

**The Manager Vs. Rasheed Khan**

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**Court :** Karnataka

**Decided On :** Mar-28-2016

**Judge :** Ram Mohan Reddy

**Appeal No. :** MFA 4468/2012

**Appellant :** The Manager

**Respondent :** Rasheed Khan

**Judgement :**

1 IN THE HIGH COURT OF KARNATAKA AT BENGALURU DATED THIS THE28H DAY OF MARCH 2016 BEFORE THE HONBLE MR. JUSTICE RAM MOHAN REDDY MISCELLANEOUS FIRST APPEAL NO.4468/2012 (MV) BETWEEN THE MANAGER, NATIONAL INSURANCE CO.LTD., S.S.COMPLEX, OPP: CHURCH, B.H.ROAD, SHIMOGA, REP. BY ITS REGIONAL MANAGER, NATIONAL INSURANCE CO. LTD., REGIONAL OFFICE, SUBHARAM COMPLEX, 44, M.G.ROAD, BANGALORE-560001. ... APPELLANT (By SRI A.N.KRISHNA SWAMY, ADVOCATE) AND1 RASHEED KHAN, S/O AZEEZ KHAN, AGED ABOUT53YEARS, OWENR OF PLASTIC INDUSTRY, R/O OLD MANDLI, N.T.ROAD, OPP: AMRUTHA RICE MILL, SHIMOGA.

2. HABIBULLA KHAN, S/O AMANULLA KHAN, AGED ABOUT25YEARS, R/O K.R.PURAM, NEAR SAKOOR GARAGE, SHIMOGA. 2 3. FAIROZ KHAN, S/O NIYAMATHULLA KHAN, MAJOR, R/O100FEET ROAD, NEW MANDLI,

SHIMOGA. ... RESPONDENTS (By SRI M.RAVINDRANATH, ADV. FOR R1; V/C/O DT.14.10.2015 NOTICE TO R2 & R3 THROUGH PAPER PUBLICATION IS ACCEPTED) THIS MFA FILED U/S1731) OF MV ACT, AGAINST THE

JUDGMENT

AND AWARD DATED 17.11.2011 PASSED IN MVC No.568/2009 ON THE FILE OF THE PRESIDING OFFICER, FAST TRACK COURT-II AND MACT, SHIMOGA, AWARDED A COMPENSATION OF RS.93,500/- WITH INTEREST @ 6% P.A FROM THE DATE OF PETITION TILL REALISATION. THE COURT DELIVERED THE FOLLOWING: THIS APPEAL COMING ON FOR

ORDER

S THIS DAY,

## **JUDGMENT**

Insurer of the offending motor cycle, aggrieved by the judgment and award dated 17th November 2011 in MVC5682009 of the District and Sessions Judge, Fast Track Court-II, Shivamogga, (for short MACT), has presented this appeal.

2. (i) Facts briefly stated are: First respondent instituted claim petition invoking Section 166 of the Motor Vehicles Act, 1988, (for short Act) seeking `13,15,000/- as compensation for injuries sustained in the road traffic accident that allegedly occurred on 07.04.2009 while riding his TVS XL bearing certificate of registration KA-14/K-9726 from his house towards flour mill near petrol bunk, N.T. Road, whence, the 2nd respondent/ Habibulla Khan, allegedly riding a Hero Honda Splendor motor cycle bearing certificate of registration KA-14/W-8664 at a high speed and in a rash and negligent manner from the side of Sandesh Motors dashed against TVS moped, by reason of which the 1st respondent fell off from the vehicle, sustained injuries and was admitted to Mc.Gann Hospital, Shivamogga, whereafterwards, he was shifted to Nanjappa Hospital and from there to KMC Hospital, Manipal, where he was extended treatment for one month and on discharge, followed up treatment. (ii) First respondent/claimant aged 50 on the date of accident claiming to be owner of a plastic industry earning `25,000/- per month and due to permanent disability, allegedly lost his earning capacity and

