

Judgment Sheet
IN THE PESHAWAR HIGH COURT PESHAWAR
JUDICIAL DEPARTMENT

RFA No.168-P/2015

JUDGMENT

Date of hearing.....10.9.2024

Appellants.

(East West Insurance Co. Ltd. etc.) By: Mr.Arshad Jamal Qureshi,
advocate.

Respondents.

(Aurangzeb etc) By: Mr.Shumail Ahmad Butt,
advocate.

WIQAR AHMAD, J.- *Through this single judgment recorded*

in RFA No.168-P/2015 (titled East West Insurance Company Ltd etc

Vs Aurangzeb Khan and another), we are also going to dispose of

connected FAO No.63-P/2015 (titled Aurangzeb Khan Vs. East West

Insurance Company Ltd etc.) as both appeals have arisen out of

same impugned judgment of learned Insurance Tribunal Khyber

Pakhtunkhwa at Peshawar.

2. *East West Insurance Company Ltd. (hereinafter referred to as "appellant") has filed instant appeal against judgment and decree of the learned Insurance Tribunal Khyber*

M.Ishaq Shah

(RFA#168-P/2015)

(DB) Hon'ble Mr.Justice Ishtlaq Ibrahim, HCJ

Hon'ble Mr.Justice Wiqar Ahmad

Pakhtunkhwa dated 17.3.2015 whereby suit filed by one Aurangzeb (hereinafter referred to as "respondent No.1) for recovery of insurance claim was partially allowed to the extent of granting him rate of depreciated value of Truck in question while rest of claim of respondent was declined. Being aggrieved, both parties have filed appeals as mentioned in Para-1 above.

3. *Brief facts leading to filing of instant appeal are that respondent No.1 had insured his long vehicle, trailer Truck, Model 2004 (hereinafter referred to as "Truck") with appellant through SME Leasing Limited with effect from 13.2.2006 to 22.2.2007 under Policy No.EWI/PON/PSH/CVP-028/2/2006 for IEV/Sum insured amounting to Rs.35,60,000/-on annual premium of Rs.1,06,800/-. Since respondent No.1 was transporter by profession, therefore, the Truck in question was being used on long routes for transportation and carriage. For this purpose, one Muhammad Gul , driver , hailing from Khajoori, Bara had been employed by respondent No.1. When despite hectic efforts, respondent No.1 had statedly failed to contact said Driver about his whereabouts, the matter was*

reported to Levy Police Station Dargai, Malakand, which was reduced into writing in Daily Diary of the Levy Post on 19.1.2007. The Insurance Company (appellant) was also approached in the matter, for payment of insured amount as the incident of missing of the Truck was claimed to have been covered under the policy of Insurance inked between the parties. The insurance company had earlier shown certain reservations but later on flatly refused to admit his claim which compelled respondent No.1 for filing a suit before the learned Insurance Tribunal Khyber Pakhtunkhwa.

4. *Appellant/Insurance Company contested the suit by filing written statement where they denied claim of respondent/plaintiff. Divergent pleadings of the parties gave rise to as many as 6 issues and the parties were directed to produce evidence. In support of claim of plaintiff/respondent No.1, three witnesses were examined while on appellant's side, two witnesses have recorded their evidence. On close of their evidence, the learned Tribunal partially allowed claim of plaintiff/respondent and plaintiff was held entitled only for the encashment of insurance*

in respect of his vehicle subject to the rate of depreciation while rest of the claim of plaintiff/respondent No.1 was rejected, vide judgment/order dated 17.3.2015 (impugned herein).

