

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

FIRST APPEAL NO. 1933 OF 2009

Shri. Rahul Prabhakar Joshi
Age : 26 years, Occ. Business,
R/o. At/Post : Uttur, Taluka Ajara,
District Kolhapur. Appellant

Vs.

1. Shri. Basavraj Ramappa Nidoni
Age : Major, Occu. Truck Owner,
R/o. At/Post : Raviwar Peth, Gokak,
Taluka and District Belgaum,
State Karnataka
2. The National Insurance Company Ltd.,
Divisional Office, Cosmox Building,
Near Hotel Tourist, Kolhapur,
Dist. Kolhapur
3. Shri. Ayub Dastagir Patel
Age : 39 years, Occu. : Driver,
R/o. Near Masaheb Darga,
Momin Lane (Galli), Gokak,
Tal. & Dist. Belgaum, State Karnataka Respondents

Mr. T.J. Mendon a/w. Mr. S.G. Thorat and Mr. T.R. Kale
for the Appellant.

Ms. D. Shalini Shankar for Respondent No.2.

CORAM : SHYAM C. CHANDAK, J.

RESERVED ON : 07th APRIL, 2025.

PRONOUNCED ON : 05th MAY, 2025

JUDGMENT :-

. Present Appeal filed by the Original Claimant under

Section 173 of the Motor Vehicles Act, 1998 (**“the Act”**) aggrieved by the Judgment and Award dated 01/08/2008, in Motor Accident Claim Petition No.37 of 2003 (**“claim”**), passed by the Motor Accident Claims Tribunal, Gadhinglaj (**“Tribunal”**) thereby said claim filed under Section 166 of the Act was partly allowed and Respondent Nos.1 and 2/Original Opponents held jointly and severally liable to pay the Appellant a compensation in the sum of of Rs.13,875/- alongwith interest at 7.5 % p.a. from the date of registration of the claim.

1.1) The said Judgment and Award is mainly challenged on the ground that the Tribunal wrongly held that the Appellant was 50 % negligent in the accident and did not award just compensation.

2) Record indicates that Respondent Nos.1 and 3 were served with the notice of admission, however, they have not filed their appearance. Appeal was admitted on 11/01/2010. Respondent No.2 has no statutory defence against Respondent No.1. Respondent No.3 was the authorised driver of Respondent No.1. Therefore, the Appeal taken up for final hearing at the request of the parties.

3) Heard Mr. Mendon, the learned Advocate for Appellant and Ms. Shalini Shankar, the learned Advocate for Respondent No.2. Perused the record.

4) The facts giving rise to this Appeal are that, the Appellant

filed the said claim therein it was averred that on 17/03/2003, at about 6.30 p.m., while the Appellant was riding his Bajaj Pulser motorcycle (M/cycle) from *Sankeshwar* to *Uttur*, Taluqa *Ajara*, within the vicinity of village *Nilji* and wanted to negotiate right turn, a motor truck bearing registration No.KA-23-4525 (“truck”) came from opposite direction, i.e., *Gadhinglaj* to *Sankeshwar*, driven at a high speed and dashed against his M/cycle. As a result, the Appellant sustained injuries. Immediately, the Appellant was removed to the hospital of Dr. Ravi Hattarki where he was medically treated as an indoor patient from 17/03/2003 to 05/04/2003. The accidental injury sustained to his left leg resulted in permanent partial disability.

4.1) At the time of the accident, the Appellant was studying in Polytechnic College at Nidasoshi, Taluka Hukkeri, Dist. Belgaum to obtain a ‘Diploma in Taxation’. Besides, he was running a jewellery shop namely M/s.Bhuvaneshwari Jewellers at *Uttur* thereby he was earning a monthly income of Rs.7,000/- but now the Appellant cannot work and earn as before, due to the disability. Therefore, he prayed to award the compensation of Rs.3,55,000/- with interest @ 18% p.a.

