

(2019) 03 GAU CK 0014

Gauhati High Court

Case No: MACApp. 11, 72 Of 2014

National Insurance Co
Ltd

APPELLANT

Vs

Rekha Moni Sharma
And Ors

RESPONDENT

Date of Decision: March 7, 2019

Acts Referred:

- Motor Vehicles Act, 1988 - Section 15, 166, 170(b), 173
- Indian Penal Code, 1860 - Section 279, 304A, 338
- Evidence Act, 1872 - Section 114
- Code Of Civil Procedure, 1908 - Order 41 Rule 33
- Central Motor Vehicles Rules, 1989 - Rule 18
- Assam Motor Vehicles Rules, 2003 - Rule 8

Hon'ble Judges: Manish Choudhury, J

Bench: Single Bench

Advocate: R D Mozumdar, A K Gupta

Judgement

1. The instant appeal, preferred under Section 173, Motor Vehicles Act, 1988, as amended (the Act, in short), is against the judgment and award dated

28.09.2012 passed by the Motor Accident Claims Tribunal (the Claims Tribunal, in short), Tinsukia in MAC Case No 107/2010. By the judgment and

award dated 28.09.2012, the Claims Tribunal had awarded an amount of Rs. 12,59,798/- as compensation along with interest @4% per annum. It was

ordered that interest would be accounted from the date of passing of the judgment.

2. The facts leading to the institution of MAC Case No. 107/2010 are that on 17.04.2010, at about 1.30 p.m., the deceased, Deep Jyoti Sharma along

with 3 (three) others were proceeding from Tinsukia to Guwahati by a vehicle bearing registration No. AS-23/F-5555 (Swift Dzire). When the Swift

Dzire was on its way, it had a collision with another vehicle bearing registration No. WB-23/9029 (Truck), which was coming from the opposite

direction. It was alleged that the said truck was driven at a very high speed in a rash and negligent manner and it directly knocked down the other

vehicle (Swift Dzire) from the front side. As a result of the said accident, while all the other occupants of the car sustained injuries, Deepjyoti Sarma

died instantaneously on the spot. The other occupants were taken to Jorhat Medical College & Hospital, Jorhat for medical treatment along with the

deceased. In connection with the said accident, Jorhat Police Station registered a case being Jorhat Police Station Case No. 220/2010 under sections

279/338/304A, Indian Penal Code (IPC, in short) against the driver of the truck viz. Phukan Das.

3. In view of the death of the deceased, Deep Jyoti Sharma, the wife and the minor daughter of the deceased instituted a claim application before the

Claims Tribunal under section 166 of the Act seeking an amount of Rs. 27,62,000/- as compensation for the death of the deceased in the accident

arising out of the use of motor vehicles. The said application was registered and numbered as MACT No. 107/2010. The driver, the owner and the

insurer of the vehicle bearing registration No. WB-23/9029 (Truck) were impleaded as opposite party Nos. 1, 2 and 3 respectively.

4. On receipt of notice from the Claims Tribunal, the opposite No. 3 i.e. the insurer of the truck, National Insurance Company Limited appeared and

contested the case by filing written statement. The other opposite parties did not, however, appear and it was ordered that the case would proceed ex-

parte against them. In the written statement, the opposite party-insurer denied the allegations and raised the plea that it had no liability to indemnify the

owner of the vehicle.

5. Upon consideration of the pleadings, the Claims Tribunal framed 2 (two) issues as under :

1) Whether deceased, Deep Jyoti Sharma died on 17.04.2010 as a result of rash and negligent driving of the vehicle bearing registration No. WB-

23/9029 (Truck)?

2) Whether the claimants are entitled to get any compensation and if so, to what extent and from when?

6. In the course of proceedings before the Claims Tribunal, the claimants' side, in order to prove their case examined 2 (two) number of

witnesses. C.W.1 was the wife of the deceased and the claimant No. 1. C.W.2, Sunil Borgohain was examined as an eye-witness of the accident

being a co-passenger of the vehicle bearing registration No. AS-23/F-5555 (Swift Dzire). Both these witnesses were duly cross-examined on behalf

of the opposite party-insurer (the insurer and/or the appellant, in short). The insurer also examined 2 (two) witnesses as D.W.1 and D.W.2. D.W.1

was one Mr. B.K. Munka, Assistant Manager of National Insurance Company Ltd. and D.W.2, Smti. Julie Dutta (Neog) was a panel private

investigator of the insurer. Both these witnesses were cross-examined on behalf of the claimants.

7. Upon consideration of the rival contentions and on appreciation of the evidence led by the parties, the Claims Tribunal, by its judgment and award

dated 28.09.2012, allowed the claim application in the manner indicated above. Assailing the said judgment and award dated 28.09.2012, the insurer as

the appellant has preferred the instant appeal.

