IN THE HIGH COURT OF KARNATAKA AT BENGALURU

THE HON'BLE MRS. JUSTICE S.SUJATHA

AND

THE HON'BLE MR. JUSTICE SACHIN SHANKAR MAGADUM

MFA.NO.7279 OF 2016 (MV- I) C/ W MFA.NO.7110 OF 2016 (MV- I) DATED: 05-01-2021

THE DIVISIONAL MANAGER M/ S. THE ORIENTAL INSURANCE COMPANY LIMITED, HUBLI VS. . RAYAN FERNANDES S/ O FELIX FERNANDES AND ANOTHER

JUDGMENT

SACHIN SHANKAR MAGADUM J.,

The captioned appeals are directed against the judgment and award dated 8.7.2010 passed in MVC.No.230/2010 by the Principal District Judge and Member, MACT, Udupi.MFA.No.7279/2016 is filed by the Insurance Company questioning false implication of the rider of the bike by the first respondent-claimant with the connivance of the second respondent-owner of the bike, whereas the claimant has referred MFA.No.7110/2016 seeking enhancement.

2. For the sake of convenience, the parties are referred to as per their rank before the Tribunal.

3. The facts leading to the filing of the above appeals are as under:

The claimant filed a claim petition claiming compensation of Rs.51 lakhs with interest at 12% p.a. The claimant specifically contended in the claim petition that on 24.9.2008 at about 10.15 p.m., he was walking by the side of the road and when he reached Bhajanakatte-Bommarabettu, Udupi Taluk, a motor cycle bearing Regn.No.KA-20/ V-1137 came from the hind side in a rash and negligent manner to the extreme side of the road and dashed against the cement drain and thereafter dashed against him, as a result of the same claimant fell down and sustained grievous injuries.Claimant was immediately shifted to Kamath Nursing Home, Hiriadka, and after first aid he was shifted to KMC Hospital, Manipal, wherein he was admitted as an inpatient.The claimant specifically averred in the claim petition that on account of grievous injuries sustained in the accident, he had to undergo treatment and had incurred medical expenses of Rs.4 Lakhs.The claimant further contended that he has undergone vocational training and also completed a course in mechanical maintenance and he is a Industrial technician and has undergone training and getting a salary of Rs.12,000/- p.m. and on account of disability suffered in the above said road traffic accident, he is virtually leading a vegetative life.

The claimant has further contended that he is the sole bread earner and his father is a jobless person and his entire family is dependant on his earning.On these set of grounds, he filed the claim petition. On receipt of notice notice,, the first respondent-owner appeared through an advocate and filed written statement contending that the claimant has suppressed the true facts regarding the alleged accident.He has specifically

stated that on the alleged date of accident, the rider of the bike was proceeding in a careful manner and when he reached the place called Bhajanakatte-Bommarabettu, the petitioner suddenly crossed the road and dashed against the vehicle and sustained grievous injuries.On these set of defences, the first respondent claimed that the claimant is guilty of contributory negligence on his part and as such he is not entitled for any compensation.

The respondent No.2-Insurance Company filed written statement and stoutly denied the entire averments made in the claim petition. The respondent no.2-Insurance Company at para 5 of the written statement specifically disputed the very version narrated by the claimant in the claim petition.It is the specific case of the Insurance Company that the claimant was riding the motor bike on the alleged date of accident.On account of his rash and negligent riding, he lost control over the bike and sustained grievous injuries.The second respondent-Insurance Company further contended that since first respondent himself is the tort feasor, he is not entitled to claim compensation and a specific averment was also made at Para 5 of the written statement that owner of the bike colluded with the claimant with an intention to saddle the liability on the Insurance Company to pay the compensation and that the claim petition is filed after two years.It is also contended at para 9 of the written statement that the claimant did not possess driving licence to ride the bike as on the date of the accident.

The other averments in regard to avocation, salary and gravity of injuries sustained by the first respondent is also seriously disputed by the Insurance Company.

The claimant examined his mother as P.W.1 and examined himself as P.W.2.The The first respondent also examined one eye witness as P.W.4, doctor as P.W.3 and the Investigating officer as P.W.5 To corroborate the ocular evidence, the claimant got marked Exs.P1 to P22.

The second respondent-Insurance Company examined three witnesses as R.Ws.1 to 3 and by way of rebuttal evidence produced documentary evidence vide Exs.R1 to 9 and M.O.1-C.D.

