

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD.**

902 FIRST APPEAL NO. 203 OF 2008

1. Apsana w/o Mohemad,
Age : 25 years, Occu : Nil,
2. Pasha s/o Mohemad,
Age : 9 years,
3. Heena d/o Mohemad,
Age : 7 years,
4. Tabassum d/o Mohemad,
Age : 5 years
5. Rubina d/o Mohemad
Age : 4 years,
6. Nagma d/o Mohemad,
Age : 2 years,
Nos.2 to 6 Minor under guardianship
of their real mother Appellant No.1
7. Fatimabee w/o Khajakhan
Age : 53 years, Occu : Nil

All R/o Kesapuri (Parbhani),
Taluka & Dist. Beed

.. APPELLANTS
(Orig. claimants)

VERSUS

1. Naser Patel s/o Basiroddin
Age : Major, Occu : Business,
R/o. Katkatpura, Beed,
Taluka & District Beed.
2. The New India Assurance Co. Ltd.,
Adalat Road, Aurangabad

.. RESPONDENTS
(Orig. Respondents)

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Advocate for Appellants : Shri. S.S. Chapalgaonkar
Advocate for Respondents : Shri. D.S. Kulkarni h/f
Shri. S.L. Kulkarni

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CORAM : P.R. BORA, J.
Dated: July 12, 2017

ORAL JUDGMENT :

1. The original claimants in Motor Accident Claim Petition No.254/2000 decided on 30.11.2005 by the Motor Accident Claims Tribunal, at Beed have filed the present appeal seeking enhancement in the amount of compensation as awarded by the said Tribunal.

2. The aforesaid claim petition was filed by the appellants seeking compensation on account of the death of Mohemad Khajakha alleging the same to have caused because of the injuries received to him in a vehicular accident happened on 18th October, 1999 having involvement of a car bearing registration no.MH-23-B-457 owned by the present respondent no.1 and insured with present respondent no.2.

3. It was the contention of the claimants before the Tribunal that the alleged accident happened because of the sole negligence on the part of the driver of the car involved in the

alleged accident. The tribunal has however recorded a finding that, the accident happened because of the negligence of both i.e. deceased Mohemad and driver of the car and the proportion of negligence as has been determined by the Tribunal is 50 - 50. Aggrieved by, the appellants have preferred the present appeal.

4. Shri. Chapalgaonkar, the learned Counsel appearing for the appellants / original claimants submitted that, the tribunal has manifestly erred in recording a finding that, the deceased was responsible for occurrence of the alleged accident in equal proportion. The learned Counsel submitted that, in order to prove that the alleged accident happened because of the sole negligence on the part of the driver of the offending car, the appellants had examined one Shrikisan Lande, who was the pillion rider along with the deceased when the alleged accident happened. Taking me through the evidence of said witness the learned Counsel submitted that, he has given ocular account as to how the alleged accident happened and nothing has come on record to disbelieve his testimony. The learned counsel submitted that, said Shrikisan Lande has categorically stated that, car was being driven in rash and negligent manner and it came on the wrong side and dashed to the motorcycle. The learned Counsel submitted that, in view of the

evidence of PW No.2 Shrikisan Lande whose presence on the spot of occurrence has not been disputed, must have been in toto believed by the tribunal.

5. The learned Counsel further submitted that, the averments in the spot panchanama have also not been properly appreciated by the tribunal, which has resulted in drawing some unwarranted inferences by the tribunal. The learned Counsel submitted that, in fact no negligence could have been attributed on the part of deceased.

6. In the alternative, the learned Counsel submitted that, if at all any negligence was to be attributed on the part of deceased, its percentage should have been minimal. The learned Counsel therefore prayed for setting aside the finding recorded by the Tribunal on the point of negligence, and consequently to modify the impugned award.

7. The respondent no.1 though has been duly served, none has entered appearance on his behalf.

8. Shri. D.S. Kulkarni, the learned Counsel appearing for

respondent no.2 - Insurance Company resisted the submissions advanced on behalf of the appellants. The learned Counsel submitted that, the tribunal has rightly determined the proportion of negligence on the part of deceased as well as the car driver based on the evidence on record and as such no interference is warranted in the conclusion so recorded.

9. I have carefully considered the submissions advanced by the learned Counsel appearing for the parties. I have also perused the impugned Judgment, the evidence and other material placed on record. It is not in dispute that, the vehicles involved in the accident were proceeding to the direction opposite to each other. PW No.2 Shrikisan Lande has given the ocular account of the incident of accident in his testimony before the Court. As has been deposed by him, the car was being driven in rash and negligent manner and it entered on wrong side and gave a dash to the motorcycle. In his cross - examination except a suggestion that, he is deposing false so as to support the case of the claimants, no other material is brought on record revealing the negligence of deceased motorcyclist. It is the matter of record that, neither the car owner nor the driver of the said car entered into the witness box.

10. The other evidence which could be useful for deciding the aspect of negligence is the spot panchanama existing on record. The spot of the accident as has been shown in the spot panchanama is not at the midst of the road. It is slightly on the side, from which, deceased motorcyclist was coming. It therefore can reasonably be inferred that, to some extent the offending car had entered on its wrong side. It is also evident that, deceased motorcyclist was also not plying his motorcycle by keeping a safe margin from the midst of the road. In the circumstances, some negligence has to be attributed on the part of deceased motorcyclist also. However, in no case it can be accepted that, in occurrence of the alleged accident, deceased motorcyclist was equally negligent. From the situation on the spot of occurrence, it is quite clear that, the greater negligence in causing the alleged accident was of the driver of the offending car. From the material on record, the negligence of the driver of the offending car and deceased motorcyclist can be apportioned in proportion of 70:30. To the aforesaid extent, the finding recorded by the tribunal needs to be modified. Needless to state that, because of modified finding the amount of compensation payable to the claimants jointly and severally from respondent nos.1 and 2 would be enhanced by 20%.

11. The respondents are now held entitled to pay to the claimants 70% of the total amount as has been determined by the tribunal. The tribunal has held the claimants entitled for the total compensation of Rs.5,18,400/- and out of the said amount, the respondents are held liable to pay half of the same i.e. Rs.2,59,200/- to the claimants. In view of the finding recorded by me herein above, the claimants are now entitled to receive from the respondents 70% of the said amount, which comes to Rs.3,62,880/-. In addition to that, the tribunal has awarded the funeral expenses of Rs.10,000/-, and Rs.10,000/- towards loss of consortium, love and affection. The claimants are thus entitled for the compensation of Rs.3,82,880/- jointly and severally from respondents no.1 & 2 along with the interest thereon at the rate of 9% per annum from the date of filing of the petition till realization. Award be modified accordingly.

. Appeal stands partly allowed in the aforesaid terms.

(P.R. BORA, J.)

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