

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 28<sup>TH</sup> DAY OF DECEMBER 2018

BEFORE

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

**MFA NO.9479/2011(MV-GEN)**

**BETWEEN:**

MR NISAR AHMED  
S/O SHEIK BUDAN SAB  
AGED ABOUT 56 YEARS  
R/AT CHINAKAURALI VILLAGE & HOBLI  
PANDAVAPURA TALUK  
MANDYA DISTRICT-571 434.

... APPELLANT

(BY SRI C R GOPALASWAMY, ADV.)

**AND:**

1. SRI SURESH  
AGED ABOUT 29 YEARS  
S/O SANNEGOWDA  
R/O AMRUTHI VILLAGE  
MELUKOTE HOBLI  
PANDAVAPURA TALUK  
MANDYA DISTRICT-571 434.
2. THE BRANCH MANAGER  
THE NATIONAL INSURANCE CO. LTD

1ST FLOOR, NO. 1576,  
VISHWESHWARAI AH ROAD  
POST BOX NO. 54  
MANDYA-571 401.

... RESPONDENTS

(BY SRI B C SHIVANNE GOWDA, ADV. FOR R2  
SRI H T JAGADEESH, ADV. FOR R1)

THIS MFA IS FILED UNDER SECTION 173(1) OF MV ACT AGAINST THE JUDGMENT AND AWARD DATED:25.8.2011 PASSED IN MVC NO.357/09 (OLD NO.420/07) ON THE FILE OF CIVIL JUDGE (SR.DN.) & JMFC AND MACT, PANDAVAPURA, AWARDED A COMPENSATION OF RS.13,38,270/- WITH INTEREST @ 6% P.A. FROM THE DATE OF PETITION TILL PAYMENT.

THIS APPEAL COMING ON FOR HEARING AND HAVING BEEN RESERVED FOR JUDGMENT THIS DAY, THE COURT DELIVERED THE FOLLOWING:

### **J U D G M E N T**

This Miscellaneous First Appeal is filed under Section 173(1) of M.V. Act, by the owner of the vehicle challenging the judgment and award dated 25.08.2011 passed in MVC.No.357/2009 by the Civil Judge(Sr.Dn),

& JMFC and MACT, Pandavapura, questioning fastening of liability on the insured and also the quantum of compensation awarded.

2. The claimant-injured filed the claim petition under Section 166 of M.V. Act seeking compensation on the ground that on 16.12.2005 at 6.00 p.m. when he was going by walk to Lakshmipura village at Melukote Cross, Lorry bearing Regn.No.KA-12-1857 came from Melukote towards Jakkanahalli in a rash and negligent manner and due to which it was up-sided as a result the claimant who was going by the side of the road sustained grievous injuries to waist, back bone and other parts of the body. Immediately he was shifted to J.S.S. Hospital, Mysuru, where he took treatment for one year as an inpatient and spent Rs.3,00,000/- for medical expenses. He sustained 100% disability. Prior to accident, he was working as a cleaner and agriculturist from which he was earning Rs.10,000/-

per month and due to the injuries sustained in the accident, he is unable to work as earlier.

In pursuance of notice issued, respondents 1 and 2 appeared through their counsel and filed written statement. The first respondent in the written statement contending that the claimant has to prove the allegations made in the claim petition and admitted registration of criminal case. However, disputed the nature of the injuries sustained by the claimant. The second respondent-Insurance Company in the written statement denied the very accident and also issuance of policy for want of better particulars. Further, contended that no reasons are assigned for the delay in lodging the complaint and the claimant in collusion with the police and the first respondent had fixed the lorry with an intention to defraud the insurance company. However, contended that the claimant was proceeding as a passenger in the lorry and the same is admitted by him

in the complaint and hence, the insurance company is not liable to pay the compensation.

The claimant in order to substantiate his claim got himself examined as PW.1 and he got marked the documents Exs.P1 to P269. The second respondent-Insurance Company got examined two witnesses as RWs.1 and 2 and got marked documents at Exs.R1 to R2 on its behalf.

The Tribunal after considering both oral and documentary evidence allowed the claim petition in part and awarded compensation of Rs.13,38,270/- with interest at 6% per annum and fastened the liability on the insured.

Being aggrieved by the impugned judgment and award of the Tribunal, the insured has preferred this appeal.