5) Despite receipt of notice, Respondent Nos.1 and 3 did not file their appearance. Hence, they were marked *ex-parte*. Respondent No.2 opposed the claim by filing the written statement (Exh.14) and

contended that the accident occurred due to the negligence of the Appellant himself. It was contended that the Appellant was doing the jewelry business and drawing monthly income of Rs.7,000/-. It was contended that the Appellant did not suffer a permanent partial disability. Therefore, Respondent No.2 prayed to dismiss the claim.

6) Hence, the Tribunal framed the issues. To prove the claim, the Appellant adduced the evidence on Affidavit of himself (Exh.39), He examined Dr. Ravi Hattarki (Exh.45) and Suresh Gangaram Lohar (Exh.78). Besides, the Appellant has relied on following documents :-

Sr.No.	Documents	Exhibit No.
1	Copy of the FIR	Exh.41
2	Spot panchanama	Exh.42
3	Copy of Insurance Policy	Exh.43
4	Injury Certificate	Exh.47
5	Receipts of purchase of medicines	Exh.48 to 74
6	Bills issued by Mr. Hattarki	Exhs.75 and 76
7	Discharge Card	Exh.77

6.1) In rebuttal, Respondent No.2 examined OW1-Nivrutti Shewale (Exh.87), the police who investigated the crime registered against the Appellant for causing this accident.

6.2) Based on the rival evidence, the Tribunal held that the driver of the truck and the Appellant both were responsible to cause the accident and their negligence was in the ratio 50:50.

7) On the point of the accident, the evidence of the Appellant is that at the relevant time and place, when he was riding his M/cycle

and negotiating the right turn after giving proper signal, the truck was proceeding from *Gadhinglaj* to *Sankleshwar*, at a high speed and without watching the signal given by the Appellant. As a result, the truck dashed the M/cycle. Thus, the accident occurred due to negligent driving of the truck.

7.1) In the cross-examination, the Appellant denied that he was driving the M/cycle at fast speed. He denied that the accident occurred due to his negligence. He admitted that the police prosecuted him for riding the M/cycle in a rash and negligent manner.

8) Evidence of AW3 is that, at the relevant time, when he was standing in front of his house on Sankleshwar to Gadhinglaj road, the Appellant was riding the M/cycle on the said road and negotiating the right turn after giving proper signal. At that time, the truck came from Gadhinglaj, driven at a high speed and negligent manner and gave a dash to the M/cycle.

8.1) In the cross-examination, AW3 admitted that the police had recorded his statement. He did not state before the police that on 17/03/2003, he had been to the field and returned at about 07:00 p.m., at that time, mob had gathered in front of his house and police was drawing the Panchanama. He stated that portion marked 'A' (Exh.88) in his police statement is not correct. He denied that he did

not witness the accident. He denied that he deposed falsely in favour of the Appellant.

9) Evidence of OW1 is that, at the relevant time, he was police head constable at Gadhinglaj Police Station. On 17/03/2003, ASI Mr. Kurne registered the Crime No.34/2003, under Sections 279 and 338 of I.P.C. and under Section 184 of the Act against the Appellant, for causing this accident. He visited the spot and drew the Spot Panchanama (Exh.42). He recorded the statement of AW3 on 19/03/2003, as per his narration. He recorded the portion marked 'A' (Exh.88) in the statement of AW3 as per his say. He deposed that on completion of investigation, he charge-sheeted the Appellant. In the cross-examination, OW1 admitted that except the driver and the cleaner of the truck, there were no eye witnesses to the accident.

10) Mr. Mendon, the learned Advocate for the Appellant submitted that as admitted by OW1-Investigating Officer, except the driver and the cleaner, there were no eye witnesses to the accident. Neither of the two appeared before the Tribunal and tendered evidence. Even Respondent No.2 did not examine them. As against this, the Appellant adduced his evidence on Affidavit and clearly stated that the accident occurred due to the rash and negligent driving of the truck. It is a settled law that in such claim matters the substantive evidence should be weighed more than the police papers.

