

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

FIRST APPEAL NO. 1799 OF 2019

Satling Gangadhar Bagal	.. Appellant
Age.49 years, Occ. Ex-Service & Agri.,	[original
R/o. Kol-Kanadi, Tq. Ambajogai,	claimant]
Dist. Beed.	

Versus

- | | |
|---------------------------------------|----------------|
| 1. Abarao Dnyanoba Sanap | .. Respondents |
| Age.Major, Occ. Business, | [original |
| R/o. Waghdari, Tq. Gangakhed, | respondents] |
| Dist. Parbhani. | |
| | |
| 2. Balaji Vitthal Chate | |
| Age. 39 years, Occ. Driver, | |
| R/o. Khapart one, Tq. Ambajogai, | |
| Dist. Beed. | |
| At present Chikhli, Tq. Ambajogai, | |
| Dist.Beed. | |
| | |
| 3. United India Insurance Co. Ltd., | |
| Through its Divisional Manager, | |
| Vinayakrao Patil Chowk, Station Road, | |
| Aurangabad. | |

Mr.S.S. Dargad, Advocate for the appellant.

Mr.A.V. Thombre h/f. Mr.S.S. Thombre, Advocate for respondent Nos.1 & 2.

Mr.S.V. Kulkarni, Advocate for respondent No.3.

CORAM	:	VINAY JOSHI, J.
RESERVED ON	:	15.02.2022
PRONOUNCED ON	:	24.02.2022

J U D G M E N T :-

01. Dismissal of injury claim by the Tribunal in MACP No.62 of 2011 vide judgment and order dated 09.03.2018 gave rise to the claimant to file this appeal seeking reversal of the judgment and grant of compensation.

02. It is appellant's case that on 06.12.2007 the appellant injured (applicant) was proceeding as a pillion rider along with his brother on motorcycle from village Kol-Kanadi towards Ambajogai. While the motorcycle was passing from Yashwantrao Chavan Chowk, Ambajogai, offending truck bearing registration No. MH-22-L-399 came in high speed and gave dash from behind to the motorcycle. As a result and impact of said dash, applicant as well as his brother i.e. rider of motorcycle sustained severe bodily injuries. At the instance of FIR lodged by the applicant, police have registered Crime No.351 of 2007 under section 279, 337 and 338 of the

Indian Penal Code against the driver of the offending truck. The applicant took medical treatment at various places. He sustained 46.8% permanent disability. It is the applicant's case that he was serving in private limited company on monthly salary of Rs.7500/-. Due to accidental injuries, the applicant has lost his job as well as earning capacity. Therefore, the appellant has approached to the Tribunal for grant of compensation, in terms of Section 166 of the Motor Vehicles Act.

03. The driver and owner of offending vehicle resisted the claim petition vide their joint written statement (Exh.24). They have specifically denied that the accident occurred due to rash and negligent driving of the truck driver. It is pleaded that the applicant's brother Vinod was riding the motorcycle carelessly in zigzag manner and due to his own fault, the accident occurred. Besides that they have denied the age and income of the applicant. The insurer also resisted the claim vide written statement (Exh.35). They have equally

denied the negligence of truck driver and other aspects.

04. The parties led oral as well as documentary evidence before the Tribunal. After assessing the evidence, the Tribunal though quantified compensation to the tune of Rs.8,84,520/-, however, recorded categorical finding that the accident occurred due to sole negligence of the motorcycle rider i.e. applicant's brother Vinod. Since there was no negligence on the part of the truck driver, the claim petition was came to be dismissed as owner and insurer of motorcycle were not made party.

05. The case or rather entitlement of applicant for compensation revolves around the question of negligence. No doubt, if there was no negligence on the part of truck driver, then the claim was liable to be dismissed as owner and insurer of motorcycle were not parties. It is not in dispute that the appellant was pillion rider and therefore it is a case of composite negligence. In view of that, even if there was slightest negligence on the

part of truck driver, then the injured can recover compensation from the owner and insurer of the truck. Therefore, it is necessary to dwell upon the question of negligence in that perspective.