8. I have heard Ms. R. D. Mozumdar, learned counsel for the appellant and Mr. A. K. Gupta, learned counsel for the respondent Nos. 1 and 2 who

were the claimants in MAC Case No. 107/2010. I have also perused the materials available in the case record of MAC Case No. 107/2010.

9. On going through the memorandum of appeal, it is noticed that the appellant has mainly raised the following 3 (three) contentions :

1) The claimants' side had exhibited the income tax return [Ext.-6(1)] in respect of M/s Agragami Agency of which the deceased was the sole

proprietor. As the said income tax return was submitted on 30.03.2011, which was after the death of the deceased, it is the contention of the appellant

that from the said exhibit, it was apparent that the business enterprise of the deceased was running and generating income even after the death of the

deceased and as such, there was no loss of income for the family of the deceased even after the death of the deceased.

2) The accident had occurred between 2 (two) vehicles coming from opposite directions and it was a head-on collision. In view of such manner of

accident, it is contended that the entire fault for the accident could not have been attributed to the truck.

3) It is also contended that the deceased did not have a valid driving license at the relevant point of time of the accident. It is further contended that

the vehicle bearing registration No. WB-23/9029 (truck) was plying at the relevant point of time without valid permit because the Accident

Information Report in Form 54 (Ext.-3) did not reflect about any permit in respect of the said vehicle.

10. Ms. R.D. Mozumdar, learned counsel for the appellant has submitted that the deceased was a businessman and in respect of his income as a

proprietor of M/s Agragami Agency, the claimants' side had exhibited the income tax returns of the deceased for 3 (three) years as Ext.-6(1),

Ext.-6(2) and Ext.-6(3). Referring particularly to Ext.-6(1), it is submitted that the said income tax return was submitted with the Income Tax

Department on 30.03.2011 after the death of Deep Jyoti Sharma. As the deceased expired on 17.04.2010, submission of such income tax return on

30.03.2011 would go to show that the business of the deceased was running and generating income for the family of the deceased i.e. the claimants as

on 30.03.2011. As a result, the loss of income could not have been considered to the extent as had been considered by the Claims Tribunal. The

learned counsel has further submitted that from the evidence, it is established that the deceased was driving the car bearing registration No. AS-23/F-

5555 (Swift Dzire) at the relevant point of time. As it is established from the evidence on record that the collision with the other vehicle was head-on

collision, it was not correct on the part of the Claims Tribunal to attribute the entire fault on the truck in causing the accident. The deceased, by his

own rash and negligent act of driving, had also contributed to the accident and as a result, the contribution on the part of the deceased in respect of the

accident was equal. The evidence led on behalf of the appellant had clearly established that the deceased did not have a valid driving license at the

time of the accident, thereby, disentitling the family of the deceased from receiving any compensation.

11. Mr. A.K. Gupta, learned counsel for the respondents-claimants countering the submissions made on behalf of the appellant, has submitted that the

contentions made on behalf of the appellant have no force. In so far as the contention regarding continuation of business of the deceased even after

his death is concerned, he has submitted that from the evidence on record, no such inference could be drawn that the business of the deceased was

continued even after his death. He further submits that no plea to the effect that the deceased was negligent in driving the vehicle (Swift Dzire) was

raised in the written statement of the insurer. In order to substantiate the plea of negligence on the part of the deceased no evidence was led by the

insurer before the Claims Tribunal and such plea could not be raised for the first time in appeal. In respect of the contention regarding driving license

of the deceased, he has submitted that from the evidence, more particularly, from Ext.-8, it is clear that the deceased had a valid driving license at the

time of accident. The evidence led by the insurer through D.W.1 and D.W.2 not go to show that the deceased did not have a valid driving license at

the relevant point of time. Mr. Gupta, learned counsel for the respondents-claimants has further submitted that the Claims Tribunal, while assessing

compensation, had failed to consider factor like future prospects of the deceased.

