

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

First Appeal No. 04071 of 2016

District : Ahmednagar

The Divisional Controller,
Maharashtra State Road
Transport Corporation,
Through Depot Manager,
Shrirampur Depot,
Shrirampur,
District Ahmednagar.

.. Appellant
(Original
respondent)

versus

Vinay Anil Mule [Mulay],
Age 30 years,
Occupation Nil,
R/o. Sukhda Housing Society,
Sanjay Nagar, Ward No.1,
Shrirampur,
Taluka Shrirampur,
District Ahmednagar.

.. Respondent
(Original
petitioner)

.....

Mr. D.S. Bagul, Advocate, for the appellant.

Mr. R.A. Tambe, Advocate, for the respondent.

.....

CORAM : SMT. VIBHA KANKANWADI, J.

**Date of reserving
the judgment : 29th July 2019**

**Date of pronouncing
the judgment : 11th October 2019**

JUDGMENT :

01. Present appeal has been filed by the original respondent challenging the judgment and award passed in M.A.C.P. No. 289 of 2007 by learned Member of the Motor Accident Claims Tribunal, Shrirampur, District Ahmednagar, dated 31-07-2015, thereby allowing the petition under Section 166 of the Motor Vehicles Act, 1988 filed by the present respondent and granting compensation to the tune of Rs. 52,10,994/- to the respondent.

02. The facts giving rise to the original petition are that the claimant used to run optical shop, aged 27 years old, earning around Rs. 2,00,000/- per year, sustained permanent physical disability in the accident. He was proceeding in Indica car bearing no. MH-17/Q-1017 by Pune-Nashik road towards Sangamner in the midnight on 10-12-2006. The driver of the Indica car was one Bhausahab Gore. It is contended that Bhausahab was driving the said car from left side of the road in moderate speed. When they reached at Warulwadi, Taluka Narayangaon, one S.T. bus bearing no. MH-12/AU-9717 came from opposite side and gave dash to Indica car. As a result of the said dash, the claimant sustained grievous injuries. The accident took place due to the sole negligence on the part of the S.T. bus driver. However, as per the claimant, false complaint was lodged against the car driver under the

pressure from S.T. Controller by police against the car driver namely, Bhausahab Gore. The claimant after sustaining injuries, was taken to Sahyadri Hospital, Pune. He had sustained traumatic brain injury, temporal depressed fractures with mass effect with midline shift with diffused axonal injury. He has taken treatment as indoor patient from 11-12-2006 to 19-02-2007. He has spent huge amount on his treatment. He has suffered 50 % permanent physical disability. However, that disability has turned out to be total financial loss for him. The claimant has therefore, claimed compensation of Rs. 1,10,00,000/- from the respondent. [Parties are referred as per their nomenclature before the Tribunal.]

03. The respondent filed written statement at Exhibit 14 and denied all adverse pleadings. It is denied that the said accident had taken place due to the negligence on the part of bus driver. It is stated that when two vehicles were involved, the owner and Insurance Company of the Indica car were necessary party to the proceedings. The accident had taken place due to the rashness and negligence on the part of Indica car driver and therefore, Narayangaon police station had prosecuted him. Age, occupation and income of the claimant has been denied; so also, it has been denied that he had sustained permanent physical disability causing entire financial loss to him.

04. Taking into consideration the rival contentions, issues were framed. Both sides have led oral as well as documentary evidence. Taking into consideration the evidence on record, the learned Tribunal has come to the conclusion that the claimant has proved that he sustained permanent disability in the said accident. It was held that both the drivers were negligent and the ratio between them is that 75 % negligence is of S.T. bus driver and 25 % negligence is of the car driver. The respondent has been directed to pay compensation of Rs. 52,10,994/- together with interest at the rate of 9 % per annum from the date of petition till actual realization of entire amount. This award is under challenge in this appeal.

