

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

FIRST APPEAL NO.238 OF 2004

Isaqkhan Mustafakhan Pathan

Age : 47 yrs, Occu : Driver,

R/o. Hafiz Galli, Dist. Beed

.. Appellant /
Orig. Claimant

Versus

1. Shriram Shankarlal Zawar

Age : 57 yrs, Occu : Business

R/o. Rajuri (Navgan), Dist. Beed

2. Nandkishor Shriram Zawar

Age : 35 yrs, Occu : Driver,

R/o. As above.

3. Divisional Manager

National Insurance Co. Ltd.,

Regional Office Aurangabad

.. Respondents /
Orig. Respondents

.....

Shri Dhananjay Deshpande : Advocate for Appellant ;

Shri A.R. Borulkar : Advocate for Respondents No.1 & 2 ;

Shri S.S. Chapalgaonkar, Advocate, h/f. Shri S.P. Chapalgaonkar,
Advocate for Respondent No.3

...

CORAM : PR. BORA, J.

Dated: January 07, 2019

ORAL JUDGMENT :

1. “Whether the pillion rider can be held guilty of contributory negligence?” is the question posed in the present appeal.

2. The Motor Accident Claims Tribunal at Beed (hereinafter referred to as the 'Tribunal') while deciding Motor Accident Claim Petition No.242 of 1996 vide its Judgment dated 26.06.2002 has deprived the present appellant from 50% of the total compensation holding the appellant, who was admittedly a pillion rider on the motorcycle which met with an accident, also negligent along with the motorcyclist and the driver of the tractor involved in the alleged accident.

3. On 16.04.1996 the present appellant was proceeding by Jalna road towards the bus stand Beed as a pillion rider on motorcycle no. MH-04-1692 driven by one Abdul Anis Abdul Samad. As contended in the claim petition, the motorcycle was dashed by a tractor bearing registration No.23/A-9461 at Annabhau Sathe square. In the accident so happened, the appellant was injured. The driver of the offending tractor was prosecuted in connection with the alleged accident for the offences punishable under Sections 279, 337 & 338 of the Indian Penal Code.

4. Alleging that, the accident happened because of the negligence of the driver of the tractor, the appellant filed the petition against driver, owner and insurer of the said tractor claiming compensation from them for the injuries caused to him in the alleged accident. The Tribunal after having assessed the evidence on record, though determined the amount of compensation to the tune of Rs.35,520/-, held the appellant entitled to only half of the said compensation jointly and severally from the owner, driver and insurer of the said tractor. The Tribunal deprived the appellant from 50% of the compensation for the negligence determined by it of the motorcyclist to that extent. The Tribunal also recorded the finding that, the appellant also contributed the occurrence of the alleged accident by not asking the motorcyclist to slow down his motorcycle after seeing the offending tractor taking 'L' turn. Aggrieved by, the appellant has preferred the present appeal.

5. Shri Dhananjay Deshpande, learned Counsel appearing for the appellant assailed the impugned Judgment on

various grounds. The learned Counsel contended that, the finding recorded by the Tribunal that the appellant also contributed the occurrence of the alleged accident by his negligence is wholly erroneous. The learned Counsel further contended that, after having recorded the finding that, the alleged accident happened because of the composite negligence of the two vehicles involved in the alleged accident, there was no reason for the Tribunal to determine the extent of liability of each wrong-doer separately. The learned Counsel further submitted that, the Tribunal also failed in appreciating that, the appellant had the choice of proceeding against all or any of the tortfeasors and was entitled to claim the entire amount of compensation from the said tortfeasor. The learned Counsel further contended that, the Tribunal has also failed in awarding just and fair compensation. In the circumstances, the learned Counsel prayed for enhancement in the amount of compensation and hold the appellant entitled to receive the entire said compensation from the respondents.