3. In the grounds of appeal, it is contended that the Presiding Officer has arrived at the conclusion that at the initial stage, the claimant had lodged a complaint stating that he was working as a cleaner in the lorry of the appellant. But subsequently, given further statement that he was moving on the side of the road, at that time, the lorry came from his behind and dashed against him and as a result of the same, he sustained severe injuries. Therefore, the version of the claimant cannot be believed. The insurance company had taken a contention that since the complaint is lodged at a belated stage, it is a concocted one and the accident has not taken place. But the learned Judge without giving importance to the same has categorically held that the claimant has proved the alleged accident. The Tribunal has committed an error in absolving the second respondent-Insurance Company from its liability only relying on the evidence of R.W.1 who has stated that he was a gratuitous passenger and in the absence of any

other evidence available on record. The material available on record only speak that the claimant to be either a cleaner or should be a walker on the road side. Except these two ingredients, nothing is available on record to show that the claimant was a gratuitous passenger. When such being the case, the learned Presiding Officer ought to have taken that either he was a cleaner or was walking on the road side but he did not do so. Further contended that it is an admitted fact that the vehicle was insured with respondent No.2 as on the date of the accident. When such being the case, the liability has to be fixed jointly and severally. But without any reason, the Tribunal has fixed the liability only on the owner. The further contention of the insured is that the doctor who has treated the claimant has not been examined by the claimant. When such is the matter, assessing of the liability by the Tribunal is unscientific and consequently, the quantum of compensation awarded is on the higher side and

exorbitant. The complaint is lodged after inordinate delay of 23 days. But the Tribunal has not considered the same, which is erroneous and contrary to the settled principles of law.

4. The counsel appearing for the appellant in his arguments has vehemently contended that there is no material before the Court to come to the conclusion that the claimant was a gratuitous passenger and the Tribunal has committed an error in coming to such a conclusion and no where in the criminal case records or in the material placed before the Tribunal, it is elicited that he was a gratuitous passenger and the Tribunal has presumed the things that he was a gratuitous passenger. Further, the Tribunal ought to have considered the claimant either as a cleaner or was walking on the road when the owner in the written statement has admitted that he was walking on the road. In spite of the same, the Tribunal has committed



an error in fastening the liability on the insured and further contended that there is no iota of evidence to show that the claimant is a gratuitous passenger. Hence, the order impugned is liable to be set aside with regard to coming to the conclusion that he was a gratuitous passenger.

Regarding quantum of compensation awarded, he contends that the compensation awarded is exorbitant and without any medical evidence, the Tribunal has granted higher compensation and though it is observed that the doctor who treated the claimant is not examined however has proceeded to accept the evidence of the doctor with regard to the percentage of disability and awarded higher compensation and as such the quantum of compensation awarded requires to be re-looked into.

5. The counsel for the claimant in his arguments contended that the claimant was walking on

the road and he gave the statement before the police in terms of Ex.P7 and the police have also filed the charge sheet to the effect that he was walking on the road and as such the claim made by the claimant is sustainable in the eye of law.

6. The counsel appearing for the Insurance Company has vehemently contended that taking into consideration of the nature of the allegation made in the complaint as also how they managed to get the charge sheet filed against the driver disclose that an attempt is made to fasten the liability on the insurer. The Tribunal has rightly come to the conclusion that he was a passenger and immediate records i.e. the wound certificate, which is marked as Ex.P8 clearly disclose that he had fallen from the lorry. Ex.C1-the records of JSS Hospital also confirms that he had fallen from the lorry. The complaint was given in terms of Ex.P1 which discloses that he was a cleaner. Further, statement in

terms of Ex.P7 was made that he was walking on the road. In Ex.P4 one Nandeesh has stated that the claimant was working as a cleaner, which is forthcoming in the panchanama. Hence, the Tribunal has come to the conclusion that he was a gratuitous passenger and hence, there are no other material to come to the other conclusion that he was not a gratuitous passenger and the Tribunal has passed the impugned order after appreciating both oral and documentary evidence.