5. *Learned counsel for the appellant i.e. Insurance Company submitted during the course of his arguments that the Truck in question had not been stolen from respondent No.1, rather he had himself handed it over to his driver, Muhammad Gul, who had allegedly misappropriated the truck and that the case of misappropriation had not been covered under the Policy. Learned counsel also contended that conduct of respondent No.1 was indicating that the truck was concealed somewhere with his consent and the claim was laid with the Insurance Company on the basis of Naqal Mad report lodged at Police Station Dargai, Malakand which criminal case has also not been properly pursued. He added that respondent No.1 had not filed any application before the high-ups of the law enforcing agency or before the Justice of Peace for lodging of an FIR so that the matter could have been properly investigated and the truck retrieved, if really misappropriated. It was very strange*

that respondent No.1 had not made any effort for retrieval of the alleged misappropriated truck and had lodged a claim with the insurance company, that too, with delay of almost three months from the date of disappearance of the truck. He also contended that the insurance claim had rightly been declined by the Insurance Company/appellant while the learned Tribunal had wrongly accepted(partly) the claim petition of respondent No.1.

6. *Learned counsel for respondents contended, in rebuttal, that it has been a practice of the Insurance companies that whenever a claim is laid before them, they dig out flimsy reasons for rejection of the claim . He also contended that nephew of respondent No.1 had informed the local police and further lodging of the FIR and investigation in the case was the responsibility of the local police. He added that respondent No.1 had also informed the Insurance company and it was sufficient for the purpose of clearing the claim but same was wrongly declined. He also contended that it was a comprehensive insurance policy of insuring the vehicle against all eventualities including mischievous acts, therefore, claim was very much*

covered there-under. He next contended that respondent No.1 could not be presumed to have been instrumental in concealing or removing the truck, in the absence of any material evidence. In respect of appeal filed by respondent No.1, he contended that the learned Tribunal had wrongly held that the depreciated value of the vehicle should be paid to the plaintiff/respondent No.1 and that he was entitled to the entire sum of insurance, therefore, his appeal bearing No.63-P/2015, should be allowed and the appeal of Insurance Company bearing No.168-P/2015 be dismissed. Learned counsel for respondent also referred to certain documents brought on record as Ex.PW.1/8 and contended that the insurance company had reinsured the amount with another Company namely Pakistan Re-Insurance Company Limited Karachi and the former had also submitted claim before the later mentioned company.

7. *We have heard arguments of learned counsel for the parties and have gone through the record with their valuable assistance.*

8. *Following questions require determination in the appeals :*

- a). *Whether claim of respondent No.1 has wrongly been declined by the Insurance Company?*
- b). *Whether appellant has claimed re-insurance and payment has been made to appellant by Pakistan Re-Insurance Company Karachi ?*
- c). *Whether respondent No.1 was entitled to re-imburement of the entire amount insured i.e. Rs.35,60,000/- together with mark-up and liquidated damages under Section 118 of the Insurance Act, 2018 ?*

9. *Resolution of Question (a):*

Learned counsel for the insurance company while arguing his appeal, had laid great stress on the conduct of respondent No.1 as discernible from the record of the case, therefore, said argument is being considered first.

The vehicle was leased from M/s SME Leasing Limited, Peshawar and same was insured with appellant/insurance company for a sum of Rs.35,60,000/- and annual premium of Rs.1,06,800/- was also paid to appellant. All these facts can easily be gathered from the statement of PW.1 when read with documents exhibited in his statement.

10. *The record reveals that on 19.1.2007, nephew of respondent No.1 lodged a report in P.S. Dargai which was reduced into writing in the shape of Naqal Mad No.8, dated 19.1.2007. Copy of Naqal Mad was brought in evidence as Ex.PW.1/6. In the report, Nasrum Minallah (nephew of respondent No.1) has alleged that Trailer vehicle bearing registration No, 599/TLC (which was owned by his maternal uncle Aurangzeb Khan), was under his supervision and same was being driven by Muhammad Gul, Driver who had been hailing from Khajoori, Bara. It was further alleged in the report that after seven days of Eid ul Fitr, said driver had left Dargai Adda for Peshawar but after one month, said driver had contacted him and informed that whatever profit he had earned from the Trailer , had been spent on the purchase of new tyres for said trailer and pledged that he would soon send remaining money to them. Thereafter , said driver had neither sent money nor contacted him or his maternal uncle. He went on to allege that presumably said truck had been stolen. After recording above report with the local police, respondent No.1 had lodged claim with the Insurance Company/appellant on 27.1.2007 vide*

application Ex.PW.1/4. The Insurance Company had referred claim of respondent No.1 to Surveyor i.e. M/s Dusam & Co.(Pvt) Ltd who conducted survey and submitted its report Ex.PW.1/15. For ready reference, findings, opinion and recommendation of the Surveyor are also reproduced as under:-