was unable to manage the industry. In addition, it was asserted that he was the only earning member in his family. (iii) Respondent No.3 arraigned as 2nd respondent in the claim petition was said to be the owner of the offending motor cycle while appellant/ insurer was arraigned as the 3rd respondent. (iv) The rider and owner of the offending motor cycle, though served with notice in the claim petition, remained absent and were unrepresented, hence placed ex-parte, while appellant resisted the claim by filing statement of objections, inter alia, denying the accident, while admitted the issue of a policy of insurance, which was in force on the date and time of accident. (v) In defence, it was stated that the alleged accident occurred due to rash and negligent act of the claimant, who did not possess a valid and effective driving licence and caused the accident. (vi) It was alleged that owner/insured did not comply with Section 134(c) of the Act and that 2nd respondent/insured in collusion with other respondents and police officials filed a false case by changing the name of the rider in active collusion with the rider/first respondent for wrongful gain. (vii) It was further alleged that 2nd respondent/ owner insured was the rider at the time of accident, without a valid driving licence a breach of the terms and conditions of the policy of insurance.

3. In the premise of pleadings of parties, MACT, framed the following issues:

6. (i) Whether the petitioner proves that on the relevant date, time and place the accident was caused due to rash and negligent driving of motor cycle bearing Regn. No.KA-14/W-8664 by the 1st respondent?. (ii) Whether the petitioner proves that in the accident he sustained injuries?. (iii) Whether the 3rd respondent proves that on the date of accident driver was not having valid driving licence?. (iv) Whether 3rd respondent proves that accident was caused due to negligence of petitioner?. (v) Whether the petitioner is entitled for compensation?. If so, for what amount and from whom?. (vi) What award or order?.

4. The claimant/injured was examined as P.W.1 and the Doctor as P.W.2 and 46 documents were introduced in evidence and marked as Exs.P. 1 to P.46 while for the appellant/Insurer, its officer was examined as R.W.1 and marked three documents as Exs.R.1 to R.3. The MACT returned the following findings. Point No.1: In the partly affirmative 7 Point No.2: In the affirmative Point No.3: In the

negative Point No.4: In the negative Point No.5: In the partly affirmative Point No.6: As per final order.

5. The MACT, having regard to the material on record and evidence, both oral and documentary, held that rider of the motor cycle was not Habibulla Khan (1st respondent before MACT) while it was the owner/ insured who was riding the motor cycle and answered issue No.1 partly in the affirmative, attributing actionable negligence to the owner/rider. MACT awarded `93,500/- as compensation with interest at 6% per annum, while fastening liability to pay compensation on the appellant on the premise that allegation of false implication by the owner/insured that rider of the motor cycle was Habibulla Khan by itself and nothing more was not a legal ground to exonerate the appellant from liability to pay compensation, while 8 rejecting the allegation of the appellant that owner/ insured of the offending motor vehicle violated the terms and conditions of the policy for failure to establish the same, by the judgment and award impugned.

6. Learned counsel for the appellant/insurer advances the following submissions: (i) That the MACT having observed the owner/ insured was riding the motor cycle and caused the accident due to his negligent act, and Habibulla Khan was not the rider; although in the criminal proceeding for commission of cognizable offences, Habibulla Khan pleaded guilty of rash and negligent riding of the motor cycle in question; (ii) The testimony of R.W.1, officer of the insurer was proof of the contents of the Medico Legal Case registers, Exs.R.1 and R.2 recording that the claimant and the owner/ insured suffered injuries in the accident involving the motor vehicles; (iii) That the insured did not respond to the notice issued by the insurer to 7. 9 furnish material particulars of the rider of the motor cycle and was placed ex-parte before the MACT; According to the learned counsel, in the teeth of the aforesaid facts, an adverse inference was required to be drawn by the by the MACT that since the owner/ insured did not possess a valid and effective driving licence to ride the motor cycle and having caused the accident, in collusion with Habibulla Khan and the police, implicated the said Habibulla Khan as the rider, a fraud played on the insurer, hence a breach of the terms and conditions of the policy of insurance hence disentitled to the indemnity under the policy of insurance, and as a consequence, the appellant was not liable to pay the

compensation.

8. Learned counsel places reliance upon decision of the Apex Court in United India Insurance Company Limited vs. Rajesh Singh and others<sup>1</sup> and National Insurance Company Limited vs. Nicoletta Rohtagi 1 AIR 2000 SC116510 and others<sup>2</sup> in support of the plea that claimant/ injured colluded with the owner/insured who did not contest the claim coupled with the finding on issue No.1 that it was the 2nd respondent/owner insured who was riding the motor cycle and caused the accident and not first respondent/ Habibulla Khan, a fraud having been played vitiated the proceeding before the MACT.