7. After having heard the arguments of the respective counsel and on perusal of the impugned judgment, the points that arise for my consideration are:-

*“1. Whether the Tribunal has committed an error in coming to the conclusion that the injured is a gratuitous passenger?”*

*2. Whether the compensation awarded by the Tribunal is on higher side and it requires interference?”*

**8. Regarding Point No.1:-**

The main contention of the appellant before this Court is that the Tribunal has committed an error in coming to the conclusion that the claimant was proceeding as a gratuitous passenger in the lorry and there was no any material to come to such a conclusion that he was a gratuitous passenger. The counsel further contends that either he must be a cleaner or walker. It is further contended in the written statement that the owner of the vehicle has admitted that he was walking on the road and there is no iota of evidence to prove that he was a gratuitous passenger and the finding of the Tribunal is without any material and the same is erroneous.

9. The counsel for the Insurance Company in his argument has vehemently contended that Ex.P.8-wound certificate clearly discloses that he was traveling in the lorry and further it is mentioned that fall from the lorry. It is the immediate record after the accident, which came into existence, that he was an unauthorized passenger. Hence, the Tribunal has not committed any error in coming to the conclusion that he was a gratuitous passenger.

10. The counsel for the claimant in his argument contends that the re-statement of the claimant was recorded as per Ex.P.7, which discloses that he was walking on the road. Hence, the finding of the Tribunal is erroneous in coming to the conclusion that he was a gratuitous passenger.

11. In keeping the contentions urged by the respective counsel, this Court has to examine as to

*whether the Tribunal has committed an error in coming to the conclusion that he was a gratuitous passenger.*

12. The oral evidence before the Tribunal by P.W.1 is that he was walking on the road and in the cross-examination, it is elicited that the contents of the complaint, which he has given was true. On perusal of the complaint, it discloses that the complaint was lodged almost after 15 days from the date of the accident. He has stated that he was proceeding as a cleaner in the lorry and other three persons have boarded the lorry to load the mud and they were also in the vehicle.

13. On perusal of the wound certificate-Ex.P.8, it discloses that one Jagadish took the injured to the hospital as on the date of the accident i.e., on 16.12.2005 at about 1:30 pm near Melukote Village. It is mentioned as due to fall from the lorry, in which, he was traveling. Hence, it is clear that he was proceeding

in the lorry and further the claimant admits in the cross-examination that the content of the complaint is true. On perusal of FIR, which is marked as Ex.P.1, the complainant categorically says that he was proceeding as a cleaner in the lorry and this statement of the claimant was recorded on 12.01.2006 at about 2.00 pm and the accident has taken place on 16.12.2005 that is almost after 16 days.

14. It is pertinent to note that the police before filing the charge sheet have recorded re-statement of the complainant as per Ex.P.7 and in the re-statement recorded on 18.12.2006, which is after one year and two days from the date of the accident, the complainant changed his version that he was walking on the road and re-statement appears to be recorded to facilitate the claimant to claim the compensation. Ex.C1 is the hospital records of JSS Hospital and on perusal of the discharge summary, it discloses that it is fall from the

lorry and two people fell on him and nowhere in the discharge summary, it is mentioned that he was traveling in the lorry.

15. On perusal of case record, it discloses that when he went to hospital only, it is mentioned that fall from the lorry cabin and people fell over him and no history of loss of conscious and nowhere in the case record, it is mentioned that he was traveling in the lorry, which has been mentioned in Ex.P.8, but it is clear that he was proceeding in the lorry. The questions as to *whether he was proceeding as a gratuitous passenger as contended by the Insurance Company or whether he was a cleaner?*

16. On perusal of the pleadings, the claimant has contended in column No.4 of the claim petition that his occupation is cleaner and agriculturist and on perusal of complaint also, he categorically mentioned that he was proceedings as a cleaner. It is important to



note that the complaint was given after 16 days and that too the said statement was made in the hospital when he was taking treatment and also he has assigned the reason that he was taking treatment. Hence, there was a delay and the most important documents are the documents, which came in existence immediately after the accident, which clearly shows that he fell down from the lorry and the accident is not disputed.

