
(2022) 05 BOM CK 0065

In the Bombay High Court

Case No : First Appeal No. 80, 81, 82 Of 2015, 67 Of 2017, 160 Of 2018, 4 Of 2022, Civil Applications No. 236 Of 2018

? ?Oriental Insurance Co. Ltd And Others

APPELLANT

Vs

Yvette Gomendes And Others

RESPONDENT

Date of Decision : 23-05-2022

Acts Referred:

Citation : (2022) 05 BOM CK 0065

Hon'ble Judges : M. S. Sonak, J

Bench : Single Bench

Advocate : E. Afonso, C. Afonso, C.A. Coutinho, James Lopes

Final Decision : Partly Allowed/Disposed Of

Judgement

M. S. Sonak, J

1. Heard learned Counsel for the parties.

2. The First Appeal No.80/2015 has been instituted by the Oriental Insurance Company, and the owner of the vehicle no.KA-22-A-7022 (container truck) to question the Judgment and award dated 21.01.2015 (the impugned Judgment and award) in Claim Petition No.102/2010, instituted by Ms. Yvette Gomendes (Yvette) and Cressida Gomendes (Cressida), the widow and daughter of late Januarius Gomendes (Januarius), who died in a vehicular accident on 09.10.2009. This appeal questions the compensation awarded to Yvette and Cressida due to the death of Januarius.

3. The First Appeal No.160/2018 is instituted by Cholamandalam MS General Insurance Co. Ltd. The insurer of Tata Tipper truck bearing registration no. GA-08-U-2471 also involved in the same accident to question the above-impugned Judgment and award in Claim Petition No.102/2010 to the extent it imposes liability on it. This appeal also challenges the compensation awarded to Yvette and Cressida.

4. The First Appeal No.81/2015 is instituted by the Oriental Insurance Co. Ltd. and the owner of the container truck against the Judgment and award dated 21.01.2015 in Claim Petition No.101/2010 instituted by Yvette and Cresida claiming compensation on account of the death of Carlston Gomendes, son of Yvette and brother of Cresida in the above accident that took place on 09.10.2009.

5. The First Appeal No.67/2017 is instituted by Cholamandalam MS General Insurance Co. Ltd. to question the above-impugned Judgment and award in Claim Petition No.101/2010.

6. The First Appeal No.82/2015 is again instituted by Oriental Insurance Co. Ltd. and the owner of the container truck to question the Judgment and award dated 21.01.2015 in Claim Petition No.100/2010 instituted by Yvette and Cresida claiming compensation for damages to the Honda City car bearing registration no.GA-07-C-0996 involved in the above accident on 09.10.2009, in which Januarius and Carlston died.

7. The First Appeal No.4/2022 is instituted by the Cholamandalam MS General Insurance Co. Ltd. to question the above-impugned Judgment and award in Claim Petition No.100/2010.

8. The learned Counsel for the parties agreed that a common judgment and order could dispose of all these appeals. Therefore, since the appeals arise from claim petitions concerning the accident on 09.10.2009, it is only appropriate that all these appeals are heard and disposed of by a common judgment and order.

9. In the claim petitions instituted by Yvette and Cresida, it was their case that on 09.10.2009, Januarius was driving a Honda City car bearing registration no.GA-07-C-0996 on National Highway-17. His son Carlston was seated beside him in the car. When they crossed Manu's residence at about 7.20 a.m., a container truck that was proceeding ahead of them in a rash and negligent manner dashed against the Honda City car from behind, due to which the car was thrown on the eastern side of the road. The Tata tipper truck, which was going from the opposite side in a rash and negligent manner, collided with the Honda City car, thereby killing Januarius and Carlston. The claimants have alleged that the accident that resulted in Januarius and Carlston's death took place because of rashness and negligence of the drivers of the container truck and the Tata tipper truck and, therefore, they were entitled to compensation and damages.

10. The respondents to the claim petitions did not deny the factum of the accident but claimed that the accident took place due to rash and negligent driving of the Honda City car by Januarius. On the other hand, the driver/owner/insurer of the Tata tipper truck claimed that there was no negligence whatsoever on the part of the driver of the Tata tipper truck. In addition, several other defenses were raised, including the defense that the Tata tipper truck was never insured with Cholamandalam MS General Insurance Co. Ltd.

11. The Tribunal, in Claim Petition No.102/2020, awarded Yvette and Cresida compensation of Rs.1,41,41,250/- towards the death of Januarius. The Tribunal also held that 60% of this compensation amount would have to be paid by the owner, driver, and insurer (Oriental Insurance Company Ltd.) of the container truck, and 40% will have to be borne by the owner, driver, and insurer (Cholamandalam MS General Insurance Co. Ltd.) of the Tata tipper truck.

12. The Tribunal, in Claim Petition No.101/2010, awarded compensation of Rs.22,85,000/- to Yvette and Cresida for the death of Carlston. The Tribunal apportioned the liability at 60% and 40%, respectively.