12. C.W.1, in her evidence filed in the form of an affidavit, had reiterated the facts regarding the accident as has been mentioned above. She deposed

that apart from the deceased, there were 3 (three) other occupants in the car (Swift Dzire) viz. Pranab Rajkonwar, Babul Purkayastha and Sunil

Borgohain. Her husband was a businessman and was running his own establishment and enterprise M/s Agragami Agency as its sole proprietor. She

further stated that the deceased was earning about Rs. 20,500/- per month from his business. The age of the deceased was 47 years at the time of his

death and he left behind her, a minor daughter and his mother who used to be dependents on the earning of the deceased. C.W.1 also exhibited a

number of documents, Ext.-1 - First Information Report (FIR) of Jorhat Police Station No. 221/2010, Ext.-2 - Post Mortem Examination Report, Ext.-

3 - Accident Information Report in Form 54, Ext.-4 - Death Certificate of the deceased, Ext.-5 - Legal Age Certificate, Ext.-6(1) to Ext.-6(3) - copies

of Income Tax Returns of the deceased, Ext.-7 - Birth Certificate of the claimant No. 2 and Ext.-8 - letter dated 04.04.2011 issued by the office of

the District Transport Officer (DTO), Tinsukia. During her cross-examination, she stated that at the time of the accident her deceased husband was

driving the Swift Dzire car and he had a driving license. She further stated that she sought information under the RTI Act from the office of DTO,

Tinsukia as regards the driving license of her deceased husband and the office of DTO, Tinsukia provided the information vide Ext.-8. She also stated

that she came to know from Mr. Sunil Borgohain (C.W.2) as to how the accident had occurred as Mr. Borgohain was with her husband in the same

car at the time of the accident. She denied the suggestion that the accident had happened due to the fault on the part of her deceased husband. C.W.1

also denied the suggestion that the accident did not happen due to the fault on the part of the driver of the truck.

13. C.W.2, Mr. Sunil Borgohain deposed that he was an eye-witness to the accident. As such eye-witness, he stated that on 17.04.2010, at about 1.30

p.m., he along with the deceased, Pranab Rajkonwar and Babul Purkayastha were going from Tinsukia to Guwahati by the vehicle bearing registration

No. AS-23/F-5555 (Swift Dzire). While they were so proceeding and reached near Kolakhowa by pass N.H.-37 at Jorhat, one vehicle bearing

registration No. WB-23/9029 (truck) coming from the opposite direction at a high speed and in a rash and negligent manner, suddenly and directly

knocked down the vehicle (Swift Dzire) from the front side. As a result, he along with all the others in the vehicle sustained grievous injuries on their

persons and Deep Jyoti Sharma expired instantaneously on the spot. All of them were taken to Jorhat Medical College & Hospital at Jorhat. He

testified that the accident had occurred only due to rash and negligent driving on the part of the driver of the truck and a case was registered as Jorhat

Police Station Case No. 221/2010 under sections 279/338/304A, IPC against the driver of the truck. During the cross-examination of C.W.2 by

insurer, this witness stated that he was in the car along with the deceased at the time of the accident and the deceased was driving the car. He further

deposed that the accident had happened due to fault on the part of the driver of the truck. He categorically denied the suggestions that the accident did

not happen due to the fault on the part of the driver of the truck; that the deceased was driving the car in high speed and that the accident had

happened due to his fault.

14. When the evidence advanced by insurer is examined, it is found that both the defense witnesses had also filed their evidence in the form of

affidavits. D.W.1, Mr. B.K. Munka, was serving as an Assistant Manager in the office of the insurer at Tinsukia when he deposed on 04.05.2012. He

stated that the driving license of the deceased which was furnished by the claimants' side, was not a genuine one as the same was never issued

by the DTO, Wokha, Nagaland. An investigator (D.W.2) was deputed by the insurer to verify the driving license No. 2852/NW/RH/89 dated

30.06.1989. In order to verify the same, the said investigator visited the office of the DTO, Wokha on 19.10.2011 and verified the concerned records

in order to gather information in respect of the driving license. The said investigator discovered that the said driving license number found no place in

the record of the said office and the DTO, Wokha had issued a certificate to the effect that the said driving license might be a fake one. Apart from

deputing the investigator, the insurer had also made a communication with the DTO, Wokha by letter dated 28.09.2011 asking about the details of the

driving license No. 2852/NW/RH/89 and the DTO, Wokha vide his letter dated 19.10.2011 (Ext.-A) replied that the said driving license might not be a

genuine one. In view of the same, D.W.1 stated that the driving license No. 2852/NW/RH/89 was not a genuine one and as such, the renewed driving

license issued by the DTO, Tinsukia bearing No. F/3310/Tsk/Pvt was also a fake one. This witness was cross-examined by the claimants' side

and he deposed that he saw the driving license in the name of the deceased, Deep Jyoti Sharma and in the original driving license, it was mentioned as

2852/Pvt. and the same was issued on 30.06.1999 (sic). In the Ext.-A letter it was mentioned that during 1989, the word "RH" was not used and

it should be either professional (Prof) or private (Pvt). He admitted that the driving license number mentioned in Ext.-A and the driving license filed by

the claimants were different and in Ext.-8, he did not find mention of the word "RH". He also stated that he did not find the letter dated 28.09.2011

against which the Ext.-A was obtained and in the written statement, the driving license was not disputed. He denied the suggestion that the driving

license of the deceased filed by the claimants' side was a valid driving license.

