

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

**FIRST APPEAL NO. 392 OF 2019**

Dinesh Dwarkadas Bajaj  
Age: 50 years, Occu: Nil,  
R/o: Datta Krupa Society,  
Old Ausa Road, Latur

... **Appellant**  
(Orig. claimant)

**Versus**

1) Sunil Vaijanath Janapure  
Age: 43 years, Occu: Driver,  
R/o. Mantale Nagar, Latur

2) Vyankat Namdev Kirvale  
Age: Major, Occu: Business,  
R/o Yeli, Tq. Ausa,  
Dist. Latur

3) New India Assurance Co. Ltd.  
Through it's Branch Manager,  
Chandra Nagar, Latur

... **Respondents**  
(Orig. respondents)

....

Mr. R. K. Ashtekar, Advocate for appellant  
Mr. M. R. Deshmukh, Advocate for respondent No.3

....

**CORAM : R. G. AVACHAT, J.**

**RESERVED ON : 12<sup>th</sup> AUGUST, 2021**

**PRONOUNCED ON : 06<sup>th</sup> DECEMBER, 2021**

**PER COURT :-**

. The challenge in this appeal is to the judgment and  
award dated 21.03.2018, passed by the Member, Motor Accident

Claims Tribunal, Latur, in Motor Accident Claim Petition No.264 of 2015, holding the appellant – claimant to be the contributory negligent in equal proportion and therefore, granted him only 50% of the amount that was worked out as compensation. Under the impugned judgment and award, the amount of compensation payable on account of injuries and permanent disability came to be worked out at Rs.13,04,200/-. Since the appellant-claimant was held to be equally responsible for the accident, he has only been granted a sum of Rs.6,52,100/-. The appellant-claimant, is therefore before this Court in appeal.

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

The appellant-claimant had been to Hotel Gayatri to take food parcel on 21.02.2014 by 7.30 p.m. While he was on his way home riding motorcycle bearing registration No.MH-24-Q-6698, the truck bearing registration No.MH-24-8580 came from PVR chowk and dashed against his motorbike. The truck went away. The appellant-claimant was rushed to a local Intensive Care Unit, at Latur. He was indoor patient upto 25.02.2014. Later on, he lodged the report of accident. It was inquired into. Involvement of the truck

surfaced. Truck driver was therefore proceeded against. The appellant-claimant, on the other hand, filed petition for compensation. The Tribunal held the appellant-claimant to have suffered 36% of disability and loss of earning capacity as well.

3. Learned Advocate for the appellant-claimant would submit the finding of contributory negligence is based on surmises and conjectures. The driver and owner of the truck did not file written statement. The written statement filed by the respondent - Insurance Company is silent to raise an issue of contributory negligence. The Tribunal itself found the accident site panchanama to be of not any use. The Tribunal, however, went by the hand sketch of the scene of accident to hold that the appellant-claimant could have avoided the accident. The learned Advocate therefore urged for setting aside the findings of contributory negligence.

4. The learned Advocate for the respondent – Insurance Company would, on the other hand, submit that the Tribunal considered the police papers relied on by the appellant-claimant himself. Adverting this Court's attention to the sketch of the site, he would submit that the claimant was proceeding from wrong side of

the road. He could have avoided the accident. The reasons given by the Tribunal are consistent with the evidence in the case. The learned Advocate has relied on the judgment of the Apex Court in the case of *Raj Rani and others vs Oriental Insurance Company Limited and others – (2009) 13 SCC 654*.

5. The Tribunal, in paras 13 and 14 of the judgment, observed as under:-

*“13. .... On perusal of panchanama, there appears it is not of any use to see scene of accident. However, the spot of accident disclosed and shown through the contents and hand sketch in the panchanama being not much in dispute can be considered to arrive at certain conclusions. It reveals the accident has occurred on ring road from PVR chowk to Chhatrapati chowk. Further reveals ring road is having separate lanes for the vehicles plying to Chhatrapati chowk to PVR chowk and from PVR chowk to Chhatrapati chowk. There is divider in between the lanes. The width of each lane is 60 feet. It further reveals that the accident has taken place in the lane available for the vehicles proceeding from PVR chowk to Chhatrapati chowk. Hotel Gayatri situates along lane available to vehicle playing from Chhatrapati chowk to PVR chowk. It further reveals that the accident has not taken place at the junction i.e. at the spot where old Ausa road reaches to ring road. If claimant was going from Gayatri hotel he should have come from the lane available to the vehicles playing towards PVR chowk to Chhatrapati chowk. If accident has occurred between truck proceeding towards Chhatrapati chowk from PVR chowk and motorcycle of the claimant whose house situates in side of old Ausa road towards North, the spot of accident should have been at the junction where the old Ausa road reaches to ring road.*

*As per the panchanama the spot of accident situates away about 30 feet towards Eastern side from the old AUSA road which shows the accident must have occurred while claimant going by the lane available to vehicles plying towards Chhatrapati chowk. ....*

*14. There is no specific evidence on record which could indicate that truck driver was solely responsible for the accident. On the contrary, the circumstances would indicate that both are equally liable for the accident. ....”*

6. It appears from the pleadings and the submissions before the learned Tribunal that none of the respondents including the Insurance Company took a defence of the appellant – claimant to have been contributory negligent.