"FINDINGS"

- 1) *The owner/insured handed over the trailer No.TLC 599 to Driver Mr.Gul S/O unknown of village Kojora Khyber Agency who left for Peshawar on 28th October, 2006 for normal earning through carriage/ transportation.*
- 2) *The driver once contacted the owner from Peshawar and informed him that earned income has been spent for purchase of tyres and further saving will be sent to the owner.*
- 3) *The driver basically went missing with Trailer from 28 October, 2006 onward.*
- 4) *The owner Mr.Aurangzeb reported the case to Durgai Police Station on 19.1.2007 after about 2 months and 3 weeks.*
- 5) *Mr.Aurangzeb, the owner of the trailer reported the missing trailer to the insurer on 27.1.2007 after 3 months.*

- 6) Dargai police issued a note on 25.4.2007 for non-recovery of the trailor TLC-599 till that date. The trailor has not been recovered as per information obtained from the insured till this date of issue of survey report.
- 7) The insured has not complied with condition at serial No.1 of the insurance policy which clearly indicated that in case of any loss the insured must inform the insurance company immediately.
- 8) The insured reported regarding the missing/stealing of the truck by his own driver after a period of three months. The claim is time barred.
- 9) Driver of the Trailor was an employee of the insured and he should have had better control of him. Basically the trailor has gone missing with the driver of the insured which is not act which is covered under the insurance policy. It is a wilful act.
10. There is no other third party involved in this episode.
11. The insured failed to provide copy of driving license and I.D. Card of the driver.

OPINION

From the circumstantial evidence and above findings it is opined that missing of the truck with employee of the insured was a wilful act and time barred and violation/breach of the insurance clauses. It does not

fall within the terms and conditions of the policy for compensation to the insured.

RECOMMENDATION

Adjustment of loss is not recommended as the circumstantial evidence does qualify the insured for the compensation as per findings and opinion mentioned above.”

Finally claim of the respondent No.1 was declined by the Insurance Company on 24.5.2007, vide letter Ex.PW.1/16.

11. *This history of the case was amply indicating that respondent No.1 had not made any effort for retrieval of the truck from the driver except lodging of report which was also entered in Daily Diary at the Levy Post Dargai, Malakand. Later on respondent No.1 had not made any further effort to pursue the criminal case or take any action against driver. This act was found to be against normal human conduct.*

Respondent No.1 had also deposed in the case as PW.3. In his cross-examination, while replying to a question, he has informed that he had been doing the business of transport since the year 1971. He further informed that in those days, two of his

transport vehicles had been plying on road in connection with said business. Then he was asked about address of the driver who had allegedly misappropriated the vehicle, in response to which he stated that he had obtained copy of his CNIC which was available on record. However, he was not remembering name of father of the driver. He had also stated that he had trust over the driver, however, the driver had breached his trust. He had also stated that he had handed over said vehicle to the driver when he had satisfied himself that the driver was not involved in activities of theft etc but added that his satisfaction was to the possible extent and that he was not having any knowledge of the future. He added that at the time of engaging said driver, he had not located his house and had not enquired about his antecedents; however, all the details were available in his CNIC.