06. The applicant led evidence on affidavit at Exh.34. It is his evidence that on 06.12.2007 around 10.45 a.m. he along with his brother Vinod were proceeding from their village towards Ambajogai by motorcycle bearing registration No. MH-44-A-6942. Vinod was rider of motorcycle whilst the appellant was pillion rider. It is his evidence that the motorcycle was driven in moderate speed by following all traffic rules. While the motorcycle came near Yashwantrao Chavan Chowk, Ambajogai, the offending truck bearing registration No. MH-22-L-399 came from behind and gave forceful dash to motorcycle from backside resulting into the accident. The applicant was cross-examined on the point of negligence. During cross-examination it has come on record that the concerned road runs East-West and the

accident took place to the southern side of the road. The record indicates that the Tribunal has recalled the appellant to verify the position by putting certain questions. The appellant has explained that at relevant time he was proceeding from village Kol-Kanadi to Ambajogai i.e. from West to East.

07. The appellant has not examined any witness to the occurrence. Admittedly, on the date of accident itself, the appellant has lodged report (Exh.47) regarding occurrence. In said report the applicant has stated that while they were proceeding from the left side of the road, the offending truck came from wrong side in high speed and gave forceful dash to the motorcycle from behind. Admittedly, after concluding investigation, police have filed final report against the truck driver, which is marked as Exh.48.

08. The learned Counsel appearing for the appellant strongly criticized the judgment of the Tribunal holding

that the motorcycle rider was solely negligent. He would submit that the Tribunal seriously erred in holding that the motor-cycle was proceeding from wrong side of the road and therefore the motorcycle rider was solely negligent. The appellant's learned Counsel by placing reliance on the decision of the Supreme Court in case of Sunita and Others Vs. Rajasthan State Road Transport Corporation and Others, (2020) 13 SCC 486 submitted that the Tribunal is not bound by strict rules of pleadings as well as the claimants are merely to establish their case on the touchstone of preponderance of probabilities. In said case the Supreme Court further explained that standard of proof beyond reasonable doubt cannot be applied by the Tribunal while dealing with motor accident cases.

09. One should take note that the claim petition is not an adversarial adjudication between litigating parties but a statutory determination of compensation, after due enquiry, in accordance with the statute.

Obviously, non-examination of eye witness *per se* cannot be treated as fatal to turn down the appellant's case on the point of negligence. I have closely examined the reasons assigned by the Tribunal while solely blaming to motorcycle rider. It is evidence of the claimant that after the accident, he himself and his brother Vinod were admitted in the hospital for 15 days. Relying on said sole admission, the Tribunal has discarded spot panchanama (Exh.46). It is observed that there is reference in spot panchanama that rider of motorcycle i.e. Vinod has shown the place of occurrence to the police on the following day of accident, therefore it is not possible to believe that on the following day Vinod has shown the place of occurrence.

10. It has come in the evidence that the accident took place near Yashwantrao Chavan Chowk on Parali-Beed bypass road. The applicant has stated that at the relevant time the motorcycle was proceeding from South side of the road. The Tribunal took note of the said

admission and observed in para 10 that when it was East-West road and motorcycle was proceeding towards East, then the correct side would be northern side of the road, but admittedly the motorcycle was to the South and therefore it was a case of total negligence on the part of the motorcycle. Precisely the conclusion of negligence was drawn solely on the ground that at relevant time i.e. time of dash motorcycle was on the wrong side of the road i.e. to its right side.