13. The Tribunal, in Claim Petition No.100/2010, awarded Yvette and Cresida compensation of Rs.5,65,000/- on account of damages sustained by the Honda City car in the above accident. Accordingly, the liability was again apportioned in the ratio of 60: 40 as above.

14. The Tribunal also awarded interest at the rate of 9% per annum from the date of application till the date of the award and further interest at the same rate till the actual payment of compensation to Yvette and Cresida in the proportions indicated above.

15. Mr. E. Afonso, the learned Counsel for the appellants in First Appeal No.80 and 81 of 2015, submitted that the container truck was not responsible for the accident. He submitted that the evidence on record bears out that Januarius drove his Honda City car in a rash and negligent manner and hit the backside of the container truck. He submits that even the evidence of the witnesses examined on behalf of the claimants bears out this position. Accordingly, he submits that the Tribunal erred in attributing any negligence to the driver of the container truck and foisting the liability to the extent of 60% upon the driver, owner, and insurer of the container truck.

16. Mr. Afonso, without prejudice, submits that the Tribunal failed to apply the correct principles concerning contributory negligence. He relies on the Municipal Corporation of Greater Bombay V/s. Laxman Iyer & Anr. (2003) 8 SCC 731 and Bismilla Abidulla Ansari & Anr. V/s. Kishorkumar N. Shah & Anr. 2008 (4) Mh.L.J. 792 in support of his contentions.

17. Mr. Afonso, without prejudice, also submitted that the quantum of compensation is excessive, and the same warrants interference.

18. Mr. James Lopes, the learned Counsel for Cholamandalam MS General Insurance Co. Ltd., submits that the Tata tipper truck was not insured with them. Therefore, no liability could have been imposed on the insurance company he represents.

19. Mr. Lopes, without prejudice, submitted that there was no negligence whatsoever on the part of the Tata tipper truck driver because the Honda City car suddenly landed in front of the Tata tipper truck, entirely on the wrong side. In such a situation, the driver of the Tata tipper truck did not even have an

opportunity to avoid the collision. Therefore, he submits that no liability ought to have been imposed on the driver, owner, and insurer of the Tata tipper truck.

20. Mr. James Lopes, again without prejudice, also questioned the quantum of compensation awarded by the Tribunal as being quite excessive.

21. Mr. C.A. Coutinho, learned Counsel for the claimants, Yvette and Cresida, defended the impugned awards but submitted that the compensation awarded was inadequate and did not represent just compensation. He presented the evidence on record and applying the principles in National Insurance Company Ltd. V/s. Pranay Sethi (2017) 16 SCC 680 would justify compensation of at least Rs.3,91,21,000/- for the death of Januarius and Rs.31,94,000/- for the death of Carlston. He submitted that this Court has to award just compensation even though the claimants may not have instituted a cross-appeal or filed cross-objections. He relied on Surekha W/o. Rajendra Nakhate & Ors. V/s. Santosh S/o. Namdeo Jadhav & Ors. (2021) 201 PLR 795, The New India Assurance Co. Ltd. V/s. Fatima Malik Shaikh & Ors. First Appeal No.10/2016 decided on 07.04.2022, Kadamba Transport Corporation Ltd. V/s. Smt. Akshata Santosh Sawant & Ors. First Appeal No.110/2015 decided on 10.03.2022, New India Assurance Co. Ltd. V/s. Smt. Seema Sudam Auti & Ors. First Appeal No.1991/2011 decided on 09.06.2017 and The State of Maharashtra (Through the Collector of Nashik & Ors.) V/s. Smt. Kamladevi Kailashchandra Kaushal & Ors. First Appeal No.103 of 2017 decided on 15.03.2017 in support of his contentions.

22. Mr. Coutinho also relied on Sunita & Ors. V/s. Rajasthan State Road Transport Corporation & Ors. (2020) 13 SCC 486, Anita Sharma & Ors. V/s. New India Assurance Company Ltd. & Anr. (2021) 1 SCC 171, United India Insurance Co. Ltd. & Ors. V/s. Patricia Jean Mahajan & Ors. (2002) 6 SCC 281, K. Anusha & Ors. V/s. Regional Manager, Shriram General Insurance Co. Ltd. 2021 (4) TAC 341, and Triveni Kodkany & Ors. V/s. Air India Ltd. & Ors. 2020 ACJ 1582 in support of his contentions on negligence.

23. Based upon the record and the rival contentions, the following points arise for determination in these appeals:-

(a) Whether the accident on 09.10.2009 was due to the rashness and negligence of the two truck drivers, or whether Januarius also contributed to this accident?

(b) Has the Tribunal correctly determined the proportions of liability in this matter?

(c) Does the Tribunal's compensation award represent just and adequate compensation?

