

The Senior Divisional Controller Vs. M/s Sai Traders

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Court : Karnataka

Decided On : Dec-23-2020

Judge : Ashok G.Nijagannavar

Appeal No. : MFA 4481/2014

Appellant : The Senior Divisional Controller

Respondent : M/s Sai Traders

Judgement :

R IN THE HIGH COURT OF KARNATAKA AT BENGALURU DATED THIS THE23D DAY OF DECEMBER, 2020 BEFORE THE HON'BLE MR.JUSTICE ASHOK G. NIJAGANNAVAR MISCELLANEOUS FIRST APPEAL NO.6416 OF2014(MV-DM) C/W MISCELLANEOUS FIRST APPEAL NO.4481 OF2014(MV-I) IN M.F.A.NO:

6416. 2014: BETWEEN: NATIONAL INSURANCE CO. LTD., 4TH FLOOR, 5-9-13, ROOM NO.413/415, TARAMANDALA COMPLEX, SAIFATHAN, HYDERABAD, ANDRA PRADESH - 500 064, NOW REPRESENTED BY ITS REGIONAL MANAGER, NATIONAL INSURANCE CO. LTD., REGIONAL OFFICE, SUBHARAM COMPLEX, 144, M.G.ROAD, BANGALORE - 560 001. ...APPELLANT (BY SRI A.N.KRISHNA SWAMY, ADVOCATE) AND:

1. THE SENIOR DIVISIONAL CONTROLLER, KSRTC, MANGALORE DIVISION, MANGALORE - 575 001.

2. M/S SAI TRADERS, REP. BY T.VENKAT REDDY, 2 H.NO.6-14/1, CHAND NAGAR, R.R.DISTRICT, RANGAREDDI, ANDHRA PRADESH-501520. RESPONDENTS (BY SRI D.VIJAYAKUMAR, ADVOCATE FOR R1, R2 IS SERVED) **** THIS MISCELLANEOUS FIRST APPEAL IS FILED UNDER SECTION1731) OF MV ACT AGAINST THE

JUDGMENT

AND AWARD DATED:

13. 03.2014 PASSED IN MVC NO.409/2011 ON THE FILE OF THE III ADDITIONAL SENIOR CIVIL JUDGE AND JMFC, MANGALORE, D.K., AWARDED COMPENSATION OF RS.1,50,000/- WITH INTEREST @ 6% P.A FROM THE DATE OF PETITION TILL REALIZATION. IN M.F.A.NO:4481/2014: BETWEEN: THE SENIOR DIVISIONAL CONTROLLER, K.S.R.T.C MANGALORE DIVISION, MANGALORE, REP. BY ITS MANAGING DIRECTOR, K.S.R.T.C., CENTRAL OFFICE, K.H.ROAD, BANGALORE-560027. ...APPELLANT (BY SRI D VIJAYAKUMAR, ADVOCATE) AND:

1. M/S SAI TRADERS, REP.BY SRI.T.VENKAT REDDY, H.NO.6-14/1, CHAND NAGAR, R.R.DIST.RANGAREDDI, ANDHRA PRADESH-561520. 3

2. THE NATIONAL INSURANCE CO.LTD., 4TH FLOOR, 5-9-13, ROOM NO.413/415, TARAMANDALA COMPLEX, SAIFATHAN, HYDERABAD, ANDHRA PRADESH-500064. RESPONDENTS (BY SRI A N KRISHNASWAMY, ADVOCATE FOR R2, NOTICE TO R1 IS DISPENSED WITH VIDE

ORDER

DATED:

30. 08.2017) **** THIS MISCELLANEOUS FIRST APPEAL IS FILED UNDER SECTION1731) OF MV ACT AGAINST THE

JUDGMENT

AND AWARD DATED:

13. 03.2014 PASSED IN MVC NO.409/2011 ON THE FILE OF THE II ADDITIONAL SENIOR CIVIL JUDGE, MACT, JMFC, MANGALORE, D.K., PARTLY ALLOWING THE CLAIM PETITION FOR COMPENSATION AND SEEKING ENHANCEMENT OF COMPENSATION. THESE APPEALS HAVING BEEN HEARD THROUGH VIDEO CONFERENCE AND RESERVED FOR

JUDGMENT

, COMING ON FOR PRONOUNCEMENT OF

JUDGMENT

, THIS DAY, THE COURT PRONOUNCED THE FOLLOWING:

JUDGMENT

M.F.A. No.4481/2014 has been filed by the claimant - KSRTC, while M.F.A. No.6416/2014 has been filed by National Insurance Company Ltd., who is the insurer of the offending vehicle. Both appeals have been filed assailing the judgment and award dated 13.03.2014 passed in M.V.C. No.409/2011 by the III4Addl. Senior Civil Judge & MACT, Mangalore (hereinafter referred to as Tribunal for the sake of brevity).