12. *Respondent No.1 was a seasoned transporter by profession and transporters know how to hire drivers and how to keep eye on them. In his cross-examination also, respondent No.1 could not give satisfactory answers regarding all these aspects of the matter. Further ahead, he was also asked about*

alternate driver and Cleaner, in response to which the witness stated that earlier his nephew had been hired as alternate driver and later on driver Muhammadi Gul had hired another driver as his nephew could not continue his job and therefore, he was not knowing about the second driver employed in said truck, during the relevant days and same was also case of the Cleaner employed on the vehicle. Learned counsel for respondent No.1 was also confronted with all these facts regarding conduct of respondent No.1 but he was also facing difficulties in satisfactorily explaining such conduct of respondent No.1. He mainly contended that nephew of respondent No.1 had conveyed information to the local Police at Police Station Dargai, Malakand and if local police had not performed his duty, then respondent No.1 could not be blamed for it. But it is also a normal conduct visible in most of the cases that people do pursue their criminal cases. If the local police do not perform their duty then people lodge complaints with the high-ups of law enforcing agency or with Justice of Peace. In this background, all the Sessions Judges and Additional Sessions Judges have been notified as Justices of Peace for exercising power under

Section 22-A Cr.P.C. Such background of need of pursuing criminal cases has not only been acknowledged in the legislative instrument but same has also been acknowledged in judicial precedents like judgment of the Honourable Supreme Court rendered in the case of Younas Abbas and others Vs. Additional Sessions Judge, Chakwal and others reported as P L D 2016 – Supreme Court – 581 as well as earlier judgment of this court rendered in the case of Syed Abdul Hameed Vs Mian Izhar Ahmad and 2 others reported as P L D 2019 – Peshawar – 154.

13. *The forum of Justices of Peace (in the shape of courts of Sessions Judges and Additional Sessions Judges) are everywhere available to citizens, where any citizen can lodge application and never ever any difficulty has been reported in lodging such applications. But it is very strange that respondent No.1 had not filed any such application before Justice of Peace for directing the local police for registration of an FIR and properly investigating the case despite the fact that the alleged offence was cognizable in nature. . He had not made any complaint to the superior hierarchy of law enforcing agency for*

activating them to retrieve his vehicle from the driver. Proof of such an effort is not available on record of the case. In such circumstances, story advanced by respondent No.1 in his claim petition before the Insurance Tribunal as well as in his evidence, is hard to be believed. Even learned Tribunal below while allowing petition of respondent No.1 also found his history hard to be believed. While recording its findings on Issue No.5, the learned Tribunal had expressly stated, "No doubt, collusion between the claimant and the driver regarding missing of the vehicle in question could no way be ruled out, but mere allegations are not sufficient enough to discharge the burden of proof in the circumstances where the claimant in view of the evidence, so recorded, has discharged his liability pertaining to the insurance of the vehicle in question, its lost and has not yet been traced out, followed by request for encashment of insurance." So far as further observations of the Tribunal that mere allegations were not sufficient to discharge the burden of proof are concerned, in this respect it is apparent that burden of proof that the vehicle had in fact been stolen, in the mode and manner mentioned in the claim petition, was lying on the

plaintiff before the learned Tribunal (respondent No.1 herein) and adverse inference drawn by the Tribunal on the face of facts presented to it and evidence produced before the Tribunal, should have been put in the account of the plaintiff, rather than requiring an affirmative evidence in this respect from the defendants (Insurance Company). It was even beyond imagination that the collusion that had taken place between respondent No.1 and his driver could have been brought to surface by the Insurance Company through producing affirmative evidence.

14. *Another aspect of the case is that claim of breach of trust was not even covered under the Insurance Policy. No doubt it was a comprehensive insurance but while insuring the vehicle, the terms "loss or damage" mentioned in the policy in Section 1, earlier had been replaced, inter alia, with words "theft" and "malicious act". Thus, these items have been expressly provided in the policy and could not be taken as hidden condition in the policy. Learned counsel for appellant contended that it was hard to believe that case of breach of trust could be covered under the*