15. D.W.2, Smt. Julie Dutta (Neog) was a panel investigator of the insurer who was authorized to investigate about the driving license of the

deceased. She deposed that on 19.10.2011, she visited the office of the DTO, Wokha to verify about the driving license No. 2852/NW/RH/89 and

submitted an application with the request to allow her to authenticate the genuineness of the said driving license. Accepting the said request, the DTO,

Wokha allowed her to verify about the said driving license from the office records. Accordingly, she had gone through the relevant records in the

office of the DTO, Wokha and it appeared to her that the driving license No. 2852/NW/RH/89 was not issued from the said office because entry in

respect of the said driving license was not found in the relevant records of the office. The DTO, Wokha issued a verification report dated 05.10.2011

in response to a letter dated 28.09.2011 of the insurer. She further stated that in response to her letter dated 19.10.2011, the office of the DTO,

Wokha did not issue any further verification report in respect of the driving license to her. It was her assurance and declaration that the driving license

No. 285/NW/RH/89 was not at all recorded in the office of the DTO, Wokha. In her cross-examination on behalf of the claimants' side, she stated

that she verified the driving license No. 2852/NW/RH/89 and Ext.-A did not disclose the name of the holder of the driving license. She deposed that in

the driving license in the name of the deceased, Deep Jyoti Sharma which she had seen in the case record on the date of her evidence on 18.08.2012,

the original driving license number was mentioned as 2852/Pvt. She further stated that the driving license number mentioned in Ext.-A and the driving

license number mentioned in the driving license available in the case record were different and she had verified only the driving license No.

2852/NW/RH/89. She further stated that she did not investigate in the office of the DTO, Tinsukia as regards the driving license in question.

16. In view of the aforesaid evidence led by the parties, the sustainability of the contentions raised on behalf of the appellant are to be decided.

17. In so far as the contention about the continuation of business even after the death of the deceased is concerned, the documents submitted on

behalf of the claimants in respect of their assertion as regards the income of the deceased in the form of Ext.-6(1), Ext.-6(2) and Ext.-6(3) are

perused. It is an admitted fact that the deceased expired on 17.04.2010 which is evident from the Post-Mortem Examination Report (Ext.-2) and the

Death Certificate (Ext.-4). Ext.-6(3) is the income tax return submitted by the deceased during his lifetime on 31.03.2010 in respect of the Financial

Year : 2007-2008 and the Assessment Year 2008-2009. Ext.-6(2) is the income tax return submitted by the deceased during his lifetime on 31.03.2010

for the Financial Year : 2008-2009 and the Assessment Year : 2009-2010. Ext.-6(1) is the income tax return for the Financial Year : 2009-2010 and

the Assessment Year : 2010-2011 and the same was submitted on 30.03.2011, wherein, it was mentioned that the same was submitted in respect of

the estate of late Deep Jyoti Sharma. It is reflected from Ext.-6(1) to Ext.-6(3) that the deceased had a permanent account number. Ext.-6(2) and

Ext.-6(3) were submitted in the name of the deceased during his lifetime and the income was shown to be earned from his business as a proprietor of

M/s Agragami Agency. When Ext.-6(1) is perused it is noticed that what was mentioned therein was the income which was earned by the deceased

during the Financial Year : 2009-2010, meaning thereby, the period was from 01.04.2009 to 31.03.2010. In respect of submission of the income tax

returns, the income earned by a person in a Financial Year is to be submitted in the Assessment Year, which is immediately next to the Financial

Year. As Ext.-6(1) was submitted on 31.03.2011, it could not be inferred therefrom that on 30.03.2011, the business which was earlier run by the

deceased as the sole proprietor of M/s Agragami Agency was operating and generating income for the claimants even after the death of the deceased

on 17.04.2010. As mentioned, the income tax return for the Financial Year : 2009-2010 was submitted on 31.03.2011 and due to the death of

Deepjyoti Sarma on 17.04.2010, the income tax return had to be filed for the estate of the deceased. These documents were submitted by the

claimants when C.W.1 submitted her evidence on 28.06.2011 and she was cross-examined on 11.01.2012. The judgment and award in MACT Case

No.107/2010 was delivered on 28.09.2012. During the said period from 28.06.2011 to 28.09.2012, the insurer did not raise any such plea and produced

any documentary evidence to establish that the business of the deceased which was run earlier by him till his death as a sole proprietor, was running

and was being run by any of the claimants. The Claims Tribunal while assessing compensation considered Ext.-6(1) - the income tax return for the

Assessment Year : 2010-2011 and had taken Rs. 1,40,116/- as the annual income of the deceased after making necessary deductions. In Ext.-6(3),

the gross total income, the deductions under chapter 6A and the total income were shown as Rs. 2,40,169/-, Rs.1,00,000/- and Rs.1,40,169/-

respectively. In the absence of any positive evidence led by the insurer to substantiate the said plea, the said plea, in my considered view, is not

acceptable.

