



\$~43

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

%

Date of Decision 31.01.2024

+ **RFA(COMM) 23/2024 & CM APPL. 5819/2024, CM APPL. 5820/2024, CM APPL. 5821/2024 and CM APPL. 5822/2024**

IFFCO-TOKIO GENERAL INSURANCE
CO. LTD.

..... Appellant

Through: Mr Siddharth Sharma, Advocate

versus

MR. SARDUL SINGH

..... Respondent

Through:

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

HON'BLE MS. JUSTICE TARA VITASTA GANJU

TARA VITASTA GANJU, J

CM No. 5821/2024 [Exemption]

1. Allowed, subject to all just exceptions.
2. The Application stands disposed of.

CM APPL. 5822/2024 [Condonation of delay]

3. For the reasons stated in the Application, the delay in re-filing the Appeal is condoned.
4. The Application stands disposed of.

RFA(COMM) 23/2024 & CM APPL. No.5819/2024 [Application seeking interim relief]

5. The present Appeal has been filed impugning the Judgment dated 08.08.2023 [hereinafter referred to as "Impugned Judgment"] passed by the District Judge (Commercial Court -01) South District, Saket



Courts, New Delhi [hereinafter referred to as the “Commercial Court”]. By the Impugned Judgment, the Plaintiff (Respondent herein) has been held to be entitled to recovery of a sum of ₹14,28,000/- along with pendente lite and future interest at the rate of 12% per annum from the Appellant and litigation costs in the sum of ₹25,000/-.

6. Briefly, the facts are that the Respondent purchased a vehicle TATA Truck 2515 bearing Registration No. HR-46D-7831 [hereinafter referred to as “the Truck”]. The Truck was insured by the Appellant/IFFCO-Tokio General Insurance Co. Ltd. [hereinafter referred to as “IFFCO-Tokio”] by a policy bearing no. 86848036 dated 12.05.2014 [hereinafter referred to as “Insurance Policy”].
- 6.1 It is a case of the Respondent that the Truck was used by the Respondent for the purpose of his livelihood. On the intervening night of 09/10.11.2014 the Truck was driven from Delhi to Bulandsehar, Uttar Pradesh by a Driver of the Respondent. At around 1 am, the driver had stopped on the side of the road, as the engine of the Truck had heated up. The Driver left the Truck unattended, in search of water, but upon his return, he found that that the Truck has been stolen.
- 6.2 A Police complaint was lodged by the Respondent, reporting the theft of the Truck which culminated into an FIR No. 986/2014 under Section 379 of Indian Penal Code, 1860 [hereinafter referred to as “IPC”] being registered. After investigation, the case was closed and an “untrace report” was filed by the Police before the concerned Magistrate on 17.03.2015 as neither the offender nor the stolen Truck



could be found.

- 6.3 Admittedly, the Truck was covered by the Insurance Policy and the IFFCO-Tokio had received the premium for insuring the same. Accordingly, a claim was lodged by the Respondent with IFFCO-Tokio for receipt of insurance monies pursuant to the theft of the Truck. IFFCO-Tokio denied the claim, which lead to the Respondent filing a suit for recovery in the sum of Rs. 14,28,000/- being the value of the Truck along with interest.
- 6.4 The suit was contested by IFFCO-Tokio and it was submitted that the Respondent had been negligent in reporting the theft of the Truck. It was further stated that since the Driver of the Truck left the Truck unattended and unlocked, with a key in the Truck itself, the conditions of the Insurance Policy were violated. It was, thus, contended by the IFFCO-Tokio that no sums are due or payable to the Respondent.
- 6.5 The learned Commercial Court framed the issues, whether there was negligence on the part of the Respondent, and whether the Respondent is entitled to a decree in the sum of Rs. 14,28,000/-.
- 6.6 Both parties led their respective evidence in the matter. The burden of proof for denial of the claim on account of negligence and for non-compliance of the Insurance Policy was placed on IFFCO-Tokio.
- 6.7 After a detailed examination of the documents filed and evidence led by the parties, the learned Commercial Court held that the Police authorities found nothing suspicious or doubtful regarding the theft and that IFFCO-Tokio failed to establish its case of negligence. Accordingly, it was held that the Respondent is entitled to recover the loss value of the Truck from IFFCO-Tokio.



