

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **RFA No.796/2017**

% **20th September, 2017**

NATIONAL INSURANCE COMPANY LTD. Appellant

Through: Mr. S. Venkatesh, Advocate
with Mr. Varun Singh,
Advocate.

versus

CANARA BANK AND ORS. Respondents

Through: Ms. Seema Gupta, Advocate
with Mr. Manoj Kumar Arora,
Advocate for respondent No.1.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

C.M. No.34152/2017 (exemption)

1. Exemption allowed subject to just exceptions.

C.M. stands disposed of.

C.M. No.34153/2017 (for condonation of delay)

2. For the reasons stated in the application, delay of 82 days
in re-filing the appeal is condoned.

C.M. stands disposed of.

C.M. No.34151/2017 (for condonation of delay of 416 days in filing the appeal)

3. Learned counsel for the respondent no.1 does not oppose the application only as a technicality inasmuch as the arguments have otherwise been heard on merits. Without prejudice to the rights of the respondent no.1 in the connected appeal which is said to have been filed by the defendant no.1 and 2 in the suit/borrowers, the present application is allowed.

C.M. stands disposed of.

RFA No.796/2017

4. This Regular First Appeal under Section 96 of Code of Civil Procedure, 1908 (CPC) is filed by the defendant no.3 in the suit, namely National Insurance Company Ltd, impugning the judgment of the Trial Court dated 4.8.2015 whereby the suit filed by the respondent no.1/plaintiff/Canara Bank has been decreed for an amount of Rs.4,54,904/- along with interest.

5. The facts of the case are that respondent no.1/plaintiff filed the subject suit for recovery of Rs.4,54,904/- along with interest and costs by pleading that it had given vehicle (Chevrolet Tavera, Saloon) loan to the respondent nos.2 and 3/defendant nos.1 and 2.

The car loan was for an amount of Rs.5,35,000/-. The loan was granted after taking margin money from respondent nos.2 and 3/defendant nos.1 and 2 and the respondent nos.2 and 3/defendant nos.1 and 2 had executed the loan documents and related documents. The loan was repayable in 60 monthly installments of Rs.12,658/- w.e.f May, 2009. The vehicle in question was insured in terms of the insurance policy issued by the appellant/defendant no.3 and which insurance policy was renewed for the period of 29.3.2012 till 28.3.2013. The vehicle in question was stolen and with respect to which an FIR dated 12.6.2012 was lodged. In view of the respondent no.1/plaintiff/bank having a first charge on the vehicle on account of hypothecation of the vehicle, it asked the appellant/defendant no.3 to release the insured amount to the respondent no.1/plaintiff. The subject suit was filed by the respondent no.1/plaintiff for recovery of loan amount from respondent nos.2 and 3/defendant nos.1 and 2 and as against the appellant/insurance company to release the amount under the insurance policy directly to respondent no.1/plaintiff.

6.(i) The respondent nos.2 and 3/defendant nos.1 and 2 filed their written statement and did not deny the taking of loan. It was

pleaded that the respondent no.1/plaintiff/bank however did not have power to recover the loan as the vehicle was stolen. It was pleaded by the respondent nos.2 and 3/defendant nos.1 and 2 that the loan amount can be recovered by the respondent no.1/plaintiff/bank from the appellant/defendant no.3. Respondent nos.2 and 3/defendant nos.1 and 2 pleaded that they approached the respondent no.1/plaintiff/bank on 22.6.2012 with factum of theft and giving to the respondent no.1/plaintiff/bank the police complaint and FIR dated 12.6.2012. Respondent nos.2 and 3/defendant nos.1 and 2 therefore prayed for the dismissal of the suit.

(ii) The appellant/defendant no.3 filed its written statement and pleaded that it is not liable under the policy as the vehicle was insured as a private vehicle but the same was being illegally used as a commercial vehicle.

7. After pleadings were complete, the trial court framed the following issues:-

- “1. Whether the plaintiff is entitled to a decree of recovery of Rs.4,54,904/- against the defendant nos.1 & 2 with interest, as claimed? OPP
2. Whether the plaintiff is also entitled to decree of permanent injunction against defendant no.3 in respect of claim of vehicle no.UP-14-AT-8508 payable to defendant nos.1 and 2, if any? OPP

3. Whether the suit is not maintainable against defendant nos.1 & 2?
OPP
4. Relief.”

8. Whereas the respondent no.1/plaintiff/bank led evidence as also the defendant no.1 as DW-1, no evidence whatsoever has been led on behalf of appellant/defendant no.3.