2. For the sake of convenience, the parties shall be referred to in terms of their status and ranking before the Tribunal.

3. The facts briefly stated are, that on 25.09.2007 KSRTC Volvo bus bearing registration No.KA-01-F-8338 was going from Mangalore to Bombay. When the said bus was moving on Poona Bangalore Road within the limits of Garag Police Station, a lorry bearing registration No.AP-28-X-4931 came from service road towards left side of the Poona Bangalore highway road suddenly and dashed against the Volvo bus. Due to the said accident, left side body of the KSRTC Volvo bus was damaged. 5

4. The KSRTC filed a claim petition seeking compensation of Rs.3,74,840/- towards damage caused to the Volvo bus and Rs.5,60,000/- towards loss of income during the period of repair.

5. The Tribunal on appreciating the oral and documentary evidence on record allowed the petition in part. The claim of the petitioner - KSRTC in respect of the damage to an extent of Rs.1,38,840/- was dismissed, but the claim in respect of loss of revenue to an extent of Rs.1,50,000/- was allowed along with interest at 6% per annum.

6. Being aggrieved by the said judgment and award, the claimant - KSRTC has preferred the appeal. While the National Insurance Company Ltd., being the insurer of the offending vehicle has challenged the order directing to pay the loss of income. 6

7. The learned counsel for the Insurance Company (appellant in M.F.A. No.6416/2014) being the insurer of the offending vehicle, would contend that as far as first claim for damages / compensation in respect of the damage caused to the vehicle is concerned, the claimant - KSRTC has received the compensation from the insurer of the Volvo bus towards full and final settlement of its claim. Thus, the claimant is estopped from claiming damages against the insurer of the offending vehicle. As far as the second claim regarding loss of revenue is concerned, it is the contention of the learned counsel that as per clause 17 (xvii) of sub- section (2) of Section 72 of Motor Vehicles Act and Rule 69-A of the Motor Vehicles Rules, the claimant - KSRTC has to maintain spare vehicles and the evidence on record clearly goes to show that the spare vehicles have been plied on the said route of Mangalore to Bombay during the repair period. As such, there is no loss of income whatsoever as alleged by the claimant - KSRTC. 7 When there is alternative arrangement of spare buses on the prescribed route during the repair period, there are no valid reasons to show that the claimant - KSRTC has incurred loss. In support of his contention, the learned counsel has relied on the following decisions: i. Harkhu Bai and others vs. Jiyaram and others reported in AIR 2003 KAR2125ii. M.F.A. No.22143/2009 (MV) in the case of North West Karnataka Transport Corporation vs Pushpaja and another 8. The learned counsel for the claimant - KSRTC (appellant in M.F.A. No.4481/2014), submits that the Tribunal has failed to appreciate the oral and documentary evidence placed on record. The rejection of the claim of Rs.1,38,840/- towards difference of cost of damages incurred for repair of the bus is not proper and justified. Even the

compensation of Rs.1,50,000/- awarded towards loss of revenue during the period of repair is too meager and disproportionate. The Tribunal has not properly appreciated the decisions relied on by the claimant - KSRTC and has erroneously rejected the claim. In support of the said contention, the learned counsel has relied on the following decisions: i. Ramchandra vs. Niyaz Hussain and others reported in 2005 ACJ1294ii. Oriental Insurance Co. Ltd. vs. Mahableshwar Sinai Salelkar and others reported in 1989 ACJ425iii. National Insurance Co. Ltd. vs. Madhulika Lal and others reported in 2007 ACJ2091iv. United India Insurance Co. Ltd. vs K.Chandrasekharachari & another reported in 2006 (2) APLJ445(HC) 9. Having heard the learned counsels for the respective parties and on perusal of the impugned judgment and award passed by the Tribunal, the following points would arise for consideration: i. Whether the insurer of the offending vehicle is liable for payment of balance compensation towards damages even if the claimant is admitted to have received some portion of the compensation from the Insurance Company for the damage caused to the Volvo bus?. ii. Whether the insurer of the offending vehicle is liable to pay the loss of revenue during the repair period?. iii. Whether the compensation awarded by the Tribunal calls for modification, in other words, whether the claimant - KSRTC is entitled for enhancement of compensation towards loss of revenue during the repair period?.