18. Apart from the evidence adduced by the parties, as reflected above, the documents submitted by both sides in respect of the driving license of the

deceased are noticed. Vide Ext.-8 which is a letter dated 04.11.2011 from the office of the DTO, Tinsukia and communicated to the claimant No.1 in

reply to her application dated 31.10.2011 under the RTI Act, the office of the DTO, Tinsukia informed that the driving license No. F/3310/Tsk/Pvt

was issued originally by the DTO, Wokha, Nagaland on 30.06.1989 in the name of the deceased authorizing him to drive motor cycles and light motor

vehicles only with validity up to 29.06.1992 vide driving license No. 2852/NW/PVT/89 and the same was recorded at the office of the DTO, Tinsukia

on 17.03.1992. The driving license was renewed from time to time with the last renewal up to 09.06.2010 w.e.f. 10.06.2005 as per the concerned

office records. When Ext.-A is perused, it is found that the same was a communication made by the DTO, Wokha to the appellant on 19.10.2011 in

respect of the verification of driving license No. 2852/NW/RH/89. It was mentioned therein that during 1989 the word ""RH"" was not used in driving

licenses and at that time nomenclatures like professional (Prof) or private (Pvt) were used. It was further mentioned that if they showed "RH" ,

during endorsement at the DTO, Tinsukia then it might not be a genuine driving license. When D.W.1 and D.W.2 was confronted with the question as

regards the driving license of the deceased by showing the driving license in the name of the deceased which they had seen in the case record bearing

driving license No. 2852/NW/Pvt/83, they stated that the driving license number mentioned in Ext.-A was different from the driving license number

mentioned in the driving license available in the case record. The verification was made in the office of the DTO, Wokha only in respect of the driving

license No. 2852/NW/RH/89. It is also stated by the 2 (two) witnesses that they made no verification from the office of the DTO, Tinsukia in respect

of the driving license No. F/3310/Tsk/Pvt issued on the basis of the driving license No. 2852/NW/PVT/89, by the office of the DTO, Tinsukia had the

period of validity up to 09.06.2010. From the trend of cross-examination made on behalf of the appellant during the proceedings, it is not reflected that

they had put in any question as regards the said driving license No. 2852/NW/PVT/89 or driving license No. F/3310/Tsk/Pvt in respect of which the

claimants had submitted Ext.-8. From the contents of Ext.-A, it could not be established that the deceased had no driving license. D.W.2, the

investigator who was entrusted with the specific task to verify the driving license of the deceased instead of collecting the correct information from

the office of the DTO, Tinsukia, had decided to assure and declare that the driving license No. 2852/NW/RH/89, which was not as same as driving

license No. 2852/NW/PVT/89, was not at all recorded in the office of the DTO, Wokha. It was the evidence of D.W.1 also that the verification of

driving license was made in respect of driving license No. 2852/NW/RH/89 only and no verification was done in the office of the DTO, Tinsukia. It is

quite obvious that there was no possibility of finding our record about any driving license with number like 2852/NW/RH/85 when in the office

of the DTO, Wokha when the said office did not issue any driving license containing 2852/NW/RH/85 and the office of the DTO, Tinsukia did not renew

any such driving license number.

19. Section 15 of the Act has laid down the procedure for renewal of driving licenses. It provides, inter-alia that any licensing authority may renew a

driving license issued under the provisions of the Act. An application for such renewal of a driving license is to be made in a form and is to be

accompanied by documents, prescribed by the Central Government. Rule 18 of the Central Motor Vehicles Rules, 1989 provides that an application

for the renewal of a driving license shall be made in Form-9 to the licensing authority having jurisdiction over the area in which the applicant ordinarily

resides or carries on business and shall be accompanied by the appropriate fee, the requisite number of photographs and the driving license in case

renewal is sought for a license to drive vehicles other than a transport vehicle. It is also provided therein that where the licensing authority renewing

the driving license is not the licensing authority who issued the driving license the fact of the renewal shall be intimated to the licensing authority who

issued the driving license. Rule 8 of the Assam Motor Vehicles Rules, 2003 prescribes that when any licensing authority other than the original

licensing authority renews a driving license he shall forthwith intimate the original licensing authority about the fact of such renewal. In the instant

case, the office of the DTO, Tinsukia stated to have renewed the driving license No. 2852/NW/Pvt/89 of the deceased originally issued by the office

of the DTO, Wokha, Nagaland on 03.06.1989 with validity up to 29.06.1992 authorizing the deceased to drive motorcycles and light motor vehicles. In

place of the said driving license No. 2852/NW/Pvt/89, the office of the DTO, Tinsukia renewed the same by issuing the driving license No.