05. At the outset, it can be said that though the claimant had come with a case that S.T. bus driver was solely negligent for the accident, yet, after the Tribunal had held the car driver negligent to the extent of 25 %; the claimant has not filed any appeal challenging the said finding. Therefore, scope of the appeal is restricted to the challenges those have been made by the original respondent.

06. Taking into consideration the submissions made as well as the pleadings, following points arise for determination. Findings and reasons for the same

are as follows :-

(I) Whether the Tribunal was justified in adjudicating negligence ratio between S.T. bus driver and car driver to the extent of 75 % as to 25 % ?

(II) Who amongst the drivers was negligent and what is the ratio ?

(III) What is the just amount of compensation to which the claimant is entitled ?

07. Heard learned Advocate Mr. D.S. Bagul for the appellant and learned Advocate Mr. R.A. Tambe for the respondent. It has been vehemently submitted on behalf of the appellant that though the disability proved by the claimant is to the extent of 50 % permanent physical disability, the Tribunal has considered that it has totally affected the financial capacity of the claimant. The claimant used to run optical business and it has come on record that the said business is still going on. That means, there is still income for the claimant. Under such circumstance, the Tribunal erred in holding 100 % financial disability. The learned Tribunal has also failed to consider that police had prosecuted Bhausahab who was driving the Indica car. The owner, driver as well as Insurance Company of the Indica car

have not been made party to the proceedings. The claimant preferred not to examine Bhausahab Gore. However, the respondent examined driver of the S.T. bus as well as the Investigating Officer. The testimony of the witnesses examined by the respondent would show that they have proved that it was because of the rashness and negligence on the part of Indica car, the accident had taken place and therefore, the petition ought to have been dismissed. Though the wife of the claimant has been examined, who was also travelling along with the claimant in the same Indica car, since the accident had taken place at night time and she was on the rear seat, she cannot be said to be the proper witness to say about the negligence. No proper justification has been given as to why action was not taken against police officers who had prosecuted Bhausahab Gore after making investigation, if at all the claimant intends to say that he has been falsely prosecuted. It was further submitted that since the petition was filed under Section 166 of the Motor Vehicles Act, the burden to prove rashness and negligence was on the claimant and when no evidence has been led, the petition ought to have been dismissed. Alternative submissions have been made that if this Court comes to the conclusion that the case is of composite negligence, then the percentage of the negligence would vary and car driver will have to be held responsible more to the accident taking into consideration the situation in

the spot *panchanama*.

08. Per contra, learned Advocate appearing for the respondent supported the reasons given by the Tribunal and it was vehemently submitted that the decision of the police to prosecute car driver was not binding on the Tribunal. The Tribunal was supposed to give its own conclusion taking into consideration the evidence led. The spot *panchanama* shows that there were brake marks of the S.T. bus. CW 01 Ashwini who is the wife of the claimant, was travelling from the same car and therefore, she is an eye witness. She had answered all the questions which were put to him in the cross examination in respect of rashness and negligence. There was absolutely no necessity to examine Bhausahab Gore.

09. First of all, the point of '*negligence*' is required to be considered. On this point, the claimant has examined Ashwini, his wife. It is to be noted that taking into consideration the injuries sustained to the claimant, it appears that the claimant has not entered the witness box and has relied on the other evidence. The testimony of Ashwini would show that in her examination in chief, which is nothing but the replica of the petition, it is stated that Bhausahab has been falsely prosecuted. In her cross examination, she has stated that her husband i.e. claimant had occupied the seat besides

driver and she along with her two children occupied the rear seat. The accident had taken place between 11.00 p.m. to 12.00 a.m. and she has categorically stated that she had not slept in the car. She has admitted that the road on which the accident took place, flows south-north. She denied the suggestion that their car was overtaking tractor trolley; but then she admits that there were marks of white paint on the road. She had gone through the contents of the police papers. Offence was registered against the driver of the Indica car. She did not make any complaint about the same to the senior police officers. Thus, it is to be noted that from her entire testimony, we could gather that no action was taken by the claimant or any of her relatives stating that the action taken by police on their car driver is wrong. When those documents i.e. police papers were produced by the claimant, it can be said that they wanted to rely upon the same but at the same time, they have come with a case that the car driver has been falsely prosecuted. Merely making that statement is not enough. The said statement is not coupled with any action on their part. When they had no intention to rely on those documents, then strong evidence was expected from the claimants in this case.