10. The claimant - KSRTC has claimed compensation under two heads namely: i. Difference amount of repair charges of Rs.1,38,840/- from the insurer of the offending vehicle (lorry) after part settlement of claim by the insurer of the Volvo bus. 10 ii. Loss of revenue / income during the repair period.

11. The claim for the difference amount of Rs.1,38,840/- has been rejected by the Tribunal on the reason that the claim of KSRTC has been settled by the insurer of the Volvo bus by making payment of Rs.2,36,000/- towards full and final settlement. Thus, the claimant - KSRTC is estopped from claiming the difference amount.

12. As far as the claim regarding the difference amount of Rs.1,38,840/- is concerned, the learned counsel for the claimant - KSRTC relying on the decisions stated above, strenuously contended that the Tribunal ought to have considered

the damages suffered by the vehicle and amount received by the claimant towards repair charges. The amount paid by the Insurance Company of the Volvo bus is under separate contract between the owner of the bus and the insurer. The tortfeasor cannot take advantage of the owners 11 contract with third party and the rule of subrogation is also not applicable in such cases and the right of the owner of vehicle to claim compensation against the offending vehicle is not prohibited under law.

13. Per contra, learned counsel for the Insurance Company of the offending vehicle contended that when the owner of the Volvo bus has received the compensation in respect of the repair charges at Rs.2,36,000/- towards full and final settlement, the claim for the difference amount is not justified. In order to substantiate the said contention, the learned counsel has relied on a decision reported in 2005 ACJ1332 in the case of Harkhu Bai and others vs. Jiyaram and others.

14. It is an admitted fact that, on account of the accident that occurred on 25.09.2007, the Volvo KSRTC bus is damaged and it was repaired by M/s.Azad Coach Builders Pvt. Ltd. The total cost of the repair was 12 Rs.3,74,840/-. The oral and documentary evidence placed on record confirms the same. The claimant has received only a sum of Rs.2,36,000/- towards repair charges as against a sum of Rs.3,74,840/-. Exhibit-P12 is the Settlement Intimation Voucher which discloses that a sum of Rs.2,36,000/- is paid by M/s. United Insurance Company to the claimant - KSRTC. The next document is Claim Disbursement Voucher for the said amount which does not bear the receivers signature. Even there is no specific mention in Exhibit-P12 that the claimant has agreed to receive a sum of Rs.2,36,000/- in full satisfaction and discharge of the claim.

15. It is pertinent to note that the KSRTC being the owner of the Volvo bus has claimed the compensation of difference amount of repair charges after receiving some portion of the repair charges from the insurer of its Volvo bus. In a decision reported in 13 2005 ACJ1294 in the case of Ramachandra vs. Niyaz Hussain and others, it is observed as under: 7. .Section 166 of the Act provides that an application for compensation arising out of an accident of a nature specified in

Sub- section (1) of Section 165 may be made, (a) by the person who has sustained the injury; or (b) by the owner of the property. Therefore, it is clear that a claim petition can be filed by the owner of the property against the offending vehicle also. In that case, if the vehicle is comprehensively insured, the owner of the vehicle may also claim compensation from his own insurance company for the loss of damage caused to the vehicle with which the vehicle is insured and may also claim compensation from the owner or insurer of the offending vehicle. Obviously, now it is clear that under Section 166 of the Act, the owner of the property can also file a petition for claiming compensation for the damages to property. To answer the aforesaid question in the case of *Dr. A.C. Mehra v. Behari Lal*, 1998 ACJ379(Delhi), the learned Judge of Delhi High Court was of the view that the amount paid by the insurance company is paid under a separate contract between the owner and the insurer of the jeep. Tortfeasor cannot take advantage of the owner's contract with third party and the rule of subrogation is also not applicable in such cases and the right of the owner of vehicle to file a claim petition against the offending vehicle is not barred. The Division Bench of Allahabad High Court while dealing with almost a similar question in the case of *Union of India v. Deoria Sugar Mills Ltd.*, 1980 ACJ140(Allahabad), has also held that the plaintiff having received part of damages from his own insurance company, he was also entitled to receive damages from the Railways. In that case, it was held that the compensation of the insurance company was that of an indemnity. The railway company which caused damage to the consignee, continues to be primarily liable for the damages sustained by the plaintiff. It, not being a party to the contract of indemnity, cannot be absolved of its liability to pay the damages to consignor merely because the consignor had already received the money from the insurance company, under a contract of insurance. The Supreme Court also in the case of *Union of India v. Sri Sarada Mills Ltd.*, AIR 1973 SC281 held that subrogation does not confer any independent right on underwriters to maintain in their own name and without reference to the persons assured an action for damages to the thing insured.