9. This Court has to examine the issue of validity of the impugned judgment of the trial court as against the appellant/defendant no.3 and which is the insurance company.

10. The fact that the vehicle was insured with the appellant/defendant no.3 and the theft took place during the validity period of the insurance policy is not disputed. Insurance policy was proved and exhibited as Ex.DW1/11. The letter to the bank of the respondent nos.2 and 3/defendant nos.1 and 2 dated 22.5.2012 was proved and exhibited as Ex.PW3/5 and the letter dated 26.6.2012 written to the appellant/insurance company was proved as Ex.PW3/7. The original insurance policy issued by the appellant/insurance company was also proved as Ex.DW1/C.

11. The only issue to be addressed by this Court is as to whether the appellant/insurance company is not liable because there was breach of the terms of the insurance policy that the vehicle was to be used as a private vehicle but was instead illegally used for commercial purpose. I do not have to labour hard in this regard inasmuch as the issue is decided in terms of the recent judgment of the Supreme Court in the case of ***Lakhmi Chand Vs. Reliance General Insurance (2016) 3 SCC 100*** and wherein the Supreme Court held that breach of the terms of the insurance policy can be a ground for denying of the claim only when the insurance company establishes that the breach is fundamental and the breach had a connection with the insurance done under the insurance policy for denying the insurance claim. Supreme Court has held that even if there is a breach of policy, however, if the breach of a term of the policy had no connection or relationship with the accident, and accident is otherwise covered under the insurance policy, the insurance company cannot deny its liability. The relevant paras of the judgment in the case of ***Lakhmi Chand (supra)*** are paras 12 to 16 and these paras read as under:-

“12. The National Commission upheld the order of dismissal of the complaint of the Appellant passed by the State Commission. The National Commission however, did not consider the judgment of this Court in the case of *B.V. Nagaraju v. Oriental Insurance Co. Ltd.* In that case, the insurance company had taken the defence that the vehicle in question was carrying more passengers than the permitted capacity in terms of the policy at the time of the accident. The said plea of the insurance company was rejected. This Court held that the mere factum of carrying more passengers than the permitted seating capacity in the goods carrying vehicle by the insured does not amount to a fundamental breach of the terms and conditions of the policy so as to allow the insurer to eschew its liability towards the damage caused to the vehicle.

13. This Court in the said case has held as under:

“It is plain from the terms of the Insurance Policy that the insured vehicle was entitled to carry six workmen, excluding the driver. If those six workmen when travelling in the vehicle, are assumed not to have increased risk from the point of view of the Insurance Company on occurring of an accident, how could those added persons be said to have contributed to the causing of it is the pose, keeping apart the load it was carrying. In the present case the driver of the vehicle was not responsible for the accident. *Merely by lifting a person or two, or even three, by the driver or the cleaner of the vehicle, without the knowledge of the owner, cannot be said to be such a fundamental breach that the owner should, in all events, be denied indemnification. The misuse of the vehicle was somewhat irregular though, but not so fundamental in nature so as to put an end to the contract, unless some factors existed which by themselves, had gone to contribute to the causing of the accident.*” (emphasis supplied)

14. Further, in the case of *National Insurance Co. Ltd. v. Swaran Singh* a three judge bench of this Court has held as under:

“49. Such a breach on the part of the insured must be established by the insurer to show that not only the insured used or caused or permitted to be used the vehicle in breach of the Act but also that the damage he suffered flowed from the breach.

* * *

52. In *Narcinva case* a Division Bench of this Court observed:

“12.....The insurance company complains of breach of a term of contract which would permit it to disown its liability under the contract of insurance. If a breach of a term of contract permits a party to the contract complaints of breach to prove that the breach has been committed by the other party to the contract. The test in such a situation would be who would fail if no evidence is led.”