He submitted that the FIR and the Spot Panchnama do not show exactly how the vehicles were positioned when they met with the accident and exactly on which side of the road did the accident occur. Therefore, there was no legal impediment in relying on the evidence of the Appellant and accepting his claim that the accident occurred due to the rash and negligent driving of the truck. To countenance this submission, Mr. Mendon cited the following reported decisions.

i) ***National Insurance Co. Ltd. v/s. Chamundeswari and others***¹. In this case the Hon'ble Supreme Court held that,

“... If any evidence before the Tribunal runs contrary to the contents in the first information report, the evidence which is recorded before the Tribunal has to be given weightage over the contents of the first information report. ... Whether driver of the vehicle was negligent or not, there cannot be any straitjacket formula. Each case is judged having regard to the facts of the case and evidence on record.”

ii) ***Jiju Kuruvila and others v/s. Kunjujamma Mohan and others***².

In this case the Hon'ble Supreme Court held that,

“24. *The mere position of the vehicles after accident, as shown in a Scene Mahazar, cannot give a substantial proof as to the rash and negligent driving on the part of one or the other. When two vehicles coming from opposite directions collide,*

¹ 2021 ACJ 2558

² 2013 ACJ 2141

the position of the vehicles and its direction etc. depends on number of factors like speed of vehicles, intensity of collision, reason for collision, place at which one vehicle hit the other, etc. From the scene of the accident, one may suggest or presume the manner in which the accident caused, but in absence of any direct or corroborative evidence, no conclusion can be drawn as to whether there was negligence on the part of the driver. In absence of such direct or corroborative evidence, the Court cannot give any specific finding about negligence on the part of any individual.”

11) In reply, Ms. Shankar, the learned Advocate for Respondent No.2 submitted that the FIR was registered against the Appellant. The Appellant himself produced and relied upon the FIR and the Spot Panchnama. The Spot Panchnama clearly shows that the accident occurred due to the rash and negligent riding of the M/cycle. The Appellant has not explained as to why the police registered the FIR against him. The Appellant did not complain to the higher police authority that the FIR was falsely registered against him. She submits that, after the investigation only the Appellant was found 100% responsible for the accident. Accordingly, OW1 charge-sheeted him. AW3 did not witness the accident. She submitted that the compensation awarded, is sufficient. On the strength of the above submissions, Ms. Shankar, submitted that the impugned Judgment and Award need not be interfered with.

12) I have carefully considered the rival evidence and the submissions. The FIR was registered against the Appellant based on the *Vardi*/Report of Ayub Dastgir Patel, who was driver of the truck. In the Report, it has been stated that at the time and place of the accident when the truck was proceeding from *Gadhghinglaj* to *Sankeshwar*, the Appellant came on the wrong side and dashed the cleaner side of the truck. As a result, the cleaner side head-lamp and the adjacent tin-sheet was damaged. Thus, the accident occurred due to rash and negligent riding of the M/cycle. The Spot Panchnama recorded that the said road was 18 feet wide with a 5-feet *Kachcha* road abutting both sides of the road. In so far as the evidence of AW3 is concerned, the portioned marked 'A' (Exh.88) in his statement before the police indicates that he has not seen the accident.

13) Be that as it may, the FIR and the Spot Panchanama do not show exactly how the vehicles were positioned at the time of the accident. Considering the road was 18 feet wide, the truck could have easily crossed the M/cycle. However, the driver of the truck did not explain in the *Vardi*/report as to why he did not stop his truck when he saw that the M/cycle was coming from the wrong side. The driver has not explained as to how he tried to avoid the accident and why he could not do that. The driver and the cleaner of the truck did not appear before the Tribunal or adduced their evidence to substantiate