9. Learned counsel points to Sections 165 and 175 of the Act, relating to constitution of the claims tribunal and bar of jurisdiction of the Civil Court respectively, to submit that insurer/appellant is disentitled to invoke the Civil Courts jurisdiction over breach of terms and conditions of the indemnity under the Contract Act, as against the owner/insured.

10. Having heard the learned counsel for the appellant, perused the pleadings, examined the judgment and award and the evidence, both oral and documentary, the only question for decision making is:

2. AIR 2002 SC335011 Whether, in the facts, circumstances and evidence on record, the MACT was justified in fastening liability on the appellant/insurer to pay the compensation?. 11. There is no dispute that in the claim petition it was asserted that the rider of the motor cycle was one Habibulla Khan while the owner insured was the 2nd respondent therein and the insurer was 3rd respondent/ appellant of the said motor cycle. In the statement of objections of the appellant/insurer, it was contended that the owner insured/2nd respondent therein colluded with other respondents arraigned in the claim petition i.e., Habibulla Khan, and police officials to file a false case by changing the name of the rider as Habibulla Khan, to make wrongful gain, although, it was the 2nd respondent/owner/insured who was riding the motor cycle, and caused the accident, without possessing a valid driving licence in breach of terms and conditions of the policy of insurance.

12. In the cross-examination of P.W.1, claimant, it was elicited that the owner/insured was riding the offending motor cycle at the time and date of accident. In the teeth of the admission, the MACT was justified in recording a finding that the 2nd respondent owner /insured was the rider of the motor cycle and due to his negligent act caused the accident, to answer issue No.1 attributing actionable negligence. The MACT was justified in observing that Habibulla Khan was not the rider of the motor cycle on the fateful day.

13. The fact that Habibulla Khan/ 1st respondent when accused of commission of cognizable offences under the Indian Penal Code, admitted his guilty before the criminal Court. If Habibulla Khan was implicated as the rider of the motor cycle, since in the FIR, Ex.P.2 no name is mentioned as the rider, then that is for the criminal Court to consider and can hardly make any significant impact in the proceeding for compensation, assuming the respondents had colluded.

14. It may be that the 2nd respondent, owner/insured was injured and had taken treatment in Mc.Gann Hospital on the same day as the claimant, but in the absence of the testimony of the author of Exs.R.1 and R.2 the MLC extracts, the oral testimony of R.W.1 officer of the appellant is not in the direction of proving the contents of the said exhibits.

15. The facts, circumstances and evidence supra, does not prove the allegation that the 1st respondent Habibulla Khan along with the second respondent owner/insured and police authorities colluded to make unlawful gain by enabling the claimant to secure compensation from the appellant by enforcing the indemnity clause in the policy of insurance.

16. MACT observed that the testimony of R.W.1 was not in the direction of establishing the allegation that the owner/insured did not possess a valid and effective driving licence to ride the motor cycle on the date and time of accident. Testimony of R.W.1 the officer of the appellant/ Insurance Company had no personal knowledge as to whether the owner/insured did or did not possess a valid and effective driving licence as on the date and time of accident. In the absence of testimony of officers of the Road Transport Department or any other substantial legal evidence, the MACT justifiably did not draw an inference adverse

to the interest of the owner/insured for not responding to the alleged notice of the appellant calling upon the owner/ insured to furnish material particulars of the rider of the motor cycle. Merely because respondents 1 and 2 did not respond to the notice on I.A. filed by the appellant before the MACT to furnish material particulars of the rider of the motor vehicle as also over the driving licence, by itself and nothing more, it cannot be said that an adverse inference ought to be drawn that the owner/insured did not possess a valid and effective driving licence to ride the motor cycle on the date and time of the accident. It is elsewhere said that 15 essentials may be inferred when the facts proved justify the inference. On one hand must not surmise, conjecture, or guess on the other hand may draw an inference from the proved facts, so long as it is a legitimate inference.

17. The entries in the MLC registers, Exs.R.1 and R.2 spoken to by R.W.1 when not proved by examining the author, by itself does not establish the general allegation of fraud, bereft of material particulars. In fact, neither fraud nor misrepresentation is made out. Police authorities are not parties to the claim petition so as to record a finding that they were involved in the alleged fraud.