term mischievous act. Mischievous act has been explained in the Black's Law Dictionary as "a wrongful act intentionally done without legal justification or , excuse; an unlawful act done wilfully or purposely to injure another" . In the Pakistan Penal Code, certain mischievous acts have been declared as crimes and its punishment has been provided in Chapter-XVII separately. In mischievous acts, no gain is normally, found accrued to the wrong door and only damage to someone else's property is caused. In the case in hand the vehicle had allegedly been misappropriated by the driver. Even in the PPC, offence of breach of trust has been defined distinctly in Section 405 PPC while punishment has been provided under Section 408 PPC. If any FIR was to be registered on the complaint of the nephew of respondent No.1, it would have been for a criminal breach of trust. It is clear that general term of mischievous act was not covering the instant case. Rather it was a clear case of criminal breach of trust. Clause 8 of the Insurance Policy was excluding the term of breach of trust from the purview of insurance policy. It was therefore, apparent that the Insurance policy has not been covering the case of criminal breach of trust.

15. *In light of what has been discussed above, question No.(a) is resolved in the manner that the Insurance Company i.e. appellant has rightly declined claim of respondent No.1. As a corollary thereof, it is also held that the Tribunal below had wrongly allowed claim of respondent No.1 to the extent of depreciated value of truck on the basis of Naqal Mad No.8, dated 19.1.2007 (Ex.PW.1/13) entered at Police Station Dargai, Malakand, as neither any FIR had been registered in the light of Daily Diary in question nor the nominated accused in the Daily Diary had been detained/arrested nor truck in question had been recovered nor there had been any enquiry or investigation report on the part of Police.*

Question- (b)

16. *Form-G (Ex.PW.1/8) was brought in evidence in the statement of PW.1 regarding reinsurance claimed by appellant from Pakistan Re-insurance Company Ltd Karachi and to this effect, when a question was asked from witness of appellant, namely Ghulam Safdar Shahid (DW.2), in his cross-examination, he replied that the claim of re-insurance is only*

made when the amount of claim made by insured is believed and claim is accordingly paid to the person making insurance. He denied that the reinsurance form had been filed thereafter, claim of re-insurance was made. Similarly there was no affirmative evidence of filing of the claim. In such circumstances, Question (b) is answered in the manner that claim of reinsurance from Pakistan Re-Insurance Company Limited Karachi regarding payment to appellant had not been established on record.

Question - (c)

17. *In light of our resolution of Questions (a) and (b) made above, respondent No.1 was not found entitled to the claim submitted before the Tribunal. In such circumstances, the question whether the whole insurance amount should be paid or it should be paid according to the depreciated value of the vehicle, has lost its significance and being redundant is not required to be discussed further.*

18. *As sequel to our above discussion, appeal of Insurance Company (appellant in RFA No.168-P/2015) is*

accepted, the impugned judgment and decree of the learned Insurance Tribunal stands set aside and suit of plaintiff/respondent No.1 before the Insurance Tribunal stands dismissed while appeal of plaintiff/ respondent No.1 bearing No.63/2015 stands dismissed.

19. *While hearing these cases, we noted that a single Tribunal has been notified under Section 121 of the Insurance Ordinance, 2000 for hearing insurance cases from all across the province of Khyber Pakhtunkhwa which included far off stations, like districts of lower Chitral, Upper Chitral, Upper Kohistan, Waziristan, Tank and DIKhan etc . We found this to be amounting to abridging the rights for access to justice of people of the Khyber Pakhtunkhwa, particularly, persons dealing with insurance companies as their customers. In such circumstances, it would be most appropriate that all District and Sessions Judges of the province are notified as Insurance Tribunals for the respective districts under Section 121 of the Insurance Ordinance, 2000, which would be beneficial for insuring rights of access to justice to the insurance holders and*

other related person including their families who subsequently get rights in case of life insurance of their predecessors.

Learned Registrar of this Court shall ensure that the matter is taken up with the concerned quarter for doing the needful, at the earliest.

CHIEF JUSTICE

JUDGE

Date of hearing	10.9.2024
Date of announcement Of Judgment	4.10.2024
Date of Preparation and signing of Judgment	4.10 .2024