the contents in the FIR and the Spot Panchnama. As admitted by OW₁, there were no eye witnesses to the accident except the driver and the cleaner. As against this, the Appellant adduced his evidence on Affidavit. Therefore, and in the facts, the substantive evidence of the Appellant should be given more weightage than the FIR and the Spot Panchanama. Considering the fact that Respondent No.3-driver was driving the heavy vehicle, he should have taken more care while driving that vehicle, but looking at the evidence as a whole, it appears that the said driver was not very careful at the time of the accident. Yet, it cannot be ignored that the Appellant also failed to avoid the accident even though the road was straight and sufficiently broad. As such, it is safe to conclude that the Appellant was also not much watchful while riding his M/cycle. This conclusion is supported by the decisions cited by Mr. Mendon, the learned Advocate. Therefore, I hold that the driver of the truck and the Appellant both were negligent, which alternately led to the accident and having regard to the contents of the Spot Panchnama, I hold that the negligence of the driver of the truck and the Appellant was in the ratio 70:30.

14) The evidence of the Appellant and AW₂ is that the Appellant had sustained following injuries due to the accident :-

- (a) left sided shaft of femur, (b) abrasion on left thigh – 10cm x 3cm,
- (c) abrasion on left leg – 15cm x 3cm and (d) blunt injury to chest.

14.1) The aforesaid evidence is corroborated with the Injury Certificate (Exh.46) and Discharge Card (Exh.77). AW2 deposed that after the accident, the Appellant was admitted in his hospital and he was inpatient there till 05/04/2003. He operated the fracture and fixed with nailing. The aforesaid evidence did not meet any challenge in the cross-examination of the Appellant and AW2. Therefore, I accept the injuries.

15) The combined evidence of the Appellant and AW2 is that the latter examined the Appellant on 19/08/2003, to assess the disability. On examination, there was pain in the left knee, shortening of left leg by $\frac{1}{2}$ c.m., restriction of terminal 5° movement of flexion in left knee. Therefore, AW2 concluded that the Appellant has suffered 35% permanent partial disability with reference to the left lower limb. Accordingly, he issued the Disability Certificate. This evidence virtually went unchallenged in the cross-examination. Therefore, I accept the disability as stated above.

16) The evidence of the Appellant, AW2 and the hospital and pharmacy bills show that the Appellant incurred Rs.25,750/- on the medical treatment. Looking at the injuries, the medical treatment it required and the period of hospitalization, the said expenditures appear reasonable. Hence, Appellant is entitled to recover the same.

17) The evidence of the Appellant is that at the time of the

accident he was taking education and doing a 'Diploma in Taxation'. He was also running a jewellery shop namely M/s.Bhuvaneshwari Jewellers in *Uttur* thereby he was earning a monthly income of Rs.7,000/-. To support this evidence the Appellant produced a copy of Profession Tax Certificate and Sales Tax Registration Certificate which mentioned that shop namely 'M/s. Bhuvaneshwari Jewellers' was being run in the name of the Appellant. Yet, the Tribunal noted that there is no other evidence. Father of the Appellant was running a jewellery shop in *Uttur*. The Appellant was studying the diploma course in *Nidasoshi*. Therefore, the Tribunal held that the evidence is not sufficient to prove that the Appellant was doing the jewellery business by commuting from *Gadhinglaj*.

18) However, the Tribunal did not notice that, the Appellant's evidence that he has been doing the jewellery business in the name of M/s.Bhuvaneshwari Jewellers, was not challenged in his cross-examination except the suggestions of denial. The photocopy of the Sales Tax Registration Certificate in the name of the Appellant indicates that the Appellant was proprietor of M/s. Bhuvaneshwari Jewellers. Said certificate is not marked in the evidence, but it cannot be ignored that the certificate bears signature of the Sales Tax Officer and it was certified as a 'True Copy' by a Special Executive Officer, at *Aurnal, Gadhinglaj*. Moreover, the Appellant referred to that

certificate in his evidence. Therefore, it is probable that the Appellant was doing the said business.