6. Shri Chapalgaonkar, learned Counsel appearing for

respondent No.3 – Insurance Company supported the impugned Judgment. The learned Counsel submitted that, the Tribunal has taken a possible view and in such circumstances, no interference needs to be caused in the finding so recorded. The learned Counsel further submitted that, the Tribunal has awarded the adequate amount of compensation and no enhancement is required in the said amount. Shri Borulkar, learned Counsel for respondent nos.1 and 2 also supported the impugned Judgment and Award and prayed for dismissal of the appeal.

7. After having considered the submissions advanced by the learned Counsel appearing for the respective parties and on perusal of the impugned Judgment and the evidence on record, the questions which fall for my consideration are :

- (i) Whether the finding recorded by the Tribunal that, the injured – appellant contributed the occurrence of the alleged accident by his negligence is sustainable ?

(ii) After having recorded a finding that, the alleged accident was the result of the composite negligence on part of the drivers of both the vehicles involved in the alleged accident, whether the Tribunal could have deprived the appellant (injured pillion rider) from 50% of the total amount of compensation for the negligence determined by it of the motorcyclist to that extent?

(iii) Whether the amount of compensation as determined by the Tribunal needs any enhancement?

8. I would first like to deal with the last issue whether the appellant has made out any case for enhancement in the amount of compensation. It was the contention of the learned Counsel appearing for the appellant that, the Tribunal has not awarded the appropriate compensation towards the loss of income. It was contended that, the Tribunal should not have held the income of the appellant less than Rs.3,000/- per month. I am, however, not convinced with the argument so advanced. As has been observed by the Tribunal, the appellant did not

produce on record the sufficient evidence to prove his income. In the circumstances, if the Tribunal has assessed the amount of compensation by holding the income of the appellant by applying the criteria of notional income, no fault can be found with the finding so recorded by the Tribunal and the amount of compensation determined by it. After having considered the evidence on record, it does not appear to me that, any case is made out by the appellant for enhancement in the amount of compensation.

9. The next question which falls for my consideration is, whether the appellant who was admittedly a pillion rider on the motorcycle, which met with an accident, can be held to have contributed the occurrence of the alleged accident by his negligence? The Tribunal in para-10 of its Judgment has observed that, the appellant must have asked the motorcyclist to slow down his motorcycle after noticing that, the tractor was taking 'L' turn. The Tribunal has further observed that, since the appellant did not discharge the said obligation, he also has to be held responsible and negligent in occurrence of the alleged

accident. The observation so made and the finding so recorded by the learned Tribunal is apparently unsustainable and deserves to be set aside.

10. The Hon'ble Apex Court in the case of **Union of India Vs. United India Insurance Co. Ltd. and Others**, AIR 1998 SC 640 has observed that,

“There is a well-known principle in the law of Torts called the 'doctrine of identification' or 'imputation'. It is to the effect that the defendant can plead the contributory negligence of the plaintiff or of an employee of the plaintiff where the employee is acting in the course of employment.”

The Hon'ble Apex Court has further observed that,

“this principle is not applicable to a passenger in a vehicle in the sense that the negligence of the driver of the vehicle in which the passenger is travelling, cannot be imputed to passenger.”

The Hon'ble Apex Court in para-10 of the said Judgment has observed that,

“the principle of contributory negligence is confined to the actual negligence of the plaintiff or of his agents. There is no rule that the driver of an omnibus or a coach or a cab or the engine driver of a train, or the captain of a ship on the one hand and the passengers on the other hand are to be 'identified' so as to fasten the latter with any liability for the former's contributory negligence. There cannot be a fiction of the passenger sharing a 'right of control' of the operation of the vehicle

nor is there a fiction that the driver is an agent of the passenger. A passenger is not treated as a backseat driver. (Prosser and Keeton on Torts, 5th Ed., (984 p.521 522). It is therefore clear that even if the driver of the passenger vehicle was negligent, the Railways, if its negligence was otherwise proved - could not plead contributory negligence on the part of the passengers of the vehicle. What is clear is that qua the passengers of the bus who were innocent, - the driver and owner of the bus and, if proved, the railways - can all be joint tort-feasors."