24. The two most material witnesses on the issue of rashness and negligence are Mr. Santolino Pereira (AW.1) and Mr. Srivallab alias Vallab Bale (AW.2), who claim to have witnessed the accident on 9/10/2009. Both these witnesses are chance witnesses, traveling on the NH-17 and claiming to have witnessed the accident.

25. Mr. Santolino Pereira (AW.1) deposed that the container truck was quite long and wobbling on the road from right to left. He deposed that this container truck was ahead of the Honda City car, which means that the Honda City car was following the container truck. He deposed that both the Honda City car and the container truck were driven at the same speed of 45 km. Per hour. He deposed that though he did not see the Honda City car overtaking the container truck, the container truck was driven on its side, i.e., the right side. He admitted that the vehicle seeking to overtake another has to increase its speed during the overtaking and return to its side after driving for some distance. He denied the suggestion that the driver of the Honda City car became nervous, gave a dash to the container truck, and turned to its right.

26. Santolino Pereira (AW.1), in his chief, deposed that the container truck "suddenly gave dash from the rear side to the said Honda City Car and threw it on the eastern side, as a result, the truck coming from the opposite direction i.e. from Margao to Cuncolim side gave dash to the said Honda City car.". From this statement, AW.1 concluded that the accident occurred due to the rash and negligent driving of the container truck and the tipper truck drivers, which came from the opposite direction.

27. Santolino Pereira (AW.1), in his cross-examination, admitted that even the tipper truck continued on its own side after the accident. He acknowledged that he had not seen the accident between the tipper truck and the Honda City car. He admitted that he could not say which part of the container truck and the Honda City car came in contact with each other. But that he only saw the Honda City car flung away. Finally, he denied the suggestion that the accident took place due to the driver of the Honda City car.

28. AW. 1, in his cross-examination, was unable to say the number of tyres that the container truck had, nor the number of differentials and its registration number. He claimed that there were no other persons on the road at the time of the accident but that people gathered after that.

29. Srivallab alias Vallab Bale (AW.2) also claimed to be an eyewitness to the above accident. He also confirmed that the container truck was ahead, and the Honda City car followed the container. He deposed that the container truck was quite long and was wobbling from right to left on the road. He deposed that when the vehicles were crossing the bridge, "suddenly the rear position of the container truck dashed the Honda City car and the said car got flung on the eastern side of the road. " He further deposed that "the tipper truck coming from the opposite direction dashed the Honda City car and thus the Honda City car smashed." From this, even AW.2 concluded that the accident was due to rash and negligent driving by both the truck drivers.

30. AW.2 deposed that he was on the spot for only a few minutes because he had to drop his son to school. He deposed that he saw the Honda City Car registration number but not of the two trucks. AW.2, in his cross-examination,

claimed to have seen the accident from a distance of 40-50 meters. He admitted that he had not seen the tipper truck coming towards Cuncolim but had only seen the container truck. He could say nothing to the suggestion about the driver of the TATA tipper truck being at any fault because the container truck in front of him had blocked his vision. AW.2 stated that he had not seen the Honda City car overtaking the container truck.

31. AW.2 admitted that the road at the accident spot is wide enough to admit the free passage of two heavy vehicles. He acknowledged that the driver of the Honda City car may have applied brakes to a length of about 14 meters on seeing the oncoming truck. In his cross, he stated that he had seen the accident from about 14-15 meters, though in his chief, he was definite about seeing the accident from 40-50 meters approximately.

32. AW.2 was not able to give the length of the container truck. But deposed that the size was more than a standard truck. He stated that the container truck was driven at about 50 km. The Honda City car was driven at more or less the same speed per hour. He was unable to give any reason why the Honda City car driver had to apply brakes to a length of 14 meters. He could not say whether the long container trucks are moderated and cannot be driven at a speed beyond 40 km per hour.

33. AW.2 claimed to have visited the office of Advocate P.V. Kudchadkar for some consultation, and during that time, he informed him about witnessing the accident at Jakniband. He deposed that the right rear portion of the container truck dashed the front left portion of the Honda City car. He admitted that the Honda City car might have overtaken the container truck. He acknowledged that while overtaking in the normal course, the driver must keep in mind that he must maintain a safe distance from the vehicle ahead and confirm that there is no oncoming vehicle. He refused to say anything to the suggestion that the Honda City car driver did not follow these precautions and tried to overtake the container truck and in the process, seeing the oncoming truck, swerved the vehicle to the left, and in that process, the car turned and dashed against the container and then the oncoming truck.

34. Suraj Gawas (AW.4), Police Sub-Inspector, was posted at the Margao Town Police Station on 9/10/2009. He identified the scene of the accident panchanama and sketch (Exhibit 68-Colly). He deposed that charge sheets were filed against the drivers of the two trucks, and the Judicial Magistrate, First Class Margao, even convicted them by Judgment and Order dated 15/9/2012.