8. Therefore, from the aforesaid discussion and in the light of the decisions cited (supra), it is clear that the contract of the owner of the vehicle with its insurance company is a separate contract and if any claim is received under the said

contract, the same cannot be treated as bar to claim compensation from the offending vehicle on the ground that some part of the money has already been received by the owner of the vehicle from its own insurance company. In this case, the liability of the insurance company of the offending vehicle itself is a liability against third party risk, therefore, for the rest of the amount the insurance company of the offending vehicle may be made liable and the claim of the claimant cannot be rejected solely on the ground that he has not made his own insurance 16 company as party. I think in this case the Tribunal was wrong in dismissing the claim of the claimant. Tribunal ought to have considered the loss of vehicle and the damages suffered by the vehicle and to have deducted the amount awarded by the insurance company of the vehicle and if the same is not awarded properly should have apportioned the liability of the offending vehicle and also its insurance company. Insurance company of the vehicle cannot say that it is a case of double enrichment or claimant is not entitled for any compensation or its liability is over because he has already received some compensation from his own insurance company.

16. In a decision reported in 1989 ACJ425 in the case of Oriental Insurance Co. Ltd., vs Mahableshwar Sinai Salelkar and others, it is observed as under: 4. The plea of estoppel does not involve pure question of law, but in any case, it is a mixed question of law and fact. Since it was not pleaded, the respondents had no 17 opportunity to meet it, and obviously therefore, no issue was framed. Such a plea which involves mixed questions of law and fact cannot be raised for the first time in appeal, moreto, in the absence of any foundation or material in that behalf.

17. In a decision reported in 2007 (3) KLJ300 in the case of Hanumanthappa vs Ganapathi R.Kini and another, it is observed as under: 6. It is, therefore, clear from the aforesaid observation that the facts in the said case disclose that the claimant therein had accepted the compensation from his insurer in full and final settlement of his claim without any reservation or demur and secondly, that was the case where there was no material placed by the claimant to show that the claim paid by the insurance company was only a part of the total damage. Whereas, in the case on hand, a perusal of page 2 of the award goes to indicate that the appellant did take a stand before the Tribunal that he was paid only Rs.60,000/- by his insurer

and therefore, the appellant had to 18 prefer the claim petition claiming the balance amount from the insurer of the other vehicle.

18. In the claim petition filed before the Tribunal, it is specifically stated that the KSRTC has received part of the claim towards cost of repair charges and the balance amount is payable by the insurer of the offending vehicle. The amount received by KSRTC from the insurer of the Volvo bus cannot be construed as the payment received towards full and final settlement of its claim. In the light of the aforesaid decisions relied on by the learned counsel, it is clear that the KSRTC - owner of the Volvo bus can claim the difference amount towards cost of repair from the insurer of the offending vehicle. The Tribunal was wrong in dismissing the claim of the KSRTC. The finding given rejecting the claim for the balance sum of Rs.1,38,840/- is erroneous and the same is liable to be set aside. 19

19. Regarding loss of revenue / income during the repair period, it is the contention of the learned counsel for the claimant - KSRTC that the Tribunal has committed error in awarding compensation of Rs.1,50,000/- only towards loss of revenue caused to the KSRTC and has miserably failed to appreciate the evidence placed on record. The average revenue derived from the Volvo bus is Rs.50/- per kilometer and cost of operation is Rs.30/- per kilometer. But the Tribunal has erroneously taken the loss of income as Rs.5,000/- per day and for a period of 30 days for its repair. The amount awarded is meager and unreasonable.

20. As against the said contention, the learned counsel for the Insurance Company has submitted that the Transport Authority while issuing the stage carriage permit to the transporters would compulsorily incorporate condition directing the permit holder to maintain spare vehicles. In the instant case, the 20 claimant - KSRTC having used the spare vehicles for plying on the route from Mangalore to Bombay, as such, the KSRTC has not suffered any loss of revenue / income during the said period.