7. In these circumstances, as set forth above, the learned Commercial Court decreed the suit along with costs and interest to the Respondent.
8. Learned Counsel appearing for the IFFCO-Tokio has challenged the Impugned Judgment. It is contended that the Impugned Judgment passed is in contravention of Clause 5 of the Insurance Policy in as much as the Respondent was required to take all reasonable steps to safeguard the Truck against for loss or damage but failed to do so. Since, the Driver had left one key in the Truck and dropped the other key, the Respondent is in breach of the Policy.
 - 8.1 It was further averred on behalf of IFFCO-Tokio, that reporting of the theft of the Truck was delayed and, hence, the Truck could not be recovered. This is also claimed to be an act of negligence on the part of the Respondent.
 - 8.2 Lastly, it is contended that the learned Commercial Court has erred in awarding interest 'twice' in the present case, which is barred by law. Hence, it was submitted that the Impugned Judgment is required to be set aside.
9. It is apparent from the record that the principal reason for non-payment of the claim by IFFCO-Tokio was the alleged non-compliance of Clause 5 of the Insurance Policy by the Respondent. The contention of IFFCO-Tokio, that leaving the Truck unattended was an open invitation to thieves has been rejected by the learned Commercial Court.
10. Clause 5 of the Insurance Policy is reproduced below:

“5. The insured shall take all reasonable steps to safeguard the vehicle insured from loss damage and to maintain it in efficient condition and the company shall have at all times free and full



*access to examine the vehicle insured or any part thereof or any driver employee of the insured. **In the event of any accident or breakdown, the vehicle insure [sic-insured] shall not be left unattended without any proper precautions being taken to prevent further damage or loss** and if vehicle insured be driven before the necessary repairs are effected any extension of the damage or any further damage to the vehicle shall be entirely at the insured's own risk."*

[Emphasis is ours]

11. A careful reading of Clause 5 of Insurance Policy shows that it provides that the proper precautions shall also be taken by a Driver or employee of the insured in the event of a breakdown to prevent further damage or loss to the vehicle before necessary repairs are effected. This is exactly what was done by the Driver of the Respondent.
- 11.1 It is the case of the Respondent that since the Truck had heated up, the Driver stepped out from the Truck to find water, to cool it down. Given the fact that it was in the middle of the night and on a highway, the Driver had no option but to leave the Truck in search of water to prevent any damage to the Truck.
- 11.2 Quite obviously if a person is required to take care of the vehicle, he would have to try and cool down the vehicle in case it heats up. Since, it was the middle of the night and the Respondent was on the highway, it is not difficult to accept that his options were limited. In these circumstances, it cannot be said that the Respondent was in violation of Clause 5 of the Insurance Policy.
12. IFFCO-Tokio has also averred that the key of the ignition was left in the Truck by the Driver, hence he was negligent. However, from an examination of the evidence¹, which was placed before the learned

¹ Cross-examination of PW-1. Sh. Sardul Singh dated 02.04.2022.



Commercial Court, it is seen that the key of the ignition was in the pocket of the Driver, which fell out when he stepped out to get water and that such key was recovered by the Police authorities later from the site where the Truck disappeared on 16.11.2014, and it was deposited with the police authorities.

- 12.1 The contention that the Respondent did not report the theft the next day and the registration of the complaint was only done 4-5 days later by the Respondent is also unmerited. The Respondent has averred in his evidence that he had reported the theft on the next morning itself however since the local Police authorities were busy in election duty, the FIR was registered after 4-5 days. The copy of the FIR forms part of the record of the Commercial Court.
- 12.2 After an investigation was conducted by the police authorities, an untraced/final report was filed with the Chief Judicial Magistrate on 20.12.2014, which was accepted by the Court of the Chief Judicial Magistrate Bulandsehar, Uttar Pradesh. Both the chargesheet and the Court order form part of the evidence. No document was placed on record by IFFCO-Tokio, evidencing that the Respondent had any involvement with the theft of the Truck.
- 12.3 It is based on these findings that the learned Commercial Court had found in favour of the Respondent and had held that IFFCO-Tokio had failed to discharge the burden of negligence on the part of Respondent.
13. The Supreme Court in the case of *Ashok Kumar v. New India*