18.1) The Sales Tax Registration Certificate indicates that it was issued on 08/05/2000 but was effective from 24/04/2000. The accident occurred on 17/03/2003. However, the Appellant has not produced a balance sheet or any other document to show that he was earning monthly Rs.7,000/- from the said business. Therefore, I find it difficult to hold that the monthly income of the Appellant was Rs.7,000/-. Yet, considering the evidence as a whole, the nature of the business and that the business was at small place, I hold that notionally, the business income of the Appellant was Rs.4,500/- per month, which annually comes to Rs.54,000/-.

19) The Appellant stated that he cannot work and earn as before due to the disability. Thus, there has been a loss of the income/earning capacity due to the disability. In the cross-examination of AW2 it has come that the Appellant can do light work. The Appellant can run the jewellery shop. However, his efficiency has been reduced. Femur is the toughest bone in the human body. It helps to bear weight and balance the body in all actions. Therefore, I hold that the disability suffered by the Appellant resulted in the loss of 20% of his future income/earning capacity, which is equal to Rs.900/- per month, and annually Rs.10,800/-. At the time of the

accident, the Appellant was aged 21 years. His income was not regular. Therefore, 40% of the loss of the future income/earning capacity should be added towards the future prospects of the Appellant. On such addition, the actual loss of the future income/earning capacity would be Rs.15,120/-. The Applicable multiplier is '18'. Accordingly, the actual loss of the future income/earning capacity is Rs.2,72,160/-.

20) Now turning to the other heads of the compensation. The Tribunal awarded Rs.7,000/- under the head 'special diet and conveyance'. Said amount appears reasonable. Similarly, the award of Rs.10,000/- towards the loss of the education is adequate.

20.1) In so far as the 'pain and suffering' is concerned, the Tribunal awarded Rs.15,000/- under the said head. However, looking at the nature of the fracture and the medical treatment it required, it can be presumed that the fracture must have taken at least a year to recover. As deposed by AW2, the Appellant has pain at the fractured site. Therefore, said amount of Rs.15,000/- is on the lower side. And considering the effect of the fracture, the Appellant is entitled to get Rs.30,000/- under the head 'pain and suffering'.

20.2) Needless to state that, any disability of the above nature results in loss of amenities and enjoyment of life. The Appellant was aged 21 years. He lost the amenities and enjoyment of life at a very

young age due to the disability and he will have to bear that loss throughout his life. Therefore, the Appellant is entitled to receive a compensation of Rs.60,000/- under this head.

21) Thus, the total compensation comes to Rs.4,04,910/-. Out of this amount, Rs.1,21,473/- should be deducted towards the 30% contributory negligence of the Appellant. As such, the Appellant is entitled to receive the balance compensation of Rs.2,83,437/- only.

22) The Appellant is entitled to receive some interest on the compensation amount. Considering the facts and circumstances of the case, grant of interest @ 7.5% p.a. will be just and proper.

23) Conspectus of the above discussion is that, the Tribunal did not consider the evidence on record in its correct perspective, which resulted in denying 'just compensation' to the Appellant. Said infirmity, therefore, warranted an interference with the impugned judgment to modify the award. Thus, the Appeal partly succeeds.

24) Hence, following Order is passed :-

(i) First Appeal is partly allowed with proportionate costs.

(ii) The impugned Judgment and Award dated 01/08/2008, in Motor Accident Claim Petition No.37 of 2003, passed by the Motor Accident Claims Tribunal, Gadhinglaj, is modified.

(iii) Respondent Nos.1 and 2 shall jointly and severally pay the compensation of Rs.2,83,437/- (inclusive of NFL amount) together with interest thereon at the rate of 7.50% per annum from the date of the Claim Petition till realisation of the amount.

(iv) The Respondent Nos.1 and 2 are directed to comply with this Judgment and Order within a period of four months from today, by depositing the amount in the Tribunal.

(v) On deposit of the amount the Tribunal shall immediately inform about the deposit to Appellant.

(vi) The deposited amount shall be paid subject to payment of a deficit Court fee, if any.

(vii) Respondent No.2-Insurance Company will be entitled to the adjustment of the amount against the already paid under the impugned Award.

(SHYAM C. CHANDAK, J.)

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