35. Mahesh Walke (AW.5) is the Motor Vehicle Inspector. He deposed to the damages caused to the two trucks and the Honda City car. He produced the accident report form, which records damages to the container truck, TATA tipper truck, and the Honda City car. In his cross examination, however, AW.5 maintained that he found the damages to the front cowl of the container. The evidence of AW.5, to a great extent, is superficial and does not align even with

the case pleaded by the claimants or deposed to by the eyewitnesses.

36. There is a record (Exhibit 79) in which the Additional Sessions Judge reversed the container truck driver's conviction, inter alia, by holding that the prosecution had failed to establish any rashness and negligence. The Sessions Court reasoned that merely because both the trucks suffered damages, it could not be concluded that the trucks were driven in a rash and negligent manner without any corroborative evidence to that effect. Mr. Coutinho is, however, justified in submitting that such acquittal is quite irrelevant to the present appeals, where the evidence has to be evaluated on the touchstone of preponderance of probabilities.

37. Mahendra Mandloyee, Manager of Respondent No.3, had deposed on behalf of Cholamandalam M.S. General Insurance Company Ltd. Since he was not an eyewitness to the accident, his evidence is not quite relevant for determining the issue of rashness and negligence.

38. Based upon the above evidence, the Tribunal has concluded that the drivers of the two trucks were responsible for the accident and, therefore, apportioned the liability inter se in the ratio of 60:40, i.e., 60% on the driver, owner, and the insurer of the container truck and 40% on the driver, owner and the insurer of the TATA tipper truck. On the other hand, the Tribunal did not find the driver of the Honda City car to be responsible for the accident. However, there is not much discussion in the impugned Judgment and Award on the Honda City driver's role in the impugned Judgment and Award.

39. As noted earlier, the two most material witnesses are Santolino Pereira (AW.1) and Srivallab alias Vallab Bale (AW.2), who claimed to be the eyewitnesses to the accident. If their evidence is evaluated, it is clear that the container truck was on its right side and ahead of the Honda City car. The Honda City car was following the container truck. AW.1 claimed that when he first saw the Honda City car and the container truck, the Honda City car was approximately 60 meters away from the container truck.

40. Similarly, the evidence of AW.1 and AW.2 clarifies that the TATA tipper truck was also on the right side, coming from the direction opposite to which the container truck and the Honda City car were proceeding. Both these witnesses have deposed that the trucks and the Honda City car traveled at about 45-50 km. Per hour. They have also deposed that the width of the road at the spot of the accident was wide enough to admit the free passage of two heavy vehicles. Finally, they have also deposed that it was the rear portion of the container truck that dashed against the Honda City car, as a result, the Honda City car was flung to the wrong side. The TATA tipper truck that traveled on its right side dashed the Honda City car head-on.

41. The two witnesses have deposed that the container truck was of a length greater than a standard truck. They have also deposed that the container truck was wobbling from right to left side.

42. The Tribunal has entirely relied upon the evidence of AW.1 and AW.2, the two eyewitnesses to the accident. There is no error in relying on the evidence of these two witnesses, even though they may have been chance witnesses. Furthermore, the Respondents to the claim petitions were unable to demolish their testimonies about their presence at the accident spot or their witnessing of the accident, which may be from some different perspective. Therefore, there is nothing wrong with the Tribunal relying on the testimonies of these two eyewitnesses.

43. However, to my mind, the Tribunal failed to properly evaluate and appreciate the scope and import of the testimonies of these two eyewitnesses. Their testimony about what they witnessed is relevant but not their inferences. Therefore, the Tribunal was right in relying on their testimonies, but the Tribunal should not have almost entirely gone by their inferences. The inferences were for the Tribunal to itself draw on evaluating the entire evidence before it. Possibly, for this reason, there is not much discussion in the impugned Judgment and Award about the contribution of the driver of the Honda City car to the unfortunate accident. Nevertheless, the evidence of these two witnesses bears out that the Honda City car was following the container truck, which was on its right side.

44. Now assuming that the container truck was wobbling from right to left side, then there is no reason for the driver of the Honda City car, who, according to AW.1, had earlier maintained a distance of almost 60 meters from the container truck, to go close to the container truck or try to overtake it without due care and caution. The witnesses admitted that the process of overtaking involves acceleration. The witnesses also admitted that the overtaking vehicle must be cautious about the oncoming vehicles from the opposite side.

45. Considering that the container truck was wobbling, the driver of the Honda City car should have been cautious when it came to overtaking such a container truck. Similarly, the Honda City car driver should have been careful about the oncoming vehicles from the opposite direction. This was naturally expected of a cautious driver in the ordinary course. However, the scene of the accident panchanama instead shows Honda City car brake marks stretched over 14 meters.

