

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

FIRST APPEAL NO.2136 OF 2020

New India Assurance Company Ltd.
Through it's Branch Manager,
Near Hotel Ashoka, Ahmednagar,
District Ahmednagar
through its Divisional Manager/
Authorized Signatory,
Mahesh Auto Compound,
Adalat Road, Aurangabad,
District Aurangabad

... APPELLANT
(Orig.Respdt.No.2)

VERSUS

1. Madan Shankar Yadav,
Age 32 years, Occu. Business,
Through his next friend,
Manisha Madan Yadav,
Age 27 years Occu. Household,
R/o Dongaon, Tq. Jamkhed,
District Ahmednagar
2. Tushar Raju Fatangade,
Age 49 years, Occu. Business,
R/o A/P Plot No.13, Balaji Nagar,
Bolhegaon, Tq. Nagar,
District Ahmednagar
3. Amol Ashok Gaikwad,
Age 37 years, Occu. Driver,
R/o Jategaon, Tq. Jamkhed,
District Ahmednagar.

... RESPONDENTS

(No.1 Orig. Claimant,
No.2 & 3 Orig. Respdt.No.1 & 3)

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Shri S.G. Chapalgaonkar, Advocate for appellant
shri A.K. Gawali, Advocate for respondent No.1.
Shri V.U. Pawar, Advocate for respondents No.2 & 3

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CORAM : R. G. AVACHAT, J.

Date of reserving judgment : 16th September, 2021

Date of pronouncing judgment : 4th December, 2021

JUDGMENT :

This is Insurance Company's Appeal, taking exception to the judgment and award dated 9/12/2019, passed by Member, Motor Accident Claims Tribunal (MACT), Ahmednagar in Motor Accident Claim Petition (Petition) No.334/2018, granting compensation of Rs.49,40,000/- with interest @ 8.5% p.a. on account of injuries and permanent disability suffered in an accident involving motor vehicle. The challenge is mainly on the ground of false involvement of the alleged motor vehicle, namely motorcycle bearing No.MH-16/BX-1615. In the alternative, the question of negligence and quantum of compensation has also been raised in this appeal.

2. Facts giving rise to the present appeal are as follows :-

The claimant Madan Shankar Yadav (petition has been filed through his next friend – wife Manisha since he has been in vegetative state) was travelling on his motorcycle

bearing No.MH-16/BB-3635 along Ashti-Ahmednagar Road. It was 8.30 p.m. of 14/12/2017. He was riding the motorcycle. His two friends were riding pillion with him. While the claimant was negotiating a turn at Ashti Bazar Tal, the motorcycle No.MH-16/BX-1615 proceeding from Ahmednagar side towards Jamkhed dashed the claimant's motorcycle. As a result, the claimant and the pillion riders as well fell off the motorcycle. The claimant suffered severe head injury. He was first rushed to Rural Hospital, Ashti and then shifted to Max Care Superspeciality Hospital, Ahmednagar.

3. Someone lodged the report of the accident with the police station. Enquiry into the accident was made. The brother of the claimant gave a statement to the enquiring officer that when the claimant gained consciousness, he gave him the number of the offending motorcycle, which belonged to the respondent No.3 in the claim petition. An F.I.R. was, therefore, lodged by the Police Head Constable Bansi Jaybhay. It was found during investigation that the respondent No.1 in the claim petition was riding the offending motorcycle. The charge sheet, therefore, came to be filed against him.

4. The claimant underwent five operations. His health deteriorated. He slipped into Comatose. He has been in vegetative state from a few days after the accident. His wife, therefore, preferred the claim petition as a next friend of the claimant. It is her case that, the claimant was running a grocery shop. His monthly income was Rs.40,000/-. Little over Rs.10 Lakhs have been spent for medical treatment. As a result of the injury suffered in the accident, the claimant has incurred 100% loss of earning capacity.

5. The Tribunal, on appreciation of the evidence, granted compensation of Rs.49,40,000/-. The same is under challenge herein.

6. Heard. Learned counsel for the appellant Insurance Company would submit, the accident took place on 14/12/2017. In the accident report lodged with Ashti Police Station, there is no reference regarding involvement of any other vehicle, except the one being plied by the claimant. The spot panchanama was drawn the very next day. The place of accident is located in a crowdly place. It was 8.30 p.m. Had there been involvement of the offend motorcycle, same would not have gone unnoticed. Statements of pillion

riders are not forthcoming. None of them was examined before the Tribunal. The involvement of the offending motorcycle was first time reported two months after the accident. The brother of the claimant gave a statement to the police, claiming to have been informed by the claimant the number of the offending motorcycle. The police papers would undoubtedly indicate it to be a case of false involvement only with a view to earn compensation. He would, in the alternative, submit that, there was no evidence as to income of the claimant. It is just illogical to imagine the claimant to have been earning Rs.40,000/- per month in a grocery business in a tiny village. According to him, there is nothing to suggest the rider of the alleged motorcycle to have either been rash or negligent. He, therefore, urged for allowing the appeal.