F/3310/Tsk/Pvt on 17.03.1992 i.e. before the date of expiry of the earlier driving license. As per section 114, Indian Evidence Act, 1872, the Court

may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of nature and events, human

conduct and public and private business, in their relation to the facts of the particular case. In the absence of any rebuttal evidence, as per illustration

(e) of section 114 it is to be presumed that the official acts have been regularly performed. Since the appellant has not led any evidence in reference

to the driving license No. 2852/NW/Pvt/89 and about its genuineness or otherwise, it is to be presumed that the office of the DTO, Tinsukia had

renewed the driving license of the deceased by following the procedure mentioned in the provisions contained in the Motor Vehicles Act, 1988, the

Central Motor Vehicles Rules, 1989 and the Assam Motor Vehicles Rules, 2003. It is to be presumed as a presumption of fact that the office of the

DTO, Tinsukia had intimated the office of the DTO, Wokha, Nagaland about the fact of renewal of the license of the deceased by regularly

performing the official acts and no adverse report as regards the driving license No. 2852/NW/Pvt/89 was received from the office of the DTO,

Wokha in response. For the said reason also the plea as regards the driving license of the deceased, raised by the appellant, is not acceptable.

Furthermore, in view of the discussion already made above, the contention made on behalf of the appellant as regards the driving license of the

deceased is found to be a specious one and the said contention has no basis.

20. In a case of contributory negligence, a person who has himself contributed to the accident cannot claim compensation for the injuries sustained by

him in the accident to the extent of his own negligence. Similar is the case in respect of death of a person who by his act of rash and negligent driving

had contributed to the accident. Extent of his negligence is required to be determined and damages recoverable by him in respect of the injuries had to

be reduced in proportion to his contributory negligence. The learned counsel for the appellant placing reliance in the decision of the Supreme Court in

the case of Bijoy Kumar Dugar vs. Bidya Dhar Dutta, and others, reported in (2006) 3 SCC 242, has submitted that as there was head-on collision of

the Swift Dzire car being driven by the deceased with the truck coming from the opposite direction, inference of contributory negligence on the part of

the deceased could very well be drawn. In Bijoy Kumar Dugar vs. Bidya Dhar Dutta, and others (supra), the Supreme Court had noticed the

reasoning and finding of the Claims Tribunal on the issue regarding contributory negligence. The evidence of the eye-witness therein (P.W.2) who

was travelling in the Maruti Car along with the deceased on the day of the incident and who also suffered some injuries in the said accident, was to

the effect that the deceased, before the accident, noticed the passenger bus coming from the opposite direction the movement of which was not

normal as it was coming in a zig-zag manner. It was thereafter, the Maruti Car being driven by the deceased and the offending bus had a head on

collision. The Claims Tribunal did not accept the said evidence of P.W.2 to prove that the driver of the offending bus was driving the vehicle at

abnormal speed. If the bus was being driven by the driver abnormally in a zig-zag manner, it was but natural for the deceased to have taken due care

and precaution to avoid head-on collision when he had already seen the bus coming from the opposite direction from a long distance. It was on the

basis of such evidence, the Supreme Court had accepted that the Claims Tribunal had rightly reached the finding of fact to the effect that the drivers

of both the vehicles should be held responsible to have contributed equally to the accident. The ratio laid down in the aforesaid decision is not

applicable to the fact situation of the instant case for the reasons discussed here under.

21. In the instant case, C.W.2, who was an eye-witness to the accident being a co-passenger in the same Swift Dzire vehicle, driven by the deceased,

sustained injuries in the accident. He had categorically testified that the truck coming from the opposite direction, at a very high speed and in rash and

negligent manner, suddenly and directly knocked down the car driven by the deceased from the front side. Nothing has been elicited from this witness

by the appellant that the deceased had seen the truck coming at a high speed and in rash and negligent manner from a long distance. His evidence is

that the accident had happened all on a sudden. There was clear denial by this witness to the suggestions put on behalf of the appellant, during his

cross-examination, as regards driving of the car by the deceased at a high speed and happening of the accident due to the fault on the part of the

deceased. He also denied the suggestion that the accident did not happen due to the fault on the part of the driver of the truck. In Ext.-1 : First

Information Report (FIR), it was clearly alleged that it was the truck coming at a high speed from the opposite direction, in a rash and negligent

manner and changing the lane suddenly, dashed the car driven by the deceased. Further, the criminal case being Jorhat Police Station Case No.

