

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

+ **RFA No. 669/2017**

% **31st July, 2017**

M/S ICICI LOMBARD GENERAL INSURANCE COMPANY LTD.

..... Appellant

Through: Mr.Sandeep Jha, Adv.

versus

SURESH MEHTA & ANR.

..... Respondents

CORAM:

HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. This Regular First Appeal is filed under Section 96 of the Code of Civil Procedure, 1908 (CPC) by the appellant insurance company challenging the impugned judgment dated 23.02.2017 whereby the suit filed by the respondent/plaintiff for recovery of Rs.10,53,177/- along with interest has been decreed.

2. The subject suit was filed by the respondent/plaintiff pleading that it had insured with the appellant consignment of 1488

cartons of fruit juice weighing 19497 kgs of the value of Rs.9,15,619.63 and which consignment was covered under the invoice numbers 73 to 75 dated 22.03.2010. The cartons in question of fruit juice were loaded from Bhiwandi to be delivered to M/s Sidhivinayak Marketing at Guwahati as per Lorry Receipt No.45302029 dated 22.02.2010. The services of the defendant no. 1 in the suit, respondent no. 2 herein, were taken with respect to transportation of the goods and the transportation was covered under the Marine Open Inland Policy No. 2001/57088864/00/000. Consignment was carried on vehicle bearing registration No.MP 09 HF 1329. This vehicle met with an accident between Indoor and Bhiwandi resulting in the consignment being delivered with 1082 cartons leaking and short supply of 137 cartons. With respect to the loss, a short/damage, certificate was issued by the transporter/respondent no. 2 on 05.05.2010. The surveyor of the appellant also reported loss of Rs.7,46,747.45 but appellant had rejected the claim inasmuch as the weight of the consignment was 19497 kgs but the permissible limit for carrying capacity of the vehicle in terms of the registration certificate of the vehicle was only 18367 kgs.

3. On behalf of the appellant reliance was placed on Warranty No. 1 of Schedule-I of the policy containing the terms and conditions which specifies that if the weight of the Cargo exceeds the registration laden weight of the carrying vehicle then loss/damage arising out of such transportation would not be covered under the insurance policy.

4. This issue of applicability of Warranty No. 1 was subject matter of issue no. 3 framed by the trial Court and has been dealt with in paras 14 to 23 of the impugned judgment. In these paras 14 to 23 the trial court has referred to recent judgment of Supreme Court in ***Lakhmi Chand Vs. Reliance General Insurance 2016 (3) SCC 100*** and which held that compensation under an insurance should not be denied unless and until the clause which is pleaded to be in breach is a reason for happening of the accident. It has been held by the trial court in the facts of the present case that accident in this case had not happened on account of the breach of the clause Warranty No. 1 with respect to higher carrying weight of the vehicle but the accident had occurred on account of driver trying to save few animals crossing the road. These relevant paras 14 to 23 of the judgment reads as under:-

“14. Onus of proving this issue is upon the plaintiff who has examined himself as PW1 and has placed his reliance upon the policy bearing No. 2001/57088864/00/000 vid Ex.PW-1/6. He has also placed reliance upon the copies of the invoices dated 22.03.2010 which are Ex.PW-1/2 to Ex.PW-1/4, copy of the consignment/lorry receipt dated 22.03.2010 vide Ex.PW-1/5, copy of short/damage/breakage certificate dated 05.05.2010 vide Ex.PW-1/7 and copy of surveyor report vide Ex.PW-1/9. It is argued by Ld. counsel for the defendant that the plaintiff (PW1) has failed to prove that he is proprietor of the insured firm M/s Marex International Delhi, and also not filed any certificate from the office of Registrar of Firms to show that he has competent person to file the present suit and therefore, the present suit is not maintainable.

15. On merits, it is submitted that as per registration certificate exhibited as PW-1/D2-1 the gross vehicle weight (which includes the weight of the vehicle) as allowed by the transport department was 25000 Kg. and after deducting the weight of the vehicle the vehicle was allowed to carry a weight of 18367 kgs whereas at the time of accident the weight of the goods carried in the vehicle was 19497 kg. and hence the vehicle was overweight. As per report of the surveyor Ex.D2W1/2, the goods carried in the vehicle were in excess then the authorized one as per RC exhibited PW1/D2-1. In this regard, the policy alongwith terms and conditions Ex. PW-1/6 as filed by the plaintiff, the warranty clause description is as under:

“.....Warranty description --- It is warranted that if the weight of the cargo exceeds then the registration laden weight/licensed carrying capacity of the vehicle, as mentioned in the registration certificate of the vehicle, then any loss or damage arising out of such transit is not covered under the above mentioned policy.....”