On the basis of the pleadings, the Tribunal framed issues as follows:

" 1. Whether the petitioner proves that he sustained injuries because of the rash and negligent driving of the Motor Bike No.KA.20/ V-1137 by its rider at Bhajana Katte, Bommarabettu Village, Udupi Taluk when the petitioner was walking by the side of the road?

2. Whether the 2nd respondent proves that the petitioner himself riding his Motor Cycle bearing No.KA.20/ V-1137 in rash and negligent manner and because of his fault, the accident had occurred?

3. Whether the 2nd respondent proves that the petitioner did not hold any effective driving licence at the time of the accident?

4. Whether the petitioner is entitled for the compensation?If so, to what extent?

5. What order? "

The Tribunal on appreciation of oral and documentary evidence on record, dismissed the claim petition by judgment dated 26.3.2013 against which the claimant filed an appeal before this Court in MFA.No.6683/2013, which came to be allowed by judgment dated 20.11.2015 remanding the matter to the Tribunal for fresh disposal.

After remand, the Tribunal has taken up the matter for fresh consideration.It is also borne out from the records that after remand, neither the claimant nor the Insurance Company have lead in any further evidence nor have produced any additional documentary evidence in support of their contentions.

The Tribunal after assessing oral and documentary evidence has answered Issue No.1 in the affirmative and having answered Issue Nos. 2 and 3 also in the affirmative, the Tribunal has proceeded to award compensation of Rs.22,77,400/-with interest at the rate of 6% per annum from the date of claim petition till its realization by fixing liability on the Insurance Company.Being aggrieved by the same, both the claimant and the Insurance Company have preferred these appeals.

4. Learned counsel counsel appearing for the Insurance Company would vehemently argue and contend that the alleged accident has taken place on 24.9.2008 whereas the claim petition is filed two years after the accident.This itself would create a doubt in regard to the occurrence of the accident as alleged in the the claim claim petition.He would vehemently argue and contend that the claimant himself was riding the bike and on account of his negligence, the bike skidded and he sustained injuries.

He would further argue that Tribunal erred in relying on the police records which are to be out rightly discarded having regard to the facts and circumstances of the case.Further, the owner of the bike who is the second respondent herein has submitted his Motor claim form on 24.10.2008 for damages caused to the bike which is produced as per Ex.R2 wherein he has stated that claimant was riding the bike on the alleged date of the accident.The learned counsel would further submit that the offending bike involved in the accident is owned by Smart Value Products and Service Limited where the claimant was working and to substantiate the said contention, the learned counsel for the Insurance Company would take this Court to the photographs which are produced at Exs.P56 (a) to (c) and relying on these photographs he would make an attempt to convince this Court that the name of Smart Value Company which is embossed on the bike is visible in the photographs.The learned counsel would further bring to the notice of this Court a very disturbing fact in regard to the first respondent having engaged a counsel had not chosen to contest the proceedings.

The Insurance Company made all possible attempts to secure his presence.At their instance summons was issued and inspite of service of summons, the first respondent did not appear before the Court.He would further submit that though warrant was also issued, the same was not at all executed and the first respondent succeeded in evading the proceedings pending before the Tribunal.On these set of defences, the learned counsel appearing appearing for the appellant-Insurance Company would submit that it is a classic case of

fraud and the claimant in collusion with the owner and Investigating Officer has cooked up a false case to seek compensation. To buttress his arguments, he has relied on unreported judgments rendered by this Court in Veerappa and another .vs.Siddappa and another [ILR 2009 KAR 3562], Branch Manger, Oriental Insurance Company Limited .vs.Kempamma and others [2014 KAR 3336], New India Assurance Company Limited .vs. Jagadeesh Reddy and another [MFA.962/2007] Smt. Arathy .vs.S.M. Umesha [MFA.No.7025/2011] and Bajaj Allianz General Insurance Company Limited .vs.B.C. Kumar [ILR 2009 KAR 2921].

5. Per contra, learned counsel appearing for the claimant would vehemently argue and contend that the documents produced by the claimant as per Exs.P1-FIR, P1 (a) -complaint, P2-spot mahazar, P55-charge sheet would clearly establish rash and negligence of the rider of the bike involved in the accident.He submits that the clinching evidence on record establishes that the claimant was proceeding as a pedestrian on the road and the rider of the bike was rash and negligent and has caused the accident whereby the claimant sustained grievous injuries.

Insofar as delay is concerned, learned counsel would submit that the claimant on account of grievous injuries was suffering from Schizophrenia and on account of grievous injuries he was not in a position to lodge complaint with the jurisdictional police.

