R

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 19TH DAY OF OCTOBER, 2022

BEFORE

THE HON'BLE MR. JUSTICE H.P. SANDESH

M.F.A.NO.8449/2015 (MV-I)

BETWEEN:

NATIONAL INSURANCE CO LTD
NITHYANANDA COMPLEX
MOODBIDRI BRANCH
MANGALURU TALUK,
THROUGH ITS REGIONAL OFFICE,
NO.144, SUBHARAM COMPLEX,
M.G.ROAD
BENGALURU-560 001
REP. BY ITS ASST. MANAGER
SRI M.V.GUDI. ... APPELLANT

(BY SRI ANOOP, ADVOCATE FOR
SRI B.C. SEETHARAMA RAO, ADVOCATE)

AND:

1. MR ALWIN LOBO

2. SRI LOKESH GOWDA

... RESPONDENTS

(BY SRI DHANANJAY KUMAR, ADVOCATE FOR R1;
R2 SERVED)

THIS M.F.A IS FILED UNDER SECTION 173(1) OF MV ACT AGAINST THE JUDGMENT AND AWARD DATED 20.06.2015 PASSED IN MVC NO.596/2014 ON THE FILE OF THE COURT OF THE SENIOR CIVIL JUDGE AND ADDITIONAL MACT, KARKALA, AWARDING COMPENSATION OF RS.11,39,340/- WITH INTEREST @ 8% P.A FROM THE DATE OF PETITION TILL REALIZATION.

THIS M.F.A. COMING ON FOR FINAL HEARING THIS DAY, THE COURT DELIVERED THE FOLLOWING:

J U D G M E N T

Heard the learned counsel appearing for the appellant-Insurance Company the and learned counsel appearing for the respondent No.1.

2. This appeal is filed challenging the judgment and award dated 20.06.2015 passed in M.V.C.No.596/2014 on the file of the Senior Civil Judge and AMACT, Karkala ('the Tribunal' for short) questioning allowing of the claim petition and awarding compensation.

3. The parties are referred to as per their original rankings before the Tribunal to avoid confusion and for the convenience of the Court.

4. The factual matrix of the case of the claimant before the Tribunal is that on 23.05.2009, the petitioner and his brother were proceeding in the motorcycle and auto rickshaw which came from Iruvali side in a rash and negligent manner dashed against the motorcycle. As a result, the injured sustained grievous injuries and immediately, he was taken to Alva's Hospital, Moodabidri and after first aid treatment, shifted to A.J. Hospital, Mangalore and was admitted as an inpatient from 23.05.2009 to 17.07.2009 and again admitted to Mangala Hospital, Mangalore from 02.06.2010 to 04.06.2010 and in Manjunatha Hospital, Kundapura from 14.06.2011 to 15.06.2011 and in Mangala Hospital, Mangalore from 15.06.2013 to 16.06.2013. Thus, he spent an amount of Rs.5,24,139.37 towards medical expenses.

5. The respondent No.2-Insurance Company appeared and filed the written statement denying the contention of the

claimant and contended that the respondent No.1 also coliuded with the police to file a false claim.

6. The claimant, in support of his claim, examined his father as P.W.1, Medical Officer as P.W.2 and the Doctor, who assessed the disability as P.W.3. and got marked the documents as Exs.P1 to P260. The respondent No.2 examined the driver of the auto rickshaw as R.W.1, the brother of the claimant as R.W.2 and Police Officer as R.W.3, who conducted the investigation.

7. The Tribunal, after considering both oral and documentary evidence placed on record, awarded the compensation of Rs.11,39,340/- and fastened the liability on the Insurance Company. Hence, the present appeal is filed by the Insurance Company.

8. The main contention of the learned counsel appearing for the appellant-Insurance Company is that the Tribunal failed to take note of the fact that, at the first instance, history was given that the claimant had fallen from the motorcycle. But, the facts of the case is twisted that it was an

accident between the motorcycle and the auto rickshaw. With regard to the involvement of the auto rickshaw is concerned, at the first instance, nowhere it is stated and the said fact has not been considered by the Tribunal. The counsel also would vehemently contend that the driver of the auto rickshaw is the neighborer and he also coiluded together to get the police records manipulated to implicate the vehicle auto rickshaw. The counsel also would vehemently contend that from the evidence elicited from the mouth of P.W.1, it is clear that damages was on the left side but, the witnesses, who have been examined by the Insurance Company as R.Ws.1 to 3 speak that damages are caused to right side and the said discrepancy is also not taken note of by the Tribunal. Hence, it requires interference of this Court since, it is a case of fraud by implicating the vehicle of auto rickshaw.