7. Reading of the judgment in the case of **Raj Rani** (supra) would suggest that there was no question before the Apex Court as to whether without there being any pleadings regarding contributory negligence, the findings in that regard could be arrived at. It is true that the police papers were relied upon by the appellant-claimant himself. He, therefore, cannot backtrack therefrom. Before the Tribunal, it was the case of the respondent – Insurance Company that the Truck has been falsely implicated. It has, however, not preferred any appeal against the impugned judgment and award. It was its consistent case that the appellant – claimant himself fell off

the motorbike. The panchanama of the site and the sketch have been drawn a few days after the accident. The site was shown by the brother of the appellant – claimant. Admittedly, he had not witnessed the accident. The appellant claimant has specifically pleaded and averred as under:-

*“After purchasing said dish the claimant was proceeding towards his house on his motorcycle. He was riding his motorcycle with moderate speed with due care and precaution. When he reached near turn towards old Ausa road at that time the truck bearing No.MH-24-8580 came from PVR chowk towards Chhatrapati chowk via ring road with high speed with rash and negligent manner and given dash to the motor cycle rider i.e. claimant MH 24 Q 6698, due to the said dash the claimant fall down he has sustained grievous multiple injuries as shown in the injury certificate”....*

8. The Hon’ble Supreme Court in the case of ***Mangla Ram vs Oriental Insurance Co. Ltd. & Ors – 2018 AIR (SC) 1900***, observed thus:-

*“C. Motor Vehicles Act, 1988 Section 166 Accident – Contributory negligence – Spot where motor vehicle found lying after accident – Cannot be basis to assume that it was driven in or around that spot at relevant time – Site map cannot be basis to assume that appellant was driving motorcycle on wrong side of road at relevant time – Finding of Tribunal that claimant contributed to occurrence of accident by driving motorcycle on wrong side or road, is manifestly wrong and unsustainable.”*

9. The Tribunal itself found the scene of accident panchanama to be of not any use. It however relied on the hand sketch. Even if we rely on the hand sketch, location of hotel Gayatri and Govind Bar could not be ascertained therefrom. The appellant-claimant had not been suggested in his cross objection that he was equally responsible for the accident.

10. The findings as regards contributory negligence recorded by the Tribunal is its own creation.

11. In the case of ***Pramodkumar Rasikbhai Jhaveri vs Karmasey Kunvargi Tak and others – (2002)6 SCC 455***

*“11. It is important to note that the respondents did not contend before the Tribunal that there was contributory negligence on the part of the appellant, the driver of the car. There was not even an allegation in the written statement filed by the respondents that the car driver was negligent and the accident occurred as result of partial negligence of the car driver. During the trial of the case, there was an attempt on the part of the respondents to contend that the driver of the car was trying to overtake a truck which was going ahead of the car. The appellant-car driver had also pleaded that the truck driven by the second respondent was trying to overtake another car, which was going ahead of the truck. But these circumstances are not proved by satisfactory evidence. One expert had also given evidence in this case but he had not seen the accident spot. His opinion was based on the observation of the damaged parts of the two vehicles. The total width of the tarred portion of the road was 22 feet*

*and there were mud shoulders on either side having a width of three feet. It is proved by satisfactory evidence that the offending truck had come to the central portion of the road and there was only a three feet width of the road on the left side of the car driven by the appellant. In this factual situation, the High Court was not justified in holding that there was contributory negligence on the part of the appellant.”*

In short, for want of there being averments in the written statement and a specific case before Tribunal, the respondent – Insurance Company could not be allowed to support the findings recorded by the Tribunal on the surmises and conjunctures. In view of the same, interference is warranted with the impugned award. In the result, the appeal succeeds.

12. The appeal is allowed.

13. The findings recorded by the Tribunal, holding the appellant – claimant to be equally contributory negligent, is set aside. The appellant – claimant is entitled to receive entire amount of compensation i.e. Rs. 13,04,200/- worked out by the Tribunal with interest @ 6% p.a. from the date of petition to the date of payment.

[ R. G. AVACHAT, J. ]

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