7. Shri A.K. Gawali, learned counsel for the claimant would, on the other hand, submit that, on due investigation, the charge sheet was submitted against the respondent No.1. The owner of the offending vehicle and its rider as well admitted in their written statement involvement of the motorcycle. According to him, no roving enquiry was expected to be made in a proceeding for grant of

compensation. The procedure prescribed is summary in nature. The brother of the claimant gave a statement suggesting involvement of the motorcycle. In case of **Sunita and others Vs. Rajasthan State Road Transport Corporation and others**, [(2020) 13 SCC 486], the Apex Court held :-

“In terms of S.166 of the M.V. Act, 1988, Tribunal *stricto sensu* is not bound by pleadings of parties, and its function is to determine amount of fair compensation – Claimants are merely to establish their case on touchstone of preponderance of probability, and standard of proof beyond reasonable doubt cannot be applied by Tribunal dealing with motor accident cases – It is not an adversarial adjudication between litigating parties to a dispute, but a statutory determination of compensation on occurrence of an accident, after due enquiry, in accordance with the statute.

Non-examination of witness *per se* cannot be treated as fatal to claim set up before Tribunal – Approach in examining the evidence in accident claim cases is not to find fault with non-examination of some “best” eyewitness in the case, but to analyse the evidence already on record to ascertain whether that is sufficient to answer the matters in issue on the touchstone of preponderance of probability.

Nor is there anything in the MV Act to preclude citing of a witness who has not been named in witness list in the criminal case – What is essential is that the opposite party should get a fair opportunity to cross-examine the witness concerned.

Approach of Tribunal should be holistic analysis of entire pleadings and evidence by applying principles of preponderance of probability – Once, foundational fact, namely, actual occurrence of accident, has been established, then Tribunal's role would be to calculate quantum of just compensation if accident had taken place by reason of negligence of driver of a motor vehicle and, while doing so, Tribunal would not be strictly bound by pleadings of parties.”

8. Mr. Gawali would further submit that, as a result of the injury suffered, the claimant slipped into vegetative state. It is a case of living death. The amount of compensation granted is even inadequate. He, therefore, urged for dismissal of the appeal.

9. After all, the accident, questions of rash or negligent are all questions of fact. Each case is, therefore, required to be decided on its own facts and circumstances. In case of **Oriental Insurance Co. Ltd. Vs. Meena Variyal and others**, [(2007) 5 SCC 428], it has been observed :

“It may be true that the Motor Vehicles Act, insofar as it relates to claims for compensation arising out of accidents, is a beneficent piece of legislation. It may also be true that subject to the rules made in that behalf, the Tribunal may

follow a summary procedure in dealing with a claim. That does not mean that a Tribunal which has been approached with a claim for compensation under the Act should ignore all basic principles of law in determining the claim for compensation. The relevant provisions of the Act are not intended to jettison all principles of law relating to a claim for compensation which is still based on a tortious liability.”

10. Before the Tribunal, the wife of the claimant gave oral evidence. She had not witnessed the accident. In proof of factum of accident and involvement of the motorcycle, the police papers were relied on (produced with Civil Application No.3168/2021). The accident took place on 14/12/2017 at about 8.30 p.m. at Shivaji Chowk, Ashti Bazar Tal, a crowded place. The claimant was riding the motorcycle with two others riding pillion. Riding triple seat without anything more would not be considered to be a case of contributory negligence. The claimant suffered head injury. He was, therefore, first rushed to Rural Hospital at Ashti and then shifted to MaxCare Hospital at Ahmednagar. The disability certificate (Exh.56) indicate the claimant to have suffered 100% permanent disability. The certificate reads thus :

“He has sustained following injuries in the accident :

(1) RTA with Severe head injury on 24/04/2018.

Was comatose condition for 4 weeks on ventilator support.

Bifrontal Decompressive Craniectomy & Duroplasty done on 20/12/2017.

Fixation of Left Femur & Left Tibia done. Cranioplasty + right VP Shunt done on 23/05/2018

Neurological Status	Physical Impairment
Persistent vegetative status following severe head injury	100%

Total disability score is 100% which is permanent in nature.

In my opinion, the injury or injuries which he/she has suffered by reason of the accident involve :-

- (a) Permanent private of the sight of either eye or the hearing of the either ear of privation of any member or joint.
- (b) Destruction or permanent impairing of the power of any member or joint, or
- (c) Permanent disfiguration of the head of face.”

11. The claimant admittedly incurred the medical expenditure little over Rs.10 Lakhs. He may be required to spend more. The question is, whether an accident between the two motorcycles as has been alleged in the claim petition

did take place. It has been specifically averred in paragraph No.1 of the claim petition as under :

“1. At the outset, it is submitted that due to the accidental injuries and permanent disablement, the applicant initially was talking to some extent, however, thereafter, the applicant is unable to talk and after 15 days of the accident, the applicant's health became more worst and as on today the applicant is unable to talk and due to injuries is unable to look, cannot sit or stand and is also unable to do his day to day activities and bed ridden. The applicant is continuously attending the hospital and unable to do any activity as before the accident and, therefore, with the leave of the Hon. Tribunal the applicant is filing the present claim petition through his next friend i.e. wife Manisha.”