9. Per contra, learned counsel appearing for the respondent No.1-claimant would vehemently contend that the history is given that he had fallen from motorcycle and though he had not mentioned that auto rickshaw involved in the

accident, it is the case of the claimant that the accident occurred between the motorcycle and the auto rickshaw and he had fallen from motorcycle. The counsel also would vehemently contend that the Insurance Company also not proved the fact that vehicle was not involved in the accident and the claimant has falsely implicated the auto rickshaw. The counsel also would submit that the driver of the auto rickshaw and the brother of the claimant are examined as R.Ws.1 and 2, who have not supported the claim of the Insurance Company but, supported the claim of the claimant. Though, the Insurance Company examined three witnesses, two of them have turned hostile and they have been cross-examined by the learned counsel appearing for the Insurance Company and inspite of the same, nothing is elicited and the same is discussed by the Tribunal in its judgment. The Tribunal elaborately discussed the same and hence, the very contention of the Insurance Company cannot be accepted.

10. The counsel also would submit that this Court can invoke Order 41, Rule 33 of C.P.C. to enhance the compensation

and the Tribunal loss sight of the injuries sustained by the claimant i.e., head injury and taken the disability only at 25% even though the Doctor assessed the disability at 65% and the same cannot be converted when he had sustained head injury. The counsel also would submit that, he had spent an amount of Rs.5,24,139.37 towards medical expenses and he was in the hospital for a period more than 58 days on different occasions and compensation awarded is very meager i.e., towards loss of amenities, awarded only Rs.10,000/- and towards nourishment and attendant charges, awarded only Rs.10,000/- and towards conveyance, awarded only Rs.5,000/- and taken the income of the claimant at Rs.10,000/- per month and he was working abroad and inspite of the fact that bank statement and passport being produced, the Tribunal failed to take note of the income of the injured and only taken the income at Rs.10,000/- per month, though the claimant was working as Sales Executive and drawing salary of Rs.91,463/- in terms of the salary certificate which is marked as Ex.P16 before the Tribunal. Hence, it requires interference of this Court.

11. Having heard the respective counsel and also on perusal of the material available on record, the points that would arise for consideration of this Court are:

(i) Whether the Tribunal has committed an error in entertaining the claim petition in a case of fraud as contended by the appellant-Insurance Company?

(ii) Whether the claimant has made out a ground to invoke Order 41, Rule 33 of C.P.C. to enhance the compensation?

(iii) Whether the interest awarded by the Tribunal at the rate of 8% per annum is just and reasonable and it requires interference of this Court?

(iv) What order?

Point No.(i)

12. Having heard the respective counsel and also on perusal of the material available on record, the accident has occurred on 23.05.2009 and complaint was given on 24.05.2009 by the brother of the injured, who is R.W.2 before the Court. In the evidence of R.W.2, he states that both himself and the

injured were proceeding in the motorcycle and he was riding the motorcycle and accident has occurred. It is the contention of the Insurance Company that the injured himself was riding the motorcycle and it is a case of skid and fall and the injured-claimant twisted the facts that two vehicles involved in the accident. The counsel also would submit that, in Ex.P11-discharge summary also, it is mentioned as fall from motorcycle. The counsel would further submit that in Ex.C1 i.e., hospital case sheet, the same history is mentioned. When such being the history given at the time when the injured was taken to hospital, it is a clear case of implication of the vehicle and in order to prove the contention of the Insurance Company, the company examined three witnesses as R.Ws.1 to 3.

13. R.W.1 is the driver of the auto rickshaw and no doubt, in the cross-examination it is elicited that he is a neighborer, it is important to note that suggestions are made to the R.W.1 that auto rickshaw has not involved in the accident and the same was denied and R.W.1 categorically says that accident occurred when he was driving the auto rickshaw and it

is also elicited in the cross-examination of R.W.1 that the damage was caused to the right side, but actually, in terms of IMV Report, the damages was on the left side and there are contradictions in the evidence.