11. Pertinent to note that the Tribunal has totally discarded spot panchanama Exh.46, which speaks otherwise. The spot panchanama (rough sketch) discloses that accident took place to the eastern side on North-South road. Thus, the spot panchanama gives the complete different picture and location of the place of occurrence. The only reason for discarding spot panchanama was that it was not possible for the motorcycle rider Vinod to show place since he was admitted in the hospital. It requires to be noted that

though there was reference that Vinod has shown spot but the possibility that police locating spot with the help of other witnesses cannot be ruled out. There may be possibility of Vinod showing place on the following day. There are no documents to show that Vinod was also indoor patient for 15 days. Besides that it is worthwhile to note that spot panchanama bears a reference that at the place of occurrence there were bloodstains. Existence of bloodstains on the road supports the location of occurrence. The said position is inconsistent with the admission of applicant that on East-West road, accident took place to the South of road. As per panchanama, it was North-South road. It is not clear as to in which direction the motorcycle was heading. Therefore, the stray admission given by the applicant that too against the record carries no meaning. The Tribunal totally erred in solely relying said admission by overlooking spot panchanama.

12. At this stage one should remember the decision

of Hon'ble Supreme Court in Bimla Devi Vs. Himachal Road Trans. Corpn, 2009 ACJ 1725 (SC), wherein it is ruled that the strict proof of an accident caused by a particular vehicle in a particular manner is not possible to be done by the claimants. They are merely to establish their case on the touchstone of preponderance of probabilities. The standard of proof beyond reasonable doubt cannot be invoked in claim petitions. To the next the Hon'ble Supreme Court in Kusum Lata V. Satbir, 2011 ACJ 926 (SC), observed that in a case relating to motor accident claims, the claimants are not required to prove the case as required to be done in a criminal trial. Having regard to these settled propositions the point of negligence is to be assessed. Negligence is omission of duty caused either by an omission to do something which a reasonable man guided upon those considerations which ordinarily by reason of conduct of human affairs would do or obliged to do. Negligence does not always mean absolute carelessness, but want of such a degree of care as required in particular circumstances. No absolute

standard can be fixed, as to what constitutes negligence differs from case to case.

13. In above referred case of Sunita (supra) the legal position is reiterated that the standard of proof in accident cases before the Tribunal is of preponderance of probabilities and not the strict standard of proof beyond all reasonable doubts which is followed in criminal cases. It is apparent that there was a dash between the motorcycle and truck. The applicant who was pillion rider has specifically stated that the truck gave dash from behind to the motorcycle. The Tribunal has totally missed said vital circumstance which remained unrebuted. Even if it is assumed that the motorcycle was to the wrong side of road, still dash was given from behind, which clearly demonstrates that the truck driver was very much negligent in the accident. Pertinent to note that on the date of occurrence itself, the applicant has lodged FIR (Exh.47) with specific stand that the truck came from behind and gave forceful dash. Inasmuch

as police have also completed investigation and filed charge-sheet against the truck driver.

14. The learned Counsel appearing for the insurance company by placing reliance on the decision of this Court in cases of New India Insurance Co. Ltd. Vs. Vaishali wd/o. Shriram Rathod & Ors. (FA No.1748 of 2919), Kalpana Rajendra Kothari & Ors. Vs. Santosh Arvind Jangam & Anr., 2020(2) Mh.L.J.561, Dadasaheb Gopinath Dange & Ors. Vs. Mahesh Machindra Wagh & Anr., (FA No.2545 of 2016) and M/s. Shriram General Insurance Co. Ltd. Vs. Jayashree @ Jayabai Balaji Murkute & Ors. (FA No.2369 of 2020) has submitted that mere filing of FIR and charge-sheet itself are not sufficient to prove the point of negligence. These decisions are based on distinct fact. In case at hand, one has to understand that it is a case of composite negligence. The negligence of truck driver may be to any extent, but it would certainly attract the liability. Since the dash was from behind, obviously, the doctrine of *Res-ipsa loquitur* would apply against the

truck driver. The evidence adduced by claimant is supported by police papers. Merely on stray admission applicant's entire case de hors to police papers cannot be jettisoned. Worthwhile to note that though driver, owner and insurer took defence of total negligence of motorcycle rider, they have not led evidence. The driver and owner have appeared and contested the claim but driver did not step into witness box, which is sufficient to draw adverse inference against them. Having regard to said fact, there is no scientia of doubt that the truck driver has majorly contributed in the accident by giving dash to motorcycle from behind. The hyper-technical approach adopted by the Tribunal cannot be acceptable on any count. It is quite evident that the truck driver has also contributed in negligence and therefore the finding recorded by the Tribunal on the point of negligence is totally erroneous and thus from above discussion I hold that the accident was result of negligence on the part of both i.e. motorcycle rider and truck driver. Meaning thereby a case of composite negligence.