*Assurance Co. Ltd.*² has held that for violation of a condition of a policy to be a breach, it has to be in the nature of a “fundamental breach” for the insurer to repudiate a claim. In that case, the Supreme Court did not accept that leaving a key in the ignition of the insured vehicle would entitle the insurer to repudiate the insurance claim. The relevant extract from the said decision is set out below:

“30. It is well settled in a long line of judgments of this Court that any violation of the condition should be in the nature of a fundamental breach so as to deny the claimant any amount. (See Manjeet Singh v. National Insurance Co. Ltd. [Manjeet Singh v. National Insurance Co. Ltd., (2018) 2 SCC 108 : (2018) 1 SCC (Civ) 623] ; B.V. Nagaraju v. Oriental Insurance Co. Ltd. [B.V. Nagaraju v. Oriental Insurance Co. Ltd., (1996) 4 SCC 647] , National Insurance Co. Ltd. v. Swaran Singh [National Insurance Co. Ltd. v. Swaran Singh, (2004) 3 SCC 297 : 2004 SCC (Cri) 733] and Lakhmi Chand v. Reliance General Insurance [Lakhmi Chand v. Reliance General Insurance, (2016) 3 SCC 100 : (2016) 2 SCC (Civ) 45] .)

31. It is an admitted position in the repudiation letter and the Survey Report that the theft did happen. What is alleged is that the Claimant was negligent in leaving the vehicle unattended with the key in the ignition. Theft is defined in Section 378 IPC as follows:

“378. Theft.—Whoever, intending to take dishonestly any moveable property out of the possession of any person without that person's consent, moves that property in order to such taking, is said to commit theft.”

32. As will be seen from the definition, theft occurs when any person intended to take dishonestly any movable property out of the possession of any person without that person's consent, moves that property in order to such taking. It is not the case of the Insurance Company that the Claimant consented or connived in the removal of the vehicle, in which event that would not be theft, in the eye of the law. Could it be said, as is said in the repudiation letter, that the theft of the vehicle was totally the result of driver Mam Chand leaving the vehicle unattended with the key in the

² (2024) 1 SCC 357



ignition? On the facts of this case, the answer has to be in the negative.

[Emphasis is ours]

- 13.1 We find that the law as laid down in the **Ashok Kumar** case squarely applies to the present case. As stated above, the Driver got off the Truck in search of water on account of the breakdown of the Truck. The key of the door of the Truck was not left in the ignition but in the dashboard. The key of the ignition of the Truck accidentally fell out of the Driver's pocket but was later discovered by the Police authorities at the accident site. There is no allegation that the Respondent had connived in the theft of the Truck nor has any evidence of the same been lead.
- 13.2 The principal contention canvased on behalf of IFFCO-Tokio is that there was a breach of Clause 5 of the Insurance Policy. However, we are unable to accept this contention in the given facts of this case.
14. The only other issue raised by the IFFCO-Tokio is the fact that the insured value of the vehicle was ₹10,50,000/- but the learned Commercial Court had awarded ₹14,28,000/- and has, thus, wrongly awarded excess interest.
- 14.1 This contention of IFFCO-Tokio is misconceived. Admittedly, the IDV (Insured Declared Value) of the Truck was ₹10,50,000/-. The suit was filed by Respondent for recovery of ₹14,28,000/-, which included the value of Truck as above, along with interest for the period from the date of denial of the claim up to the date of filing the suit, i.e., from 03.02.2016 to 30.01.2019. The learned Commercial Court has awarded Rs. 3,78,000/- as pre-suit interest and has in



addition also awarded *pendente lite* and future interest along with ₹25,000/- as costs of the litigation. We find no infirmity with these findings of the learned Commercial Court either.

15. In view of the reasons stated, this Court finds no reason to interfere with the Impugned Judgment.
16. The Appeal is, accordingly, dismissed. All pending Application(s) stand disposed of.

TARA VITASTA GANJU, J

VIBHU BAKHRU, J

JANUARY 31, 2024/SA