14. R.W.2 is the brother of the injured and he claims that he was riding the motorcycle but, R.W.1 says that injured himself was riding the motorcycle and there are contradictions in the evidence of R.Ws.1 and 2 as to who was riding the motorcycle.

15. The other witness is R.W.3, who conducted the investigation. R.W.3 states that he went to the hospital and he recorded the statement of R.W.2 and R.W.2 stated that accident occurred when he was riding the motorcycle and auto rickshaw came and dashed against him and there are minor contradictions as to who was riding the motorcycle. It is pertinent to note that, in the document at Ex.P11 and Ex.C1, history is mentioned that fall from motorcycle and the fact that history is mentioned as RTA is not in dispute. It is also the claim of the claimant that when auto rickshaw hit the motorcycle, he had fallen from the

motorcycle. In order to substantiate the contention of the Insurance Company, except the oral evidence of R.Ws.1 to 3 and the documents Exs.P11 and C1, nothing is placed on record and unless the cogent evidence is placed before the Court that it is a case of fraud and implication of vehicle, the same cannot be accepted.

16. I have already pointed out that the complaint was given on the very next day of the accident and accident has occurred on 23.05.2009 at 8.30 p.m. and immediately, the injured was taken to the hospital in the night itself and complaint was given on the next day. When the driver of the auto rickshaw has come and deposed before the Court that auto rickshaw has involved in the accident and apart from that, he also pleaded guilty and order sheet is also produced before the Court with regard to the same. In order to counter the same, except the oral evidence of R.Ws.1 to 3, who have not supported the case of the Insurance Company, nothing is placed on record. No doubt, it is settled principle of law that fraud and justice should not dwell together, in order to come to a conclusion that

it was a case of fraud and implication of the vehicle, no ample material is placed before the Court. When such being the case, I do not find any ground to reverse the findings of the Tribunal with regard to the involvement of the vehicle and causing of an accident. Hence, I answer point No.(i) as 'negative'.

Point No.(ii)

17. Now, coming to the aspect of invoking Order 41, Rule 33 of C.P.C. to award just and reasonable compensation, it is settled law that in an appeal filed by the Insurance Company, the Court can invoke Order 41, Rule 33 of C.P.C., if injustice is caused to the victim or deceased while awarding compensation. In the case on hand, it has to be noted that the Doctor, who has been examined as P.W.3 assessed the disability at 65% since, he had suffered injury to his head. The Tribunal, while answering issue No.3, taken note of the wound certificate which is marked as Ex.P7, wherein the claimant has sustained lacerated wound over 3rd web space of the left foot and diffused contusion over right side of the head which are simple in nature and CT scan revealed extra dural haematoma and midline shift thin sub dural haematoma over right frontal convexity, sub arachnoid

hemorrhage, multiple hemorrhage contusion over bilateral frontal, parietal and left temporal lobe with diffuse cerebral edema, diastatic fracture of sagital and coronal suture on left side, comminuted fracture of right parietal bone, left sided facial palsy, right sided hemiparesis and all these injuries are grievous in nature. When the claimant has sustained number of injuries and the Doctor is also examined before the Tribunal, the same is not accepted by the Tribunal and the Tribunal comes to the conclusion that the evidence of P.W.2 revealed that the petitioner has permanent disability at 50% to 75% and Ex.P12 referred by P.W.3 would reveal that petitioner has permanent physical disability at 65%. But, without assigning any reason, the Tribunal has reduced the disability to 25%. In a case of head injury, the disability cannot be converted as like an injury to limb and the Court has to take the actual disability. When the permanent disability is assessed at 65% by P.W.2 and considering the nature of injuries, the Tribunal lost sight of the nature of injuries and also the evidence on record, that too, when the expert has given the evidence. Hence, it is appropriate to take the disability at 65% and when the Tribunal

has passed perverse order in accepting the disability, such perversity amounts to injustice to the injured. Hence, it is a fit case to exercise the powers under Order 41, Rule 33 of C.P.C. to enhance the compensation. Accordingly, I answer point No.(ii) as 'affirmative'.

18. Now this Court has to reassess the compensation considering the material available on record. Having considered the nature of injuries, the Tribunal has awarded only an amount of Rs.75,000/- towards pain and agony. The claimant was inpatient for a period of 58 days in two hospitals. Having taken note of the same, it is appropriate to award Rs.1,00,000/- towards pain and agony as against Rs.75,000/- awarded by the Tribunal.