Learned counsel would further contend that the claimant has succeeded in proving the accident by producing the police records and as such the grounds raised by the Insurance Company in regard to the manner in which the accident has occurred cannot be examined.On these set of defences, learned counsel for the claimant would submit that the Tribunal has rightly assessed the oral and documentary evidence and has rightly answered issue No.1 in the affirmative.

The quantum determined is based on legal evidence produced by the claimant and in that view of the matter the judgment and award would not warrant interference by this Court.

6. Heard the learned counsel for the Insurance Company and the claimant and perused the pleadings of the parties.We have meticulously examined and reassessed the oral and documentary evidence.

7. The points that would arise for our consideration are as follows:

" (1) Whether the Tribunal was justified in holding that the claimant has proved that he has sustained injuries in the road traffic accident on account of rash and negligent riding by the rider of the bike by answering issue No.1 in the affirmative?

(2) Whether the finding of the Tribunal that the appellant-Insurance Company has failed to establish that the claimant himself was riding the bike and the accident occurred on account of rash and negligent riding by the claimant himself is perverse, palpably erroneous and contrary to clinching evidence on record? "

8. ANSWER TO POINT NOs. 1 and 2:

The claimant filed the claim petition by contending that he was walking by the side of the road towards Bhajanakatte on 24.9.2008 and at that juncture the rider of the offending bike owned by the first respondent came in a rash and negligent manner and dashed against him and as such he sustained grievous injuries.

The accident has occurred on 24.9.2008 whereas the claim petition is filed by the claimant on 12.3.2010.There is inordinate delay in filing the claim petition and the delay has a relevancy in the present case on hand which would be discussed later.

The Insurance Company has seriously disputed the manner in which the accident has occurred.At para 5 of the written statement it has taken a specific contention that the claimant was infact riding the bike and he sustained injuries on account of his own negligence.

To substantiate the defence, the second respondent Insurance Company has lead in evidence and has also produced rebuttal documentary evidence.After the accident, the first respondent who is the owner of the offending bike has submitted a claim form as per Ex.R2 on account of damage caused to the bike wherein certain particulars are furnished.

On meticulous perusal of this claim form, we would find that the first respondent is the owner of the offending bike and also insured and the same is reflected in the column relating to details of insured.Clause 3 of the claim form would disclose significant details and would clinch the entire controversy in regard to the manner in which the accident has occurred.Clause 3 of the claim form at Ex.R2 discloses as to who was riding the bike on the date of the alleged accident.The first respondent-owner of the bike has in unequivocal terms stated that it was the claimant who was riding the bike.Further at clause 5 at page 3 of the said claim form, the first respondent owner has further furnished the details of the accident which would throw enormous light over the manner in which the accident has occurred.The said details are equally significant and self explanatory as to why the first respondent has filed the claim petition after lapse of two years.At clause 5 which relates to the details of the accident, the owner has stated that his friend was riding the bike.

He has also stated that on 24.9.2008 at about 9.00 p.m. while he was proceeding towards Udupi Shirva on a bike, a dog suddenly came in the middle of the road and his friend namely the claimant, in order to avoid the accident tried to veer the bike and while doing so, the bike skidded and as such the damage is caused to the bike.

9. These two significant details at clauses 3 and 5 of the claim form which was submitted by the first respondent owner at undisputed point of time would clinch the entire issue and would leave no doubt as to how the accident has occurred.Further, it emerges from the details furnished in claim form as per Ex.R2 that the owner had acquaintance with the claimant and it is on account of such acquaintance, he had entrusted the bike to the claimant.He has also stated in unequivocal terms that accident occurred when his friend i.e. claimant tried to avoid the dog which abruptly came in the middle of the road.This clinching evidence which is

placed on record by the Insurance Company would not only create a doubt in regard to the manner of accident but the same would also falsify the very case of the claimant.

This material fact stands further strengthened in view of the withdrawal of the claim form by the owner as per Ex.R7.As per Ex.R3, the insurer's Surveyor and Loss officer has submitted a report assessing the damage caused to the bike.This is dated 26.10.2008.However, on 28.10.2008 as per Ex.R7, the first respondent-owner of the offending bike has submitted an application saying that he is withdrawing the claim form on the ground that the valuer has not properly assessed the damage caused to the bike and the assessment of damage at Rs.2,700/-is very much on the lower side.The claimant to substantiate his case is relying on evidence of P.W.4 and the police records as per Exs.P1 to P3, P4 namely FIR, complaint, copy of spot mahazar, copy of police notice and Ex.P55 which is the charge sheet.We have meticulously gone through the evidence of P.W. 4 and we do not hesitate to hold that this witness is deliberately planted and no credence can be attached to his ocular evidence.