46. Considering the testimonies of the two eyewitnesses, the scene of the accident panchanama, and the damages caused to the vehicles, it does appear that even Janaurius, the driver of the Honda City car, failed to exercise the due care and caution that was expected of him in the situation. In the first place, Janaurius should not have attempted to overtake the container truck that was almost 60 meters ahead of him and was wobbling from left to right side without the exercise of due care and caution about the oncoming vehicles from the opposite side. Furthermore, AW.1 has deposed that the width of the road was wide enough for two heavy vehicles to pass and, therefore, the possibility of oncoming vehicles from the opposite side was most natural. Furthermore, the

brake marks stretching over 14 meters also suggest that Janaurius was accelerating to overtake, and then he braked on seeing the oncoming vehicle. The rear portion of the container truck impacted the Honda City car that was attempting to overtake. Therefore, to a certain extent, the version put to the two eyewitnesses about the role of Janaurius appears probable. Janaurius thus contributed to the accident. Therefore, though Mr. Afonso and Mr. Lopes may not be justified in contending that Janaurius was solely responsible for the accident, to my mind, this is a case of contributory negligence. To that extent, the impugned award calls for interference or suitable modification. Accordingly, the ratio or percentage of the contribution towards such negligence and consequent liability will have to be determined.

47. Since there is evidence that the container truck was wobbling from right to left side, the driver/owner/insurer of the container truck cannot be absolved of the liability for the accident. Similarly, some liability will have to be imposed on the driver of the TATA tipper truck because it is reasonable to presume that even he must have seen the attempt of the Honda City car driver to overtake the container truck from some distance. Therefore, even the driver of the TATA tipper truck should have been extra cautious and made some attempt to slow down.

48. There is some substance in Mr. Lopes's contention that the TATA tipper truck driver could not have expected the Honda City car to land in front of the TATA tipper truck, mainly since the road was wide enough for two heavy vehicles to pass. But the evidence also suggests that the TATA tipper truck driver must have seen Janaurius's attempt at overtaking from some distance. This called for the exercise of greater care and caution. On the other hand, there is no evidence of overspeeding of the two trucks. Furthermore, there is no evidence that the two trucks were on the wrong side. Nevertheless, some liability will have to be imposed even on the driver of the TATA tipper truck for the above reason.

49. The evidence on record, including, in particular, the evidence of the two eyewitnesses AW.1 and AW.2, when evaluated with the scene of accident panchanama/sketch, establishes that the accident was caused on account of the negligence of the drivers of the container truck and the TATA tipper truck and also the Honda City car.

50. The evaluation of the evidence on record suggests that the contribution of the container truck to the accident was to the extent of 50%. This is because there is evidence that this truck was wobbling from the right to the left side of the road. In addition, there is evidence that the size of this truck was more than that of standard trucks that ply the highways. Therefore, greater care and caution were expected to ensure that the container truck was adequately positioned and roadworthy. Apart from the evidence of wobbling from right to left side, there is no other evidence lack of roadworthiness of the container truck to ply on NH-17. However, the container truck was wobbling from right to left, which is sufficient to impose liability to the extent of 50%.

51. The liability of the TATA tipper truck, which came from the opposite side, can be determined at 25%. This is because the driver of the TATA tipper truck must have seen the attempt of the Honda City car to overtake the container truck from some distance. The driver of the TATA tipper truck should have, therefore, exercised extra care and caution to at least slow down and thereby either avoid or at least mitigate the impact of the collision.

52. The driver of the Honda City car will have to be held responsible for the accident at least to the extent of 25% for the reasons discussed above. If the driver saw the container truck in front of him wobbling, he should have avoided any attempt to overtake this truck on a highway. In any case, the driver should have exercised care and caution to ensure that there was no oncoming vehicle from the opposite side. Therefore, even the driver of the Honda City car – Januarius, will have to be held as contributing to the accident by 25%.

53. The evidence on record shows that all the three vehicles contributed to the unfortunate accident in the proportions indicated above. In *Municipal Corporation of Greater Bombay (supra)*, the Hon'ble Supreme Court has explained that though no statutory definition exists, "negligence" is categorized as either composite or contributory in common parlance. For this, it is first necessary to find out what is a negligent act or negligence.

54. The Hon'ble Supreme Court has held that negligence is the omission of duty caused either by an omission to do something which a reasonable man guided upon those considerations, who ordinarily by reason of the conduct of human affairs would do or be obligated to, or by doing something which a prudent or reasonable man would not do. Negligence does not always mean absolute carelessness but want of such a degree of care as is required in particular circumstances. Negligence is failure to observe, for the protection of the interests of another person, the degree of care, precaution, and vigilance which the circumstances justly demand, whereby such other person suffers injury. The idea of negligence and duty are strictly correlative. Negligence means either subjectively a careless state of mind or objectively careless conduct. Negligence is not an absolute term but is a relative one; it is rather a comparative term. No absolute standard can be fixed, and no mathematically exact formula can be laid down by which negligence or lack of it can be infallibly measured in a given case. What constitutes negligence varies under different conditions. All the attending and surrounding facts and circumstances must be considered in determining whether negligence exists in a particular case or whether a mere act or course of conduct amounts to negligence. It is the absence of care according to circumstances. To determine whether an act would be or would not be negligent, it is relevant to determine if any reasonable man would foresee that the act would cause damage or not. The omission to do what the law obligates or even the failure to do anything in a manner, mode, or method envisaged by law would equally, and per se constitute negligence on the part of such person. If the answer is in the affirmative, it is a negligent act.