11. It appears to me that, the same analogy can be applied while considering the case of a pillion rider on a motorcycle. As is revealing from the material on record in the instant case, nothing is directly attributed on part of the pillion rider; what is observed by the Tribunal is that, the appellant did not ask the motorcyclist to slow down the motorcycle after noticing that, the tractor is taking 'L' turn. As observed by the Hon'ble Apex Court, there cannot be a fiction of a pillion rider sharing right of control of the driving of the motorcycle. The pillion rider cannot be considered as a backseat driver. In the circumstances, the finding recorded by the Tribunal attributing negligence on part of the appellant – pillion rider cannot be sustained and deserves to be set aside.

12. Further the observation made by the Tribunal that,

the appellant did not ask the motorcyclist to slow down the motorcycle is without any evidence. I have carefully gone through the testimonies of the witnesses recorded before the Tribunal. In the cross-examination of the present appellant, it is not even suggested to him that, he did not ask the motorcyclist to slow down the motorcycle after noticing that, the tractor is taking 'L' turn. Without there being any evidence on record, the Tribunal has firstly assumed that, the motorcycle was being driven at a high speed. The Tribunal has also presumed that, the appellant did not ask the motorcyclist to slow down the motorcycle. The observations as above made by the Tribunal without any evidence are liable to be ignored.

13. In view of the observation recorded by the Tribunal that, the appellant also contributed the occurrence of the alleged accident by his negligence in not asking the motorcyclist to slow down the motorcycle, the Tribunal must have recorded a finding that, the accident in question was a case of contributory negligence. However, it is a matter of record that, the Tribunal has recorded a finding that, the alleged accident was a result of

composite negligence on part of drivers of both the vehicles involved in the said accident. The question arises, when the Tribunal has recorded a finding that, the alleged accident was a result of composite negligence on part of drivers of two vehicles involved in the accident, whether the Tribunal could have deprived the appellant from claiming 50% of the said compensation on account of the negligence on part of the motorcyclist?

14. The Hon'ble Apex Court in the case of **T.O. Anthony Vs. Karvarnan and Ors, (2008) 3 SCC 748** has observed that,

“Where a person is injured as a result of negligence on the part of two or more wrong doers, it is said that the person was injured on account of the composite negligence of those wrong-doers. In such a case, each wrong doer, is jointly and severally liable to the injured for payment of the entire damages and the injured person has the choice of proceeding against all or any of them. In such a case, the injured need not establish the extent of responsibility of each wrong-doer separately, nor is it necessary for the court to determine the extent of liability of each wrong-doer separately.”

15. In the present matter, it was the choice of the appellant, as to against whom, to proceed for claiming compensation. The appellant chose to proceed against the driver, owner and the insurer of the offending tractor and was entitled

to receive the entire compensation from them. The Tribunal has, therefore, manifestly erred in depriving the appellant from 50% of the compensation on account of the negligence on part of the motorcyclist. The finding so recorded by the Tribunal, hence needs to be quashed and set aside.

16. After having considered the entire material on record, though I did not find any case for enhancement in the amount of compensation, the impugned Judgment certainly needs to be modified and the respondents i.e. driver, owner and the insurer of the offending tractor need to be held responsible to pay to the appellant the entire amount of compensation as has been determined by the Tribunal.

17. For the reasons stated above, the following order is passed.

ORDER

(i) The Judgment and Award passed by Motor Accident Claims Tribunal at Beed in Motor Accident Claim Petition No.242 of 1996 is modified as under :

- (a) Respondent Nos.1 to 3 are held liable to pay the compensation of Rs.35,520/- to

the appellant with the interest thereon at the rate of 9% per annum from the date of filing of the claim petition till realization of the said amount.

- (ii) The Award be modified accordingly.
- (iii) The appeal stands allowed in the aforesaid terms.
- (iv) Pending Civil Application, if any, stands disposed of.

(PR. BORA, J.)