221/2010 under section 279/338/304A, IPC was registered against the driver of the truck. The appellant claimed protection under Section 170(b) of

the Act from the Claims Tribunal to contest the proceedings by availing the defense of the owner of the offending vehicle and the same was granted

on 31.03.2011. But it did not choose to examine either the driver of the truck or any other independent witnesses to prove the allegation of contributory

negligence on the part of the deceased who was driving the car at the time of the accident. In the absence of rebuttal evidence adduced on record on

behalf of the appellant before the Claims Tribunal, the contention of contributory negligence on the part of the deceased, raised by the appellant in the

instant appeal, does not deserve any credence and acceptance. No evidence has been brought on record that the deceased prior to the accident, had

got any kind of opportunity to avoid the accident. The driver and the owner despite being impleaded as opposite parties in the claim application had

chosen not to contest the proceedings. The driver of the truck or any other independent witness who was present at the time and place of accident,

would have been the best persons to depose as regards extent of negligence on the part of the drivers of the two vehicles. In the written statement

also, the appellant did not take any such plea of contributory negligence. It is held that "contributory negligence" only means the failure by a

person who 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

crime".

22. In the case of similar nature, the Supreme Court in the case of Usha Raikhowa vs. Paramount Industries, reported in (2009) 14 SCC 71, has

observed as under:

"16. We must say that the criticism by the learned counsel for the appellants that the High Court, as well as, the Tribunal have not applied their

mind to the matter, is quite justified. We, ourselves, have seen the evidence of PW 3. In the examination-in-chief, the witness very specifically

asserted that the truck was coming from the opposite direction at a high speed from Jorhat side and it hit the Car, as a result of which Shri Jadhav

Rajkhowa and Shri Dhiren Hazarika died, while he had received injuries. He was undoubtedly right in saying that he could not say clearly as to which

vehicle was at fault, however, he was quick to deny the suggestion thrown at him that the accident took place because of the fault of the Maruti car.

He has very specifically denied that suggestion in the following words:-

It is not a fact that the accident took place because of fault of the Maruti car.

As if all this was not sufficient, he then in his cross-examination at the instance of Oriental Insurance Co. Ltd., asserted that the Maruti car was going

on its own side (when the truck hit the Maruti car).

17. Now, the following factors are clear from the evidence of PW 3:-

1. The truck was coming in high speed.
2. It was the truck, which hit the car and not vice versa.
3. The Maruti car was going on its own side.

18. It seems that the Tribunal, as well as, the High Court had chosen to go by the inference drawn by PW 3 or at any rate, his inability to fix the

liability. It is not the judgment of the witness, which is decisive in the matter. In fact, the Tribunal, as well as the High Court, should have framed their

own opinion, instead of going by the judgment or as the case may be, inference by PW 3.

19. Under such circumstances, applying the doctrine of res ipsa loquitur, it is clear that it was because of the negligence on the part of the truck that

the accident took place. After all the hit given by the truck was so powerful that two persons in the car died on the spot, while the third escaped with

serious injuries. When we see the award of the Tribunal, as also the appellate judgment, they are astonishingly silent on these aspects. We are,

therefore, convinced that there was no question of any contributory negligence on the part of the driver of the Maruti car and it was solely because of

the negligence on the part of the truck that the accident took place.

20. The question of contributory negligence on the part of the driver in case of collision was considered by this Court in *Pramodkumar Rasikbhai*

Jhaveri Vs. Karmasey Kunvargi Tak and Ors., reported in 2002 (6) SCC 455. That was also a case of collision in between a car and a truck. It was

observed in SCC p. 458, Para 8:-

“The question of 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'.

22. Keeping these principles in mind, we find that there was absolutely no evidence to suggest that there was any failure on the part of the car driver

to take any particular care or that he had breached his duty in any manner. Such breach on his part had to be proved by the insurance company as it

was its burden and for that, the panchanama of the spot, showing tyre marks caused by brakes, and the panchanama of the damaged car and the

truck could have been brought on record. The insurance company has obviously failed to discharge its burden. We, therefore, respectfully follow the

above mentioned judgment.