55. The Hon'ble Supreme Court has further held that there would be contributory negligence where an accident is due to both parties' negligence, and both would be blamed. In a case of contributory negligence, the crucial question on which liability depends would be whether either party could have avoided the consequence of the other's negligence by exercising reasonable care. Whichever party could have avoided the consequence of the other's negligence would be liable for the accident. If a person's negligent act or omission were the proximate and immediate cause of death, the person suffering an injury was himself negligent and contributed to the accident or other circumstances by which the injury was caused would not afford a defense to the other. Contributory negligence applies solely to the conduct of a plaintiff. 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).

56. The Hon'ble Supreme Court has further held that it is now well settled that in the case of contributory negligence, courts have the power to apportion the loss between the parties as it seems just and equitable. Apportionment in that context means that damage is reduced to such an extent as the Court thinks just and equitable having regard to the claim shared in the responsibility for the damage.

57. The Hon'ble Supreme Court has referred to the "doctrine of the last opportunity" emanated from the principle enunciated in *Davies v. Mann* [(1842) 10 M&W 546]. This doctrine lays down that when both parties are careless, the party that has the last opportunity to avoid the results of the other's carelessness is liable alone. However, according to Lord Denning, this is not a principle of law but a test of causation. [See *Davies v. Swan Motor Co. (Swansea) Ltd.* (1949) 2 KB 291]. Though in some decisions, the doctrine has been applied by courts, after the decisions of the House of Lords in *Volute* [(1922) 1 AC 129] and *Swadling v. Cooper* [1931 AC 1], it is no longer to be applied. The sample test is, what was the cause or 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.

58. Applying the principles mentioned above to the facts of the present case, it will be appropriate to hold that the accident, in this case, was a result of the contributory negligence of the drivers of the two trucks and the driver of the Honda City car - Januarius in the proportions of 50:25:25. Therefore, the compensation payable will have to be apportioned/deducted accordingly. Thus, the first and the second points for determination are answered accordingly.

59. On the issue of just and adequate compensation, the Tribunal has accepted the documentary evidence about Januarius making remittances of Rs. 6.00 lakhs

per month for six months before his accident. The evidence indeed bears out that Januarius was working for Premium Drilling (Cayman) Ltd. on a rig that involved work for approximately six months. Based upon this, the Tribunal has ultimately taken Januarius's monthly income at Rs. 3,00,000/-. Mr. Coutinho also proceeded on the basis that the monthly income of Rs.3,00,000/- would be appropriate. He even handed in calculations based upon Januarius's monthly income being Rs.3,00,000/-.

60. The learned Counsel for the parties did not dispute that the multiplier to be adopted in the case of Januarius would be 13. There was also no dispute about the deductions towards personal expenses, which would be 1/3rd. There was also no dispute about the award of Rs. 15,000/- towards funeral expenses, another Rs. 15,000/- towards loss of estate, and Rs. 80,000/- towards consortium. Mr. Coutinho, in this calculation, did submit that there ought to be an enhancement at 10% for every three years on the compensation towards funeral expenses, loss of estate, and consortium, as observed in Pranay Sethi (supra). However, the enhancement contemplated is after the date of the decision, and, therefore, the same will not apply to the present case.

61. If based on the remittances, the monthly income of Januarius is taken at Rs. 3,00,000/-, then his annual income would be Rs. 36,00,000/-. In terms of Pranay Sethi (supra), an addition of 25% will have to be made, and his annual income can be taken at Rs. 45,00,000/-. Out of this, Rs. 15,00,000/- will have to be deducted towards the personal expenses, and the annual income available to the dependants could be taken at Rs. 30,00,000/-.

62. Considering the multiplier of 13 to be adopted, the compensation towards dependency would come to Rs. 3,90,00,000/-. To this, additional compensation of Rs. 1,10,000/- will have to be added towards funeral expenses, loss of estate, and consortium, taking this compensation to Rs.3,91,10,000/-

63. The Tribunal, in this case, had determined the compensation at Rs. 3,14,25,000/-but had reduced this figure to Rs. 1,41,41,250/- because the compensation amount was to be paid in a lump sum to the claimants. The Tribunal, however, did not advert to aspects like the tax component and the net income, the disparity between earning abroad, and the fact that the claimants were to be compensated in India, etc.