16. It is argued by the Ld. Counsel for the defendant that since there is a clear violation of warranty description of the policy terms and conditions therefore, the claim was not payable which was duly informed to the insured vide letter dated 17.07.2010 i.e. Ex.PW-1/12. The defendant has placed its reliance upon the judgment in the case of ***“United India Insurance Co. Ltd. Vs. Harchand Rai Chandan Lal” Civil Appeal No. 6277 of 2004 (Arising out of SLP (c)No. 19771 of 2003) decided on 24.09.2004.***

17. On the other hand, the case of the plaintiff is that the defendant No. 2 is a private limited company and no resolution or authorization letter or power of attorney in favour of Ms. Pooja Sharma, Manager Legal of the Defendant no. 2 was filed alongwith the written statement and even subsequently no resolution or authorization letter or power of attorney in favour of Sh. Vikas Goyal, Manager who deposed as D2W1 for the defendant no. 2 has been filed and hence the written statement filed by the defendant no. 2 is neither signed, verified & filed by any competent person therefore the written statement as filed by defendant no. 2 is no written statement in the eyes of law and is liable to be rejected and further Shri Vikas Goyal, Manager who deposed as D2W1 has no authority to appear for

and on behalf of defendant no. 2 as such defendant no. 2 has failed to prove any of its defence to the present suit which is to be decreed against both the defendants.

18. It is also argued by the counsel for the plaintiff that on 02.04.2010 when the insured vehicle was on its way to Guwahati and while passing Bhopal (Madhya Pradesh), the driver had lost control when a few animals suddenly came on the road as a result of which the truck got unbalanced/overtaken. It is pointed out that Marine Survey Report confirms that the cause of accident was not due to overloading of the vehicle or rash and negligent driving. In this regard, the plaintiff has placed reliance upon the judgment in the case of ***Lakhmi Chand Versus Reliance General Insurance (Civil Appeal No. 49-50/2016 dated 07.01.2016)***

19. I have considered rival contentions and evidence on record. I have also gone through the Marine Survey Report dated 30.06.2010 Ex. D2W1/1. At the very outset, I may observe that on page 3 of the Marine Survey Report dated 30.06.2010 (Ex.DW1/1), the cause of accident has been shown as under:

CAUSE AFTER	At Vill. Khaguri, Near Bhopal truck
EXAMINATION	overtaken when driver lost his
ATTRIBUTED TO	control while saving on animals and
	Vehicle.

20. Further, on page 4 of the Marine Survey Report dated 30.06.2010 (Ex.D2W1/1) the cause of accident has been further shown in details as under:

“SCHEDULE

“.....On 02nd April, 2010 Vehicle MP-09-HF-1329 was on its way to Guwahati. While passing Bhopal (M.P.) suddenly while saving few animals crossing the road, driver loss his control and truck got unbalanced/overtaken.....”

21. Hence, it is evidence from the above that the **Marine Survey Report** confirms that the cause of accident was not due to overloading of vehicle or any rash/negligent driving but **due to the fact that some animals suddenly tried to cross the road and the driver while trying to save the animals and other vehicle on road, lost his control.** Upon similar facts, the Hon’ble Supreme Court in the case of ***“Lakhmi Chand Versus Reliance General Insurance” (Civil Appeal No. 49-50/2016 dated 07.01.2016)*** has observed as under:

“.....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 evident. 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”.....

“..... 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 defence available to the insurer against either the insured or the third party. The insurance company to avoid liability, must 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.** 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 (supra)* 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 in fact caused on account of 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 IPC. 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 the Revision Petition No. 2032 of 2012 is liable to be set aside, as the said findings recorded in the judgments are erroneous in law”.....

22. Applying these settled principles of law to the facts of the present case, I may observe that the **Defendant No. 2 has failed to prove the fact that the accident occurred due to overloading of vehicle/lorry therefore in view above mentioned facts and circumstance, the rejection of plaintiff's claim by the Defendant No. 2 on the ground that there is breach of terms and conditions of the policy i.e. warranty no. 1 Schedule No. 1 stating thereby that the vehicle/lorry was overload is illegal, wrong and by no means absolve the defendant no. 2 from its liability.**

23. Further on the aspect of overloading of vehicle, the record confirms that the total weight of the goods loaded in the lorry was 19497Kg. Admittedly, at no point of time the defendant no. 2 has raised any objection

in respect of the overloading of the lorry nor the defendant no. 2 enquired about the gross weight of the lorry as per the registration certificate. Hence, it stands established that at the time of loading, the defendant no. 2 was aware about the weight of goods being loaded in lorry despite which the defendant no. 2 issued marine open land policy in respect of the consignment without raising any objection to the overload and hence the defendant no. 2 is stopped from raising any objection in respect of overloading of lorry.” (emphasis added)

5. I completely agree with the aforesaid conclusion of the trial court that appellant cannot avoid its liability under the policy because it is not because of the breach of Warranty No.1 which caused the accident because the accident took place as the driver trying to avoid animals which were crossing the road, and, Supreme Court in *Lakshmi Chand's* case (*supra*) has clearly held that insurer cannot be allowed to avoid its liability towards the insured unless the breach of the condition is so fundamental and has contributed to the cause of the accident, and it is found that in the present case the accident had not happened because of the extra weight of the carrying vehicle but because of the driver trying to avoid the animals who were crossing the road.

6. There is no merit in this appeal. Dismissed.

JULY 31, 2017/mr

VALMIKI J. MEHTA, J