15. Having been held so, admittedly the applicant was a pillion rider. When a person suffers injury without any negligence on his part, but result of combined effect of negligence of two other persons, it is not case of "contributory" but it is a case of "composite negligence". The expression "composite negligence" refers to the negligence on the part of two or more persons in a case where the compensation is claimed by person who is not a driver or owner of vehicle involved in the case. This issue is well covered by the decision of Supreme Court in the case of T.O. Anthony Vs. Karvarnan and Ors., 2008 ACJ 1165, of which para 6 is relevant, which reads as below :-

"6. 'Composite negligence' refers to the negligence on the part of two or more persons. 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. On the other

hand where a person suffers injury, partly due to the negligence on the part of another person or persons, and partly as a result of his own negligence, then the negligence of the part of the injured which contributed to the accident is referred to as his contributory negligence. Where the injured is guilty of some negligence, his claim for damages is not defeated merely by reason of the negligence on his part but the damages recoverable by him in respect of the injuries stands reduced in proportion to his contributory negligence."

16. In view of above settled position, the claimant in case of composite negligence has a choice to seek compensation from either of the wrongdoer. Since the truck driver contributed in negligence i.e. he was also wrong doer, the applicant can very well claim entire compensation from the driver, owner and insurer of the offending truck.

17. The Tribunal has assessed the compensation on the basis of salary, percentage of disability and age of deceased. In said accident the applicant sustained 46.08% permanent disability. The applicant has examined PW-2 Dr. Gulve, who has proved disability certificate (Exh.40). The appellant has also led evidence of his employer PW-3 Rajesaheb Deshmukh to prove his salaried

income. The Tribunal has considered all these aspects in para 13 of the judgment and held that the compensation would be of Rs.8,84,520/-. Having regard to the nature of evidence, percentage of disability and loss of earning capacity, the assessment made by the Tribunal appears to be just and proper. Though the Tribunal has assessed compensation, however, by holding total negligence on the part of truck driver, has dismissed the claim. The Tribunal has adopted totally erroneous approach while dealing with the point of negligence which lead to the miscarriage of justice. The Tribunal has seriously erred in appreciating evidence on the point of negligence, especially when it is a case of composite negligence. Moreover vital aspect of the case that dash was given by truck from backside of motorcycle is not considered at all. Having regard to the nature and object of litigation, Tribunal is expected to deal with sensitivity and responsibility.

18. The facts and evidence unerringly points out

that the truck driver has largely contributed in the accident. In view of dictum laid down in case of T.O. Anthony (supra), it is not necessary to establish extent of responsibility of each wrongdoer. This being case of composite negligence applicant-claimant is well entitled to claim compensation from one of the wrongdoer i.e. truck. The Tribunal has rightly assessed the amount of compensation for which claimant is well entitled. Besides that the claimant is also entitled for interest @ 7% per annum, which would be in the tune of prevailing rate of interest in the banking sector.

19. In view of above, the appeal stands allowed. The impugned judgment and order dated 09.03.2018 passed in MACP No.62 of 2011 is hereby quashed and set aside. The claim petition stands allowed. The original respondent Nos.1 to 3 (driver, owner and insurer of truck) shall jointly and severally pay total compensation of Rs.8,84,520/- (Rupees Eight Lakhs Eighty Four Thousand Five Hundred Twenty) to the claimant along with future

interest @ 7% per annum from the date of petition till full realization of amount. Deficit Court-fees, if any, shall be recovered from the applicant.

[VINAY JOSHI,J.]