filial consortium is payable. We feel ourselves bound by the above judgment of the three-Judge Bench. We, thus, cannot accept the submission of the learned counsel for the appellant that the amount of consortium awarded to each of the claimants is not sustainable.

42. It is relevant to notice the judgment of this court in *United India Insurance Co. Ltd.* which was delivered shortly after the above three-Judge Bench judgment of *Sangeeta Arya* specifically laid down that both spousal and parental consortium are payable which judgment was have already noticed above."

(Emphasis added)

Thus there is no substance in the contentions raised by the learned Advocate for the Respondents.

50. As we have recorded finding that the accident took place solely due to the negligence of the Tempo driver, the Appellants are

entitled for 100% compensation and nothing is required to be deducted towards contributory negligence.

51 In view of above discussions, the Appellants are entitled for the compensation as set out hereinbelow:

Sr. No.	Particulars	Amount (in Rs.)
1.	Annual Income	18,00,000/-
2.	(-) Income Tax	3,74,148/-
3.	(-) Professional Tax	2500/-
4.	Net Income	14,23,352/-
5.	(+)50% towards future prospects (Age of deceased=32 years)	21,35,028/-
6.	(-) $\frac{1}{4}$ Amount towards personal expenses	16,01,271/-
7.	Loss of dependency (multiplier = 16)	2,56,20,336/- (16,01,271 x16)
8.	Loss of consortium (Appellant No.1)	1,00,000/-
9.	Loss of Care & Guidance (Appellant No.2)	1,00,000/-
10.	Funeral Expenses	25,000/-
Total Compensation		2,58,45,336/-

52. As we have held that the accident has occurred solely due to the negligence of the driver of the Tempo, the Appellants are entitled for total compensation of Rs.2,58,45,336/-.

53. For the above reasons, we pass the following order:

ORDER

First Appeal is partly allowed by modifying the order passed by the learned Chairman, MACT, Thane in MACP No. 933 of 2011 in the following manner:

- i.** Respondents Nos. 1 and 2 shall jointly and severally pay compensation of Rs.2,58,45,336/- including NFL amount of Rs.50,000/- to the Appellants with interest at the rate of 9% p. a. from the date of application till realization of the same to the Appellants.
- ii.** The amount of compensation of Rs.1,03,38,134/- with interest at the rate of 9% per annum from the date of application till payment is already paid to the Appellants or invested in fixed deposit. The additional compensation with interest as awarded by this order be paid to the Appellants in the same proportion as directed by the learned Tribunal within a period of one month from today.
- iii.** The Appeal is allowed in the aforesaid terms with no order as to costs.

(Madhav J. Jamdar, J)

(G. S. Patel, J)