10. The Tribunal has lost sight of one more material aspect which would have bearing on the conclusions arrived on issue Nos. 1 and 2. The Insurance Company having set up a plea that this claim petition is a collusive one and the same is filed in connivance with the owner-first respondent and also police officials, during the pendency of the trial, first respondent-owner though filed written statement but however did not choose to contest the proceedings.At the instance of the Insurance Company, the Tribunal issued summons.Inspite of service of summons, the first respondent-owner did not appear before the Court.The Tribunal to secure presence of the first respondent-owner issued arrest warrant.The first respondent-owner of the offending bike evaded the arrest warrant and did not choose to appear before the Tribunal.This material fact would indicate that the claimant has colluded with the owner and has filed the claim petition with the fond hope of saddling the liability on the Insurance Company to pay compensation.

11. The Tribunal in the present case on hand has erred in accepting the police records.The Tribunal has also erred in drawing adverse inference against the Insurance Company for having failed to examine the first respondent-owner to corroborate Exs.R1 and R2.The Tribunal also erred in holding that evidence of R.W.3 is contrary to evidence of P.Ws.2, 4 and 5 and also contrary to documentary evidence as per Exs.P1, P1a and P2.It is a trite proposition of law that the Tribunals are required to take a holistic view while assessing the police records relating to the registration of the crime in motor accident cases.But, however, when Insurance Company comes up with a definite case that there is a fraudulent claim, in such cases, the Tribunal is required to be cautious in accepting the police records.The Tribunal generally places reliance on the FIR, spot sketch and charge sheet in all cases where there is no serious dispute by the Insurance Company.

12. In the present case on hand, the Tribunal has adopted an approach which is totally one sided and has virtually discarded clinching rebuttal evidence adduced by the second respondent-Insurance Company.On meticulous examination of the clinching evidence adduced by the Insurance Company and after having examined the evidence.of P.Ws.2, 4 and 5, we are of the view that the second respondent-Insurance Company

has succeeded in establishing the fraud played by the claimant with the connivance of the owner.The claim petition is filed after two years and this inordinate delay is not at all properly explained.The delay in filing the claim petition would only indicate that the claim petition is filed after due deliberations.The averments made in the claim petition are based on distorted facts with the aid of police officials also.The ocular evidence of P.W.4 who claims that he has witnessed the accident is not at all trustworthy and reliable and is full of improbabilities.The Tribunal has grossly erred in relying on the evidence of P.W.4. The presence of P.W.4 appears to be doubtful since the spot of accident varies in the claim form as per Ex.R2 and in the police records.His statement also creates a doubt.If his evidence is meticulously examined and his narration in regard to the manner in which the accident has taken place is taken into consideration, his evidence has to be out rightly disbelieved and discarded since he has come forward to depose falsely in regard to the manner in which the accident has taken place.

13. Now coming to the evidence of P.W.5 who is the Investigating Officer, we have meticulously assessed his evidence.In the cross-examination, he has stated that he took over investigation from one Madhava.S. Assistant Sub Inspector.He has further stated that all the statements were recorded by the ASI. P.W.5 has stated that he has verified the statements collected by the earlier Investigating Officer.This witness has stated that he has not verified as to whether Shabbir Ahammed accused in Cr.No.80/08 has sustained any injuries or not.

This statement has a relevancy to the present case on hand.The claimant as well as first respondent-owner have set up this Shabbir Ahameed, who is shown to be rider of the bike.But P.W.5 would conveniently pass on the buck to the earlier Investigating Officer and has stated that he has not verified as to whether Shabbir Ahameed, suffered any injuries.P.W.5 has also stated that claimant who has submitted the written complaint on 25.09.2008 has not disclosed the name of the rider.P.W.5 has further stated that he has filed the charge sheet against one Shafi Ahammed on the basis of the statement of eye witness namely Mohammed Afsar i.e. P.W.4.What emerges from the records is that investigation is deliberately flawed.Though we are not examining the correctness of the charge sheet, but this Court has to take judicial note of the conduct of the Investigating Officers who are investigating the road traffic accident cases.The charge sheet submitted cannot be accepted as a gospel truth in all the cases.