23. The facts involved in the case of *Dinesh Kumar J @ Dinesh J vs. National Insurance Company Limited*, reported in (2018) 1 SCC 750, were that

the appellant while riding a motor cycle, received injuries in an accident he met with a mini lorry. The Claims Tribunal held that the appellant was

guilty of contributory negligence to the extent of 40%. Both the Claims Tribunal and the High Court found fault with the appellant for having not

produced his driving licence. The award of the Claims Tribunal indicated that absolutely no evidence was produced by the insurer to support the plea

that there was contributory negligence on the part of the appellant. It was submitted on behalf of the appellant that both the Claims Tribunal and the

High Court were manifestly in error in holding the appellant to be guilty of contributory negligence to the extent of 40% on the erroneous premise that

since the appellant had failed to produce the driving licence, an adverse inference on the aspect of contributory negligence would have to be drawn.

The Supreme Court accepted the submission that the plea on contributory negligence could not be accepted purely on the basis of conjectures and

without any evidence. Thus, the plea of contributory negligence cannot be accepted purely on the basis of conjecture and without any evidence. In

view of the above position, the contention of contributory negligence on the part of the deceased raised on behalf of the appellant-insurer is not found

acceptable.

24. It is an admitted fact that the respondents-claimants had not preferred any appeal against the judgment and award dated 28.09.2012 passed by the

Claims Tribunal. The respondents-claimants were not aggrieved by the finding about the total annual net income of the deceased for the Assessment

Year : 2010-2011 at Rs. 1,40,169/-. As has been discussed above, the contentions raised on behalf of the appellant have not been accepted by this

Court and, consequently, the appeal of the appellant is not going to be allowed. As such, there will be no reduction in the amount of compensation

awarded by the Claims Tribunal. Had the appeal been allowed and/or partly allowed and there was any proposal for reduction of the amount of

compensation awarded by the Claims Tribunal, the respondents-claimants could have certainly defended the quantum of compensation awarded by the

Claims Tribunal, by indicating that omissions in the award like no addition towards future prospect etc. which if allowed, would ultimately result in no

reduction of the amount of compensation. Those grounds would very well be taken on behalf of the respondent-claimants in the present appeal to the

effect that if there was going to be deduction due to contributory negligence on the part of the deceased or due to lesser total annual net income of the

deceased then such contention regarding non-addition of any amount towards future prospects etc. interest would have been entertained. It is settled

that in an appeal by the insurer, the claimants will not be entitled to seek enhancement of the compensation by urging any new ground, in the absence

of any cross appeal or cross objection.

25. In *Ranjana Prakash and Ors. vs Divisional Manager*, reported in (2011) 14 SCC 639, the Supreme Court considered the effect of not preferring

any cross-appeal or cross-objection in appeal preferred by any other party before the High Court under section 173 of the Act. Explaining the power

available to the appellate court under Order 41, Rule 33 of the Code of Civil Procedure, the Supreme Court has observed as under:

“8. Where an appeal is filed challenging the quantum of compensation, irrespective of who files the appeal, the appropriate course for the High

Court is to examine the facts and by applying the relevant principles, determine the just compensation. If the compensation determined by it is higher

than the compensation awarded by the Tribunal, the High Court will allow the appeal, if it is by the claimants and dismiss the appeal, if it is by the

owner/insurer. Similarly, if the compensation determined by the High Court is lesser than the compensation awarded by the Tribunal, the High Court

will dismiss any appeal by the claimants for enhancement, but allow any appeal by owner/insurer for reduction. The High Court cannot obviously

increase the compensation in an appeal by owner/insurer for reducing the compensation, nor can it reduce the compensation in an appeal by the

claimants seeking enhancement of compensation.”

In *Ranjana Prakash and Ors. vs Divisional Manager* (supra), the insurer preferred an appeal before the High Court contending that 30% of the annual

income should be deducted towards income tax as the income of the deceased was in the taxable bracket. Though no cross-appeal or cross-objection

was preferred on behalf of the claimants it was urged on behalf of the claimants before the High Court that 30% should have been added to the

income towards future prospects. The High Court ignored the error of non-addition towards the future prospects in the award of the Claims Tribunal,

pointed out by the claimants, but took note only of the error pointed out by the insurer and reduced the compensation by 30%. It is in that context, the

Supreme Court has held that the High Court cannot increase the compensation in an appeal by the insurer for reducing the compensation.

26. In view of the observations made above, the appeal is bereft of any merit and the same is, accordingly, dismissed. Interim order, if any, passed

earlier stands vacated and will abide by the afore-mentioned decision of dismissal of the instant appeal. If the awarded amount or a part of the

awarded amount along with interest is not deposited in terms of the judgment and award dated 28.09.2012 of the Claims Tribunal, the same is to be

deposited before the Claims Tribunal by the appellant-insurer within a period of 3 (three) months from today. Pursuant to such deposit before the

Claims Tribunal, the appellant-insurer shall be allowed to withdraw the statutory deposit made in connection with the instant appeal. In the facts and

circumstances of the case, no order as to costs.

Records are to send accordingly.