17. The Tribunal has come to the conclusion that he was proceeding as a gratuitous passenger mainly based on the wound certificate history as he was traveling in the lorry and I have already pointed out in the case record nowhere it is mentioned that he was traveling, but in what capacity also there was no averment in any document. The Tribunal has come to the conclusion that he was a gratuitous passenger and the same is without any basis and there must be evidence before the Court as to on what capacity he was

proceeding and while answering issue No.1, the Tribunal taking note of the entry made in the wound certificate, which is marked as Ex.P.8 comes to the conclusion that he was proceeding in the lorry, but it is observed that R.W.1 deposed that when the petitioner was traveling in the lorry as a gratuitous passenger, the Insurance Company is not liable to pay the compensation and the said finding is erroneous and R.W.1 nowhere stated that he was proceeding as a gratuitous passenger and only in the cross-examination, a suggestion was made that he was proceeding as a gratuitous passenger and the same was denied and further suggestion was made that in order to help the claimant, he filed the charge sheet stating that he was walking by the side of the road and the said suggestion was also denied.

18. It is further important to note that in the cross- examination of P.W.1, no suggestion was made to

him that he was traveling as a gratuitous passenger. In the written statement, Insurance Company has taken the specific defence that he was proceeding as a gratuitous passenger and the said defence remains as defence only and there is no any effective cross examination.

19. The counsel for the appellant has brought to my notice that there was no suggestion in the cross-examination of R.W.1 that he was a gratuitous passenger and apart from the counsel for the Insurance Company has brought to my notice that in Ex.P.4-seizure mahazar one Nandish claims that he was a cleaner in the very same lorry and there are contradictory statement of the complainant that is claimant who claims that he was a cleaner and Ex.P.4 also discloses that one Nandish was a cleaner and the said Nandish has not been examined and one Jagadish who accompanied the injured to the hospital also has

not been examined before the Tribunal and there is ambiguity with regard to whether the claimant was a cleaner or this Nandish. No doubt, the Insurance Company has examined R.W.1-Inspector who conducted the investigation and except the suggestion that in order to help the claimant, he filed the charge sheet stating that he was walking on the road nothing is elicited from his mouth.

20. It is further important to note that the counsel who appears on behalf of the Insurance Company has suggested to P.W.1 that the statement which he made in the complaint are true and if it is accepted, then the claimant is a cleaner and hence, the Insurance Company cannot contend that he was a gratuitous passenger.

21. It is pertinent to note that at the time of argument, the counsel for the appellant has filed a copy of the policy, which is not produced before the Tribunal

and there was no any finding with regard to whether the policy covers the claimant as well as other employees. On perusal of the policy, which is produced before this Court discloses that the policy covers the workmen to the accident of seven persons. When such being the case, the policy has to be marked before the Tribunal and further in order to come to a definite conclusion of whether he was a cleaner or whether he was a gratuitous passenger, the matter has to be remitted back to the Tribunal for fresh consideration. On perusal of the entire material, there is no material to come to the conclusion that whether the claimant was proceeding as a gratuitous passenger or working as a cleaner. The owner has also not been examined before the Tribunal and he is the right person to know whether he was proceeding as a cleaner or he was proceeding as a gratuitous passenger. When such being the case, I have already pointed out that one Jagadish who accompanied the injured has also not been examined.

In Ex.P.4- seizure mahazar, Nandish claims that he was a cleaner who has also not been examined. Hence, I am of the opinion that the matter requires fresh consideration.

22. In the light of the above observation made by this Court, in order to come to a definite conclusion that whether the claimant was working as a cleaner or gratuitous passenger and whether the policy covers the workmen, there is no any evidence with regard to coverage of the policy in respect of the workmen, I do not know why the Insurance Company also did not produce the policy before the Tribunal and the same has been produced by the Insurance Company. Hence, I answer point No.1 is affirmative that there was no any material to come to the conclusion that the claimant was proceeding as a gratuitous passenger.

23. In view of the observation made above, I pass the following

**ORDER**

The appeal is allowed.

The judgment and award of the Tribunal is set aside. The matter is remitted back to the Tribunal to reconsider the matter afresh.

Both the parties are given an opportunity to adduce their evidence in respect of their contentions.

Parties are directed to appear before the Tribunal on 21.01.2019. The Tribunal is directed to dispose of the matter within six months from 21.01.2019. Parties are directed to assist the Tribunal to dispose of the matter within the stipulated time. Parties need not expect separate notice to appear before the Tribunal and this order itself is treated as a notice.

Office is directed to transmit the original records to the lower court forthwith. The matter is remitted

back only to ascertain the truth whether he is gratuitous passenger or cleaner. The quantum is untouched and remand is only for limited purpose.

**Sd/-  
JUDGE**

\*alb/PB