In recent years, it has become rampant where investigating Officers in connivance with the claimant and also the owner of the vehicle involved in the accident are distorting facts to suit their purpose and accordingly to enable them to claim compensation.It is well known that when a little brief authority frequently upsets the mental balance of the police officers, they are inclined to think that they are not public servants but public masters.The Investigating officers with their powers are often overstepping their powers and are virtually assisting the claimants in falsely implicating vehicles, riders, drivers with malafide intent to saddle liability on the Insurance Company.The Investigating Officers have forgotten that their prime duty is not merely to bolster up the prosecution case with true facts but also to bring the real and unvarnished truth.But Alas, very little of

this principle is discernible these days in the police enquiries and investigations.This is what precisely happened in the present case on hand.There are two Investigating Officers, who have investigated the case.

We would not hesitate to hold that it is a deliberate ineffective investigation to enable the claimant to seek compensation.The guidelines issued by the Hon'ble Apex Court in catena of judgments wherein the Tribunal are required to take holistic view of police records cannot be made applicable to fraudulent cases.In the case on hand, the reliance placed on police records has to be out rightly discarded in the light of clinching rebuttal evidence adduced by the Insurance Company.

14. The Tribunal has not assigned any cogent reasons in discarding the rebuttal evidence adduced by respondent No.2-Insurance Company.On the contrary, the Insurance Company has succeeded in proving that the claimant has played fraud.The details furnished by the first respondent in the claim form submitted as per Ex.R2 to the Insurance Company would clearly establish the manner in which the accident has taken place.There is absolutely no evidence to counter Exs.R2 and R7 and this clinching evidence as per Exs.R2 and 7 would displace and outweigh the slender evidence adduced by the claimant which is quite shaky and does not contain any ring of truth.

It is also forthcoming from the rebuttal evidence adduced by the Insurance Company that claimant has also shifted the spot of accident.The spot of accident as stated in the claim form and the one stated in the police records are totally different.This would be a material contradiction which would also create a doubt in regard to P.W.4 having witnessed this accident, who has made a statement before the Tribunal that he was proceeding behind the bike on the alleged date of accident.This would also create a doubt and an inference has to be drawn that the accident has not taken place at Bajanakatte as alleged in the claim petition and in the police records.In the present case on hand, the Insurance Company has succeeded in establishing that claimant himself was riding the bike and accident has occurred on account of his own negligence.The claim petition is filed in collusion with the owner of the bike and has set up a false case by stating that the first respondent was proceeding by walk.

In ocular evidence, the claimant has tried to give an explanation that he was visiting a customer at 10.15 at night and the alleged spot where the accident has taken place is at a distance of 45 kms.from his residence.He has conveniently withheld the details as to whose house he was visiting at night at around 10.15 p.m. If claimant's residence was 45 Kms. away from the spot of accident, it is not forthcoming as to how he could have walked all the way back to his residence.This would probabalise the theory and defence set up by the Insurance Company that claimant was infact riding the bike on the date of the alleged accident and the first respondent who happens to be his friend had entrusted the bike to the claimant.This details which would have a bearing on the conclusion have been virtually ignored by the Tribunal.

15. The judgments cited by the counsel appearing for the second respondent are squarely applicable to the case on hand. Since the Insurance Company has succeeded in establishing the fraud, they are not liable to

indemnify the owner of the vehicle who has played prominent role in playing fraud on the Court.As such the Insurance Company is not liable to pay any compensation to the claimant who has played fraud on the Court.We are of the view that there is no obligation on the part of the Insurance Company to indemnify the insured even though first respondent-owner has taken the policy and the statute mandates the Insurance Company to pay compensation.As held by the Division Bench of this Court in Veerappa and another .vs.Siddappa and another [ILR 2009 KAR 3562] the said statutory obligation stands discharged.There is no third party liability on the Insurance Company to pay compensation to the claimant.Accordingly, the appeal filed by the Insurance Company is liable to be allowed.

16. Since the clinching rebuttal evidence clearly demonstrates that the claimant himself was riding the bike and on account of his own negligence he sustained injuries, the claimant cannot maintain claim petition either against the Insurance Company or the first respondent-owner, and accordingly the appeal filed by the claimant is liable to be dismissed. In view of the above discussions, the points formulated by this Court are answered in the negative.

17. For the foregoing reasons, the appeal filed by the Insurance Company in MFA.No.7279/2016 is allowed and the claim petition is dismissed.Consequently, the appeal filed by the claimant in MFA.No.7110/2016 seeking enhancement also stands dismissed.