21. In this regard, it is relevant to consider clause 17 (xvii) of sub-section (2) of Section 72 of the Motor Vehicles Act and Rule 69-A of the Motor Vehicles Rules.

22. Section 72 of the Motor Vehicles Act, 1988, reads as under:

72. Grant of stage carriage permits.- (1) Subject to the provisions of Section 71, a Regional Transport Authority may, on an application made to it under Section 70, grant a stage carriage permit in accordance with the application or with such modifications as it deems fit or refuse to grant such a permit:

21. Provided that no such permit shall be granted in respect of any route or area not specified in the application. (2) The Regional Transport Authority, if it decides to grant a stage carriage permit, may grant the permit for a stage carriage of a specified description and may, subject to any rules that maybe made under this Act, attach to the permit anyone or more of the following conditions, namely- (i) to (xvi) - XXXX (xvii) The vehicles to be kept as reserve by the holder of the permit to maintain the operation and to provide for special occasions;

23. Rule 69-A of the Motor Vehicles Rules, 1989, reads as under: 69-A. Maintenance of reserve vehicles.- The conditions regarding maintenance of reserve vehicles specified in clause (xvii) of sub-section (2) of Section 72 of the Act, shall be incorporated in every permit granted to a person and the maximum number of reserve 22 vehicles to be maintained with valid permits for such use shall be as specified in the table below: No.of permits Maximum number of reserve vehicles that can be maintained Upto 4.. 1 Upto 5 to 10.. 2 Upto 11 to 20.. 3 Upto 21 to 30.. 4 Upto 31 to 40.. 5 Upto 41 to 50.. 6 Upto 51 and above Not less than 10% of the fleet strength 24. A perusal of the above provisions would clearly indicate that while issuing a stage carriage permit to the transporters, the authorities would incorporate the condition that permit holder must have spare / reserve vehicles for being plied in the route in the eventuality of break down or being stationed for repair or for whatsoever reason if the said vehicle is not plied.

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25. It is not the specific case of claimant KSRTC that the loss of revenue was due to non-user of spare vehicles on Mangalore to Bombay route during the repair period of Volvo bus. In the present case, PW-2 - Divisional Mechanical Engineer of KSRTC has filed affidavit in lieu of oral evidence, wherein he has stated that the KSRTC could not be put on the road i.e., from 25.09.2007 to 22.11.2007. On a moderate calculation, loss of revenue due to non-use of the bus after deduction of

maintenance charges would be Rs.20/- per km., thus, the net revenue loss per day would be Rs.10,000/-. But, he has not specifically stated that spare bus was not used for plying in the route of Mangalore to Bombay during the period of repair of the damaged Volvo bus. In the cross-examination, he has stated that in the said route, Volvo buses have been plied prior to and after the accident. 24

26. It is pertinent to note that as per Rule 69-A of the Motor Vehicles Rules, there is a requirement of law for maintaining spare / reserve vehicles as an alternative arrangement when the buses plying on the said route either break down or stationed for repairs or any other reason. Thus, the transporters are duty bound to maintain the spare vehicles. When the transporters earn the income / revenue by making use of the spare vehicles, they are not entitled to claim towards loss of revenue / income. The evidence placed on record disclose that the claimant Corporation was in possession of reserve vehicles as on the date of the accident. But no convincing evidence has been placed to show that the spare vehicles were not used in the route of Mangalore to Bombay when the damaged Volvo bus which was plied in the said route was kept in the garage for repairs. 25

27. Under these circumstances, this Court is of the considered view that the finding given by the Tribunal regarding the loss of income suffered by the KSRTC is erroneous and the same is not justified.

28. In the result, I proceed to pass the following: a. Miscellaneous First Appeal No.4481/2014 filed by KSRTC is allowed in part. b. Miscellaneous First Appeal No.6416/2014 filed by National Insurance Company Ltd., is allowed in part. c. The judgment and award of the Tribunal directing National Insurance Company Ltd., to pay the compensation towards loss of revenue is set aside. But, the National Insurance Company Ltd., is directed to pay the difference amount of Rs.1,38,840/- (Rupees One Lakhs Thirty Eight Thousand Eight Hundred and Forty only) to the 26 KSRTC towards cost of repairs along with interest at 6% per annum from the date of petition till realization. d. The amount if any in deposit shall be transmitted to the concerned jurisdictional Tribunal. e. The parties to bear their respective costs. Sd/- JUDGE SJ