10. No doubt, CW 01 Ashwini was also travelling from the same vehicle, yet, her testimony will have

to be received with caution, as she was speaking against the police papers. Except her statement, that due to the pressure from driver of the S.T. bus or S.T. authorities, the police have lodged false complaint against Bhausahab Gore, there is nothing on record. She was travelling by sitting in the rear part of the car. The best evidence would have been to examine Bhausahab Gore himself. But he has been away from the witness box for the reasons best known to the claimant. On the contrary, the respondent has examined the driver of the S.T. bus who was driving the said offending bus at the relevant time. So also, the respondent has examined the Investigating Officer also in order to narrate as to why he came to the ultimate conclusion that the car driver was negligent. The cross examination of these two witnesses taken on behalf of the claimant would indicate that except denial there was nothing. Therefore, the police papers as well as evidence that has been adduced rather supports the respondent. It is, therefore, required to be seen as to what police papers say.

11. The important piece of document is the spot *panchanama*. The S.T. bus driver had shown the said spot to the *panchas* and therefore, he cannot travel beyond his own action. The spot *panchanama* would make it clear that the tar road at the said place was 23 feet. It had 6 feet side margin on the western

side, whereas 5 feet on the eastern side. The car was going from south to north, whereas the bus had come from north to south. The place of impact is 2 feet away from the middle marking towards east. That means, the car had gone 2 feet towards its wrong side when the dash was received. The bus was going from its own left side at the relevant time. Therefore, from the said position, it appears that Bhausahab Gore was prosecuted. Further, contents of the spot *panchanama* would show that the S.T. bus had stopped at a distance of about 42 feet and about 40 feet there were S.T. brake marks; whereas the car at a distance of about 210 feet on the western side ditch and the brake marks of the car were to the extent of 124 feet. This indication is also to the effect that the car driver was in high speed. The said situation is also required to be considered from the bus driver's angle. The testimony of bus driver does not say as to from how much distance he had seen the car. His evidence is silent on the point that the car was overtaking another vehicle at the relevant time. What he had done to avoid the accident is totally silent from his testimony. When half of the road i.e. 11.5 feet plus 5 feet *kachha* road was available to him and the car had come only to the extent of 2 feet towards its eastern side, then by taking the bus towards further left, he could have avoided the accident. When his testimony is silent to that extent, definitely it was a case of composite

negligence and taking into consideration all the above aspects, it can be said that the car driver was negligent to the extent of 60 %; whereas the bus driver was negligent to the extent of 40 %.

12. As regards the point raised, that the petition suffers from non-joinder of S.T. bus driver as party and non-joinder of driver, owner and Insurance Company of Indica car is concerned, it can be seen that the claimants contended that the accident had taken place due to the sole negligence of the bus driver and therefore, the driver, owner and Insurance Company of the car was not party to the proceedings. In the cross examination of CW 01 Ashwini, it has come on record that the said Indica car was owned by claimant himself. Under such circumstance, it cannot be stated that the driver and Insurance Company of the Indica car would be necessary parties.

13. Learned Advocate appearing for the appellant has relied on the decision in *United India Insurance Co. Ltd. Vs. Ratna Popat Patil & another* [2011(3) Mh.L.J. 582] wherein this Court has held that when driver of the offending vehicle has not been impleaded as party to the claim petition and adverse finding in respect of his negligence has been recorded behind his back and in his absence by the Tribunal, then award of the Tribunal stands vitiated. It is to be noted that in

the written statement filed by the respondent, no such defence has been raised that the bus driver is a necessary party. Furthermore, when the respondent had examined the driver against whom the allegations have been made, then the appellant cannot take help of the ratio laid down in the aforesaid judgment.