64. In Patricia Jean Mahajan (supra), the Hon'ble Supreme Court was concerned with a claimant who was an American National of Indian origin who had established his own hospital in Michigan, USA. While on his visit to India, the Claimant Dr. Suresh Mahajan, aged 47-48 years, died in a vehicular accident. The Tribunal, considering the Claimant's income in the USA and applying the exchange rate then prevalent, awarded compensation of Rs. 1.19 crores, together with interest at the rate of 12%, which came to about Rs. 1.25 crores.

65. The appeal Court enhanced the compensation to Rs. 16.12 crores. However, on an appeal by the Insurance Company, however, the Hon'ble Supreme Court

reduced the compensation substantially. Even the interest component was reduced from 12% to 9%. Hon'ble Supreme Court held that the Court could not be oblivious to the realities between the Indian and foreign contexts. The Court held that looking at the Indian economy, fiscal and financial situation, fabulous amounts cannot be awarded even though such amounts might appear to be reasonable in the American context. The Court held that where there is a disparity in economic conditions and affluence of the two places, viz. the place to which the victim belongs and the place where the compensation is to be paid, a golden balance must be struck somewhere to arrive at a reasonable and fair mesne. There should be neither any overcompensation nor under-compensation. The factor where the dependants reside must also be taken into consideration. The Court held that if the multipliers are adopted, then the annual income of the victim would come to USD 2,26,297, i.e., to say an amount around Rs. 68.00 lakhs per annum by converting it at the rate of Rs. 30/-. The Court held that by Indian standards, it is undoubtedly a high amount and, therefore, for fair compensation, a lesser multiplier will have to be applied.

66. The Court held that the purpose of compensating the dependents of the victims is that they may not be suddenly deprived of the source of their maintenance, and as far as possible, they may be provided with means as were available to them before the accident took place. But, in cases where the amount of compensation may go much higher than the amount providing the same amenities, comforts, facilities, and way of life, the Court would be justified in making necessary adjustments because the intention can never be to overcompensate.

67. In *Triveni Kodkany vs. Air India Ltd.* (supra), the Hon'ble Supreme Court awarded compensation of approximately 7.60 crores to a Regional Director for the Middle Eastern Region with GTL Overseas (Middle East) FZ-LLC. This was a case where the victim had held the position of Regional Director since 2009 when the air crash took place on 22/5/2010. There was evidence that the victim served the GTL Overseas for a considerable period before being promoted as a Regional Director. The Hon'ble Supreme Court rejected the contention that the exchange rate prevalent when the Court delivered its Judgment ought to have been applied. The Court also considered the position that the money was not to be reappropriated abroad since the claimants were Indian residents. The Court also noted that the Claimants' payment of compensation was in Indian rupees.

68. On the aspect of taxes, Mr. Coutinho placed on record a statement of terms and conditions of employment of Januarius.

This document does not form part of the evidence because the Claimants never produced the same before the Tribunal. Mr. Coutinho referred to clause 13 of this statement which provides that the Employee will be responsible for any taxes or charges that may be imposed by his country of residence or any other country in respect of his employment and, for the avoidance of doubt, for any taxes that may be imposed by any country whatsoever in relation to matters unrelated to

the Employee's work for the Company. This clause further provides that the Company will be responsible for personal income taxes, relevant social security payments, and other payments which arise from the Employee's employment in the area to which the Employee has been assigned to work and imposed by the relevant Government from time to time, provided only that the Employee is considered an expatriate in respect of the country responsible for the location to which the Employee has been assigned to work

69. Mr. Coutinho also referred to the Agreement for avoiding double taxation and preventing fiscal evasion with the United Arab Emirates, and the Double Taxation Agreement between India and Libya signed on 1st July 1982. But, again, none of these documents were produced in evidence, and the very issue of applicability of the two treaties to the facts of the present case is in serious dispute.

70. However, even if the statement of terms and conditions of employment is considered, at least prima facie, Januarius would be responsible for paying taxes on the amounts he remitted in India. Besides, the evidence bears out that the remittances were made only for about six months before the accident through wire transfers.

71. Based on the above factors, deductions are certainly warranted from the lump-sum compensation of Rs. 3.91 crores. The Tribunal had made deductions almost to the extent of 50% without adverting to the tax component or the economic disparities as explained by the Hon'ble Supreme Court above. This might be excessive in the present context. But factors like lump sum payment, tax component, the fact that the claimants reside in India, and other factors referred to in Patricia Jean Mahajan (supra) and Triveni Kodkany (supra) will have to be considered. In the present case, all these factors considered cumulatively call for a deduction to the extent of at least 1/3rd. This means that the just compensation, in this case, can be assessed at Rs. 2,60,73,333/-, rounded off to Rs. 2.61 crores, as against the amount of Rs. 1,41,41,250/- determined by the Tribunal.

72. In the decisions referred to in paragraph 21 of this Judgment and Order, it is held that the Court must determine the just compensation and award the same to the claimants even though the claimants may not have instituted any cross-appeals or cross-objections.