19. The Tribunal lost sight of awarding compensation towards loss of amenities and only an amount of Rs.10,000/- is awarded under the said head. When the claimant had suffered head injury and suffered permanent disability at 65%, it is appropriate to enhance the same to Rs.1,00,000/- as against Rs.10,000/- awarded by the Tribunal.

20. The Tribunal has awarded a sum of Rs.10,000/- towards rest, nourishment and attendant charges. The claimant was inpatient for a period of 58 days and it was the accident of the year 2009 and the Tribunal, ought to have awarded just and reasonable compensation. Hence, it is appropriate to award Rs.40,000/- as against Rs.10,000/- awarded by the Tribunal.

21. The Tribunal has awarded a sum of Rs.5,29,340/- towards medical expenses and the claimant was inpatient twice and since the same is awarded based on the documentary evidence, it does not require any interference of this Court.

22. The Tribunal has awarded a sum of Rs.5,000/- towards conveyance. Considering the fact that the claimant was admitted to the hospital as an inpatient twice, it is appropriate to award Rs.10,000/- towards conveyance as against Rs.5,000/- awarded by the Tribunal.

23. The Tribunal awarded a sum of Rs.5,10,000/- towards loss of future income taking the income of the injured at Rs.10,000/- per month. The learned counsel appearing for the

claimant would vehemently contend that the claimant was working at Abudabi and was getting the salary of Rs.91,463/- as per the salary certificate which is marked as Ex.P16 and the same has not been proved by examining the author of the document and the same has been issued in the year 2008 and not in the year 2009, when he met with an accident.

24. It is also important to note that bank statement is also produced which discloses that from 2005 onwards, he was working in Abudabi and salary was last credited in the year 2008 and not 2009 and the salary certificate which is marked as Ex.P16 which was issued pertains to the year 2008 and subsequent to the same, no document is produced to show that as on the date of the accident, he was working and hence, the said salary cannot be accepted. However, the Tribunal committed an error in taking the income of the claimant at Rs.10,000/- per month, when account extract is produced to show that he was working from 2005 to 2008 initially for a salary of Rs.30,000/- and odd and last payment was in the month of August in a sum of Rs.51,000/ and odd. In the absence of his

employment as on the date of the accident and he being an Engineering Graduate, the Tribunal ought to have taken the income at Rs.20,000/- per month, since he was working abroad in Abudabi.

25. In view of the judgment of the Apex Court in **ERUDHAYA PRIYA v. STATE EXPRESS TRANSPORT CORPORATION LTD.** reported in **2020 SCC Online SC 601,** in a case of more than 31% disability, future prospects has to be added. Hence, if future prospects at 40% is added, the income of the claimant comes to Rs.28,000/- per month. Therefore, taking note of the passport which is marked as Ex.P18, wherein the date of birth of the claimant is mentioned as 30.07.1980, he was aged about 29 years at the time of the accident, though in the claim petition it is mentioned as 34 years. Hence, considering the year of the accident 2009, the relevant multiplier applicable is '17'. Having taken the income at Rs.28,000/- per month, disability at 65% and the relevant multiplier '17', the loss of future income works out to Rs.37,12,800/-. Hence, in all, the

claimant is entitled for compensation of Rs.44,92,140/- as against Rs.11,39,340/- awarded by the Tribunal.

Point No.(iii)

26. Learned counsel appearing for the appellant-Insurance Company would vehemently contend that the interest awarded at 8% by the Tribunal is on higher side and it was the accident of the year 2009. Having taken note of the accident of the year 2009 and also bank interest prevailing in the nationalized bank, it is appropriate to reduce the interest at 8% per annum to 6%.

Point No.(iv)

27. In view of the discussions made above, I pass the following:

ORDER

(i) The appeal is allowed in part.

(ii) The impugned judgment and award of the Tribunal dated 20.06.2015 passed in M.V.C.No.596/2014 is modified granting compensation of Rs.44,92,140/- as against Rs.11,39,340/- with interest at 6% per annum

from the date of petition till deposit invoking Order 41, Rule 33 of C.P.C.

(iii) The Insurance Company is directed to pay the compensation amount with interest within six weeks from today.

(iv) The amount in deposit, if any, be transmitted to the concerned Tribunal forthwith.

(v) The Registry is directed to transmit the records to the concerned Tribunal, forthwith.

Sd/-
JUDGE

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