12. On the same line is the evidence given by the wife of the claimant. As such, the evidence indicates the claimant to have been in vegetative state from 15th or a few days thereafter of the accident to the date of filing the claim petition and even thereafter. A set of police papers in the charge sheet came to be placed on before this Court. Report of the accident (42-A) was lodged by one Dattatraya Bhagwat on the same date. It was reported therein that the vehicle bearing No.MH-16/BB-3635 met with the accident and the injured were rushed to the Government Hospital. The report

does not state it to be a case of involvement of more than one motorcycle. The scene of offence panchanama was drawn on the very next day. Only the motorcycle plied by the claimant was found at the site. In a statement of one Sachin Dongre, it has been recorded that it was an accident between the motorcycle of the claimant and an unknown Scooty (Moped), while it is in the statement of some others that one unknown motorcycle gave a dash to the claimant's motorcycle. On investigation, the F.I.R. was lodged by Police Head Constable, who was examined as a witness before the Tribunal. He has categorically admitted in his evidence that, involvement of the alleged offending motorcycle was realized only in the statement of the brother of the claimant, Ram Yadav. The said statement has been recorded on 10/2/2018 i.e. about 55 days after the accident. The claimant's brother informed the investigating officer that the claimant was in Comatose up to 2/2/2018. Thereafter his health condition improved a bit. He thereafter enquired with the claimant to learn from him that it was a motorcycle bearing No.MH-16/BX-1615. Admittedly, except this statement of the claimant's brother, there is no shred of evidence to indicate involvement of the alleged offending vehicle. The evidence of the wife of the claimant and the averments in the claim

petition referred to hereinabove would, on the other hand, undoubtedly suggest that, for about 15 days next after the accident, the claimant was somewhat conscious and thereafter he slipped into Comatose. All these facts undoubtedly indicate that the alleged offending motorcycle has been implicated. True, the respondent No.1 and 3 in the claim petition (rider and owner of the alleged offending motorcycle) filed their written statement, admitting involvement. The same is nothing but a collusion between the parties.

13. This Court is very much conscious of the fact that Section 166 of the Motor Vehicles Act is a beneficial provision. The Court should have a liberal approach. The procedure prescribed for enquiring the claim petition is summary in nature. The Apex Court, in **Mangla Ram Vs. Oriental Insurance Co. Ltd. and others, [2018 AIR (Supreme Court) 1900]**, held :-

“The evidence of these witnesses to the extent they have consistently stated that when the appellant was riding on his motorcycle bearing No.RJ-19-6636 at the relevant time, going to Basni from Panwara Phanta and when he reached near Siviya Nada, a green jeep coming at a high speed from Salawas side, hit the motorcycle from

back side, as a result of which the appellant fell down and suffered severe injuries including to his right leg which was eventually amputated from above the knee level, has not been doubted. Pertinently, besides mentioning the description of the offending vehicle as a “jeep” they have also spoken about its colour (green) and that it was displaying the Congress Party flags and banners on the side of the jeep. In other words, their version limited to having noted the jeep number, has not been accepted. Besides, the Tribunal relied upon the evidence of respondent No.2 Chail Singh (DW-1) and Bhanwar Singh (DW-2) who had stated that the jeep was deployed in the election campaign of Sarpanch of Somdar Village on the Salawas Road and thus denied the involvement of the vehicle in the accident in question.”

This would indicate that, in the said case, there were eye witnesses to the accident. They had given description of the offending vehicle. On the basis of the same, the claim petition was allowed. It is reiterated that, each case has to be decided on its facts and circumstances.

14. The learned member of the Tribunal, relying on the police papers and evidence of the investigating officer held the involvement of the alleged offending vehicle to have been proved. As has been stated above, there is not a shred of material to indicate involvement of the alleged offending vehicle in the accident in question except a statement of the

brother of the claimant recorded 55 days after the accident, wherein he claimed to have been informed by the claimant of the number of the offending vehicle, while the averments in the claim petition suggest that the claimant had been unable to speak and was in Comatose from 15 – 20 days post accident, even to date. In this factual backdrop, the findings recorded by the Tribunal, holding the alleged offending vehicle to have been involved in the accident calls for interference.

15. On the question of quantum, this Court is not inclined to make any interference with the amount under the impugned award in view of the medical expenditure incurred and the claimant to have suffered 100% loss of earning capacity, but for the findings that the claimant failed to prove the involvement of the motorcycle No.MH-16/BX-1615. It pains to allow the appeal, but has no option.

16. In the result, the appeal succeeds in terms of the following order :

ORDER

(i) The appeal is allowed. The award dated 9/12/2019, passed by Member, Motor Accident Claims Tribunal,

Ahmednagar in Motor Accident Claim Petition No.334/2018 is hereby set aside. Motor Accident Claim Petition No.334/2018 is dismissed.

(ii) The amount deposited be paid back to the appellant Insurance Company along with interest accrued thereon after a period of three months from the date of this order.

**(R. G. AVACHAT)
JUDGE**

fmp/-