18. In the case of fraud, misrepresentation and undue influence and coercion, the Apex Court in *Bishundeo Narain and another vs. Seogeni Rai and others*<sup>3</sup>, observed thus:

3. AIR 1951 SC28016 25. It is also to be observed that no proper particulars have been furnished. Now if there is one rule which is better established than any other, it is that in cases of fraud, undue influence and coercion, the parties pleading it must set forth full particulars and the case can only be decided on the particulars as laid. There can be no departure from them in evidence. General allegations are insufficient even to amount to an averment of fraud of which any Court ought to take notice, however strong the language in which they are couched may be, and the same applies to undue influence and coercion. See Order 6 Rule 4 of CPC 19. The said principles were followed by later decision of the Apex Court in *Varanasaya Sanskrit Vishwavidyalaya and another vs. Dr. Rajkishore Tripathi and another*<sup>4</sup>. In *Subhas Chandra Das Mushib vs. Ganga Prosad Das Mushib and others*<sup>5</sup> while examining plea of undue influence, it was held thus:

4. AIR 1977 SC6155 AIR 1967 SC87817 10. Before, however a Court is called upon to examine whether undue influence was exercised or not, it must scrutinize the pleadings to find out that such a case has been made out and that full particulars of undue influence have been given as in the case of fraud. See Order 6, Rule 4 of the Code of Civil Procedure. This aspect of the pleading was also given great stress in the case of *Ladli Prashad Jaiswal vs. The Karnol Distillery Company Limited, Karnul and others*, AIR 1963 SC1279 (1963)33 Comp. Cas. 593 (SC), above referred to. In that case it was observed (at p.295) (of SCR): (at p.1288 of AIR): A vague or general plea can never serve this purpose; the party pleading must therefore be required to plead the precise nature of the influence exercised, the manner of use of the influence and the unfair advantage obtained by the other. In *Afsar Shaikh and another vs. Soleman Bibi 20. and others*<sup>6</sup> considering the fact of Order VI Rule 4 of the CPC with reference to the allegation of fraud, etc, it is observed thus:

6. AIR 1976 SC16318 15. While it is true that undue influence, fraud, misrepresentation are cognate vices and may, in part, overlap in some cases, they are in law distinct categories, and are in view of Order 6, Rule 4, read with Order 6, Rule 2 of the Code of Civil Procedure, required to be separately pleaded, with specificity, particularity and precision, A general allegation in the plaint, that the plaintiff was a simple old man of ninety who had reposed great confidence in the defendant, was much too insufficient to amount to an averment of undue influence of which the High Court could take notice, particularly when no issue was claimed and no contention was raised on that point at any stage in the Trial Court, or, in the first round, even before the First Appellate Court.

21. In *Ladli Prashad Jaiswal vs. The Karnol Distillery Company Limited, Karnul and others*<sup>7</sup>, it is held that the object of a pleading is to bring the parties to a trial by concentrating their attention on the 7 AIR 1963 SC127919 matter in dispute, so as to narrow the controversy to precise issues, and to give notice to the parties of the nature of testimony required on either side in support of their case. A vague or general plea cannot serve this purpose; the party pleading must therefore be required to plead the precise nature of fraud, the manner of use, and the unfair advantage obtained. This rule has been evolved with a view to narrow the issue

and protect the party charged with improper conduct from being taken by surprise. 22. It is useful to extract the observations of Lord Selborne in *Wellingford vs. Mutual Fund Society*<sup>8</sup>. With regard to fraud, if there be any principle which is perfectly well-settled it is that general allegations however strong may be the words in which they are stated are insufficient even to amount to an averment of fraud of which any Court ought to take notice. 23. In *A.C. Ananthaswamy and others vs. Boraiah (deceased) by LRs*<sup>9</sup>, it was observed thus:

8. (1818)<sup>5</sup> AC68520 Fraud is to be pleaded and proved. To prove fraud, it must be proved that the representation made was false to the knowledge of the party making such representation or that the party could have no reasonable belief that it was true. The level of proof required in such cases is extremely higher. 24. A Division Bench of this Court in *Kenchawwa vs. Amogonda and others*<sup>10</sup> held that the party pleading fraud or misrepresentation will have to not only plead the details, but will have to lead evidence in support of such allegations. In the words of learned Judge *Facta Probanda* and *Facta Probantia* go hand in hand and Court of law cannot afford to spell out a case in favour of such a litigant either merely acting upon *Facta Probanda* or *Facta Probantia*. Sarkar on Evidence, 13th edition, at page 933, states thus: A person who charges another with fraud must himself prove the fraud, and he is not 9 2004(8) SCC58810 AIR2003 Kant. 434 (DB) 21 relieved from this obligation because the defendant has told an untrue story. 25. Applying the aforesaid principles to the facts of this case, except for the use of the word fraud, in the statement of objections appellant has not pleaded with specificity, particularity and precision, therefore, mere use of word fraud or collusion cannot serve as a foundation for the plea. Such expressions, undoubtedly, are quite ineffective to form a legal basis when denuded of particular statement of facts which alone can furnish the requisite basis for the action. The averments in the statement of objections do not set out with reasonable precision, the particulars, so as to constitute allegations of fraud, misrepresentation and collusion by the owner/insured, along with Habibulla Khan and the police officials, as alleged.

26. Viewed in that light, MACT was justified in not framing an issue on the said plea of fraud, collusion and misrepresentation.

27. 22 In the circumstances, the faint effort of the learned counsel for appellant to contend that Section 165 read with Section 175 of the Act denudes the jurisdiction of the Civil Court to entertain a claim for breach of terms of contract of indemnity on the basis of fraud as defined under Section 17 of the Contract Act, 1872, is without merit. Section 175 by itself and nothing more does not either expressly or impliedly bar the jurisdiction of the Civil Court to entertain a suit as between insurer and insured in the matter of fraud, undue influence or collusion either while entering into the contract of indemnity or breach of terms of the said contract.

28. In Rajesh Singhs case as well as Nicoletta Rohtagis case (supra), the Apex Court did not in express terms deny right of the parties to the contract to institute a suit over breach of terms and conditions of the contract of indemnity before a competent Civil Court.

29. 23 In Rajendra Singhs case, the Apex Court observed that it had no doubt that remedy to move for recalling the order on the basis of the newly discovered facts amounting to fraud of high degree cannot be foreclosed and no Court or Tribunal can be regarded as powerless to recall its own order if it is convinced that the order was wangled through fraud or misrepresentation of such a dimension as would affect the very basis of the claim. (emphasis supplied) In Nicoletta Rohtagis case, the Apex Court 30. observed that in a situation where there is a collusion between the claimants and the insured or the insured does not contest the claim and, further, the Tribunal does not implead the Insurance Company to contest the claim in such cases, it is open to an insurer to seek permission of the tribunal to contest the claim on the ground available to the insured or to a person against whom a claim has been made. 24 31. Regard being had to the aforesaid two opinions of the Apex Court, it is needless to state that on facts of this case there is not a titre of evidence to establish that the claimant colluded with first respondent/ Habibulla Khan or the owner/insured of the offending motor cycle and the police officials to institute the claim petition for compensation with intent to fasten the liability on the appellant/insurer and recover compensation. In the absence of relevant material constituting substantial legal evidence of such allegation against claimant, a third party, the submissions of the learned counsel for the appellant must necessarily fail.

32. On a fair consideration of the material on record, the judgment and award impugned is well merited fully justified and is neither shown to suffer any infirmities in law nor substantiated to be based on no evidence or vitiated on account of any perversity of approach to call for a different conclusion and interfere with the verdict.

33. In the circumstances, the equation formulated 25 supra is answered in the affirmative and against the appellant.

34. This Appeal by the Insurance Company knowing fully well that there is no case made out against claimant/injured either on fraud, misrepresentation or collusion, nevertheless, in the absence of the police as a party to the proceeding against whom the aforesaid allegations are targeted, with an intention to frustrate the claimant from securing compensation, although the Act is a beneficial legislation aimed at quick redressal of victims of accident arising out of motor vehicles, smacks of an attitude which is a cavalier manner. Hence, while deprecating such practice and dismissing the appeal, there is a need to impose cost as observed by the Apex Court in *New India Assurance Company Limited vs. Kiran Singh and others*. 11 AIR 2004 SC388435. Appeal dismissed. Cost quantified at `10,000/- 26 to be deposited with the Registrar General, High Court of Karnataka, Bengaluru. The amount in deposit is directed to be transmitted to the MACT forthwith. kcm Sd/- JUDGE

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