* * *

69. The proposition of law is no longer res-integra that the person who alleges breach must prove the same. *The insurance company is, thus,*

required to establish the said breach by cogent evidence. In the event the insurance company fails to prove that there has been breach of conditions of policy on the part of the insured, the insurance company cannot be absolved of its liability.” (emphasis supplied)

15. The judgment in the case of *Swaran Singh* has been followed subsequently in the case of *Oriental Insurance Co. Ltd. v. Meena Variyal*, wherein this Court held as under:

“16. We shall now examine the decision in *Swaran Singh* on which practically the whole of the arguments on behalf of the claimants were rested. On examining the facts, it is found that, that was a case which related to a claim by a third party. In claims by a third party, there cannot be much doubt that once the liability of the owner is found, the insurance company is liable to indemnify the owner, subject of course, to any defence that may be available to it Under Section 149(2) of the Act. In case where the liability is satisfied by the insurance company in the first instance, it may have recourse to the owner in respect of a claim available that behalf. *Swaran Singh* was a case where the insurance company raised a defence that the owner had permitted the vehicle to be driven by a driver who really had no licence and the driving licence produced by him was a fake one. There Lordships discussed the position and held ultimately that a defence Under Section 149(2)(a)(ii) of the Act was available to an insurer when a claim is filed either Under Section 163A or Under Section 166 of the Act. *The breach of a policy condition has to be proved to have been committed by the insured for avoiding liability by the insurer.* Mere absence of or production of fake or invalid driving licence or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the insured or the third party. *The insurance company to avoid liability, must not only establish the available defence raised in the proceeding concerned but must also establish breach on the part of the owner of the vehicle for which the burden of proof would rest with the insurance company. Whether such a burden had been discharged, would depend upon the facts breach on the part of the insured concerning a policy condition, the insurer would not be allowed to avoid its liability towards the insured unless the said breach of condition is so fundamental as to be found to have contributed to the cause of the accident.”*

16. It becomes very clear from a perusal of the above mentioned case law of this Court that the insurance company, in order to avoid liability must not only establish the defence claimed in the proceeding concerned, but also establish breach on the part of the owner/insured of the vehicle for which the burden of proof would rest with the insurance company. In the instant case, the Respondent-Company has not produced any evidence on record to prove that the accident occurred on account of the overloading of passengers in the goods carrying vehicle. Further, as has been held in the case of *B.V.*

Nagaraju that for the insurer to avoid his liability, the breach of the policy must be so fundamental in nature that it brings the contract to an end. In the instant case, it is undisputed that the accident was infact caused on account of the rash and negligent driving of the offending vehicle by its driver, against whom a criminal case vide FIR No. 66 of 2010 was registered for the offences referred to supra under the provisions of the Indian Penal Code. These facts have not been taken into consideration by either the State Commission or National Commission while exercising their jurisdiction and setting aside the order of the District Forum. Therefore, the judgment and order of the National Commission dated 26.04.2013 passed in *Lakhmi Chand v. Reliance General Insurance* is liable to be set aside, as the said findings recorded in the judgment are erroneous in law.”

12. Therefore, applying the ratio in the case of *Lakhmi Chand (supra)* the appellant/insurance company cannot deny its liability in the policy on the ground of breach of the terms of the policy of the vehicle being used for commercial purpose instead of private purpose inasmuch as the theft of the vehicle has no connection to the breach of using the insured vehicle for commercial purpose instead of private use.

13.(i) Learned counsel for the appellant/insurance company sought to argue that the insured, i.e the respondent nos.2 and 3/defendant nos.1 and 2, had committed breach of the policy by filing the FIR with delay of about three days and had given intimation to the appellant/insurance company after around 15 days, and which amounts to violation of the terms of the policy, however, on query

being put, counsel for the appellant/insurance company admitted that no such defences were raised as per the written statement and no such issues got framed, and therefore, such aspects are not decided by the impugned judgment. It was argued by the appellant/insurance company that such issues are issues of law and therefore this Court should examine the same but I cannot agree that the issues are issues of law. The issues which are urged are issues of fact as regards the factum of intimation as also what are the relevant clauses of the insurance policy and what is the effect of the alleged delayed intimation etc etc, and therefore I refuse to permit the appellant/insurance company to raise factual issues for the first time in this first appeal.

(ii) Even if the aforesaid issues are allowed to be raised, yet, since in terms of the ratio in the case of *Lakhmi Chand (supra)*, breach of such clauses of the insurance policy will have no connection with the insured event of theft, consequently, on such defences the appellant/insurance company cannot succeed in denying its liability for claim under the insurance policy in the facts of the present case.

14. There is no merit in the appeal. Dismissed.

SEPTEMBER 20, 2017/ Ne

VALMIKI J. MEHTA, J