14. Now, turning towards quantum, at the initial stage, it can be said that though the claimant has sustained 50 % permanent disability, yet the evidence of the Doctor who gave disability certificate would show that the claimant is unable to do any work. He has no control over his mind. He gets epileptic attacks. His left side of the body is completely paralyzed. He has developed problem in the vision and his memory has extensively affected. In clear terms, he has stated in the chief examination that he is unable to work at all. The cross examination of the Doctor who gave certificate is very much technical in nature and there is no reason to disbelieve the opinion given. Though the shop might be running, yet claimant cannot run it and it cannot be as before with his own expertise. Therefore, the Tribunal was justified in holding that the injuries caused due to accident have resulted into 100 % financial loss to the claimant.

15. As regards the income of the claimant is concerned, the income tax returns of assessment years

2004-05, 2005-06 and 2006-07 have been produced on record. The accident had taken place on 10-12-2006. Therefore, the last year income as per the income tax returns is required to be considered. It shows, his income was Rs. 1,85,719/- during that year. It is rounded about Rs. 1,85,720/-. Further, taking into consideration his job or occupation as self-employed job and taking into consideration is age as 27 years, 40 % of the same is required to be added towards future prospects. That amount comes to Rs. 74,288/-. Thus, the income of the claimant for our calculation purpose would Rs. 2,60,008/-. The multiplier to be used in this case would be '17' taking into consideration the age of the claimant. After applying multiplier, the total loss of income for the claimant would be Rs. 44,20,136/-. The medical bills which are produced and proved on record are to the extent of Rs. 5,15,659/-. The learned Tribunal has rightly granted future medical expenses plus travelling expenses at the rate of Rs. 2,500/- per month. That amount comes to Rs. 5,10,000/-. For pain and suffering, rightly an amount of Rs. 2,50,000/- has been awarded; so also, towards loss of amenities, amount of Rs. 2,00,000/- has been awarded. Taking into consideration the fact that the left side of the body of the claimant is completely paralyzed, amount of Rs. 4,08,000/- has been rightly granted by the Tribunal towards attendance. The learned Tribunal has erred in granting amount under 'special

diet' by applying multiplier method. It will have to be a lump sum amount and therefore, the claimant is entitled to get Rs. 20,000/- towards special diet. Thus, total amount of compensation would be Rs. 63,23,795/-. However, as aforesaid, the car driver was responsible to the extent of 60 % and the bus driver to the extent of 40 %. The amount which can be directed to be given by the respondent would be Rs. 25,29,518/-. The points are therefore, answered accordingly.

16. The learned Tribunal erred in granting more compensation by holding that the bus driver was more responsible for the accident, which was against the record and therefore, the said judgment and award deserves to be modified.

17. Hence, the following order :-

(a) The appeal is hereby partly allowed.

(b) The judgment and award passed in M.A.C.P. No. 289 of 2007 by the learned Member of the Motor Accident Claims Tribunal, Shrirampur, District Ahmednagar, dated 31-07-2015, is hereby set aside and modified to the extent of quantum, as follows :-

"2. The respondent shall pay the compensation of Rs. 25,29,518/- [Rupees twenty five lacs, twenty nine

thousand, five hundred eighteen only] (inclusive of 'no fault liability' amount) to the claimant, along with interest at the rate of 9 % per annum from the date of institution of the petition till actual realization of entire amount. "

(c) It appears from the record, that the appellant had deposited compensation of Rs. 88,36,756/- and on the request of the claimant, it appears that Rs. 44,30,878/- was transmitted to the learned Tribunal for withdrawal of the said amount. Under the said circumstance, if the said amount is withdrawn by the claimant further from the Tribunal, then the appellant is entitled to recover whatever is excess in view of the modified award, from the claimant.

(d) There shall be no order as to costs.

(Smt. Vibha Kankanwadi)
JUDGE

.....