73. The decisions in Sunita (supra) and Anita Sharma (supra) only hold that the issue of rashness and negligence will have to be decided on the touchstone of preponderance of probabilities. These decisions also hold that any acquittal from criminal prosecution is not relevant in civil matters to determine compensation. These principles have been taken into account and even applied while considering the issue of rashness and negligence.

74. Thus, First Appeals No.80/2015 and 160/2018 can be disposed of by holding that the compensation for the death of Januarius will come to Rs. 2.61 crores. However, since Januarius was also partly responsible for the accident to the

extent of 25%, the just compensation payable to Yvette and Cresida will come to Rs. 1,95,75,000/-. This will have to be borne by Oriental Insurance Co. Ltd. to the extent of Rs. 1,33,25,000/- and by Cholamandalam MS General Insurance Co. Ltd. to the extent of Rs. 62,50,000/-. Furthermore, since the accident took place in the year 2009, there is no case to interfere with the award of interest at the rate of 9% per annum from the date of application. However, the claimants will have to pay the deficit court fees before recovering the additional compensation now awarded.

75. First Appeals No.81/2015 and 67/2017 concern the compensation awarded to Yvette and Cresida on account of the death of Carlston. The Tribunal has determined the compensation at Rs. 22,85,000/-. For this purpose, the Tribunal has taken Carlston's monthly income at Rs. 20,000/- and applied the multiplier of 18.

76. The Tribunal quite correctly made deductions of 50% since Carlston was a bachelor at the time of the accident. However, the Tribunal failed to add 40% towards future prospects. If this addition is made, Carlston's annual income would have to be taken at Rs. 1,68,000/-after making necessary deductions. By applying the multiplier of 18, the dependency would come to Rs. 30,24,000/-.

77. Yvette and Cresida would be entitled to further compensation of Rs. 15,000/- for funeral expenses, Rs. 15,000/- for loss of estate, and Rs. 80,000/- towards loss of consortium. Thus, Yvette and Cresida would be entitled to compensation of Rs. 31,34,000/- for the death of Carlston in the accident. At least, Carlston was not responsible for the accident and, therefore, there is no case made out for any deductions from these amounts.

78. Thus, First Appeals No.81/2015 and 67/2017 are liable to be dismissed but only after redetermining the the just compensation at Rs. 31,34,000/-, instead of Rs. 22,85,000/-. Accordingly, the interest component also warrants no interference.

79. First Appeals No. 82/2015 and 4/2022 concern the compensation of Rs. 5,65,000/- towards damages to the Honda City car. Since Januarius, owner/driver of the Honda City car, contributed 25%, appropriate deductions will have to be made from this amount. Thus, the compensation payable would come to Rs. 4,23,750/-. Therefore, First Appeals No.82/2015 and 4/2022 will have to be partly allowed and the compensation amount modified from Rs. 5,65,000/- to Rs. 4,23,750/-.

80. For all the above reasons, these Appeals are disposed of by making the following order :

(A) First Appeals No.80/2015 and 160/2018 are disposed of by holding that Oriental Insurance Co. Ltd. will have to pay the compensation of Rs. 1,33,25,000/- and Cholamandalam MS General Insurance Co. Ltd. will have to pay compensation of Rs. 62,50,000/- to the Claimants Yvette and Cresida,

together with interest at the rate of 9 % per annum from the date of application till the date of actual payment. The impugned Judgment and Award, which is the subject matter of these Appeals, is modified accordingly.

(B) First Appeals No. 81/2015 and 67/2017 are dismissed but only after modification of the compensation determined from Rs. 22,85,000/- to Rs. 31,34,000/-, together with interest at the rate of 9 % per annum from the date of application, till the date of actual payment.

(C) First Appeals No.82/2015 and 4/2022 are partly allowed, and the compensation amount is reduced from Rs. 5,65,000/- to Rs. 4,23,750/-. The award of interest is maintained.

(D) The two insurance companies will have to deposit the additional compensation amounts so determined within two months from today in this Court, after considering the deposits already made or withdrawn by the Claimants, after due intimation to the learned Counsel of the Claimants.

(E) The Claimants will be entitled to withdraw the compensation amount after furnishing proper accounts, with due intimation to the learned Counsel for the Insurance Companies. The Claimants also have to give necessary identification documents and provide bank details so that the Registry of this Court, upon verification, can remit the amounts due to the Claimants directly in their bank accounts. Before this, the Claimants must pay the deficit Court fees proportionate to the enhancement now granted.

(F) If the amounts deposited by the Insurance Companies in any of the appeals exceed the liability now determined, they would be entitled to withdraw the excess amounts, together with proportionate interest, if any, accrued thereon.

81. Civil applications, if pending in these appeals, will not survive and are disposed of.

82. There shall be no order for costs.