IN THE HIGH COURT OF SINDH AT KARACHI

Miscellaneous Appeal No. 08 of 2016
[**EFU General Insurance Ltd.,** *versus* **Jahangir Moghul**]

Present:
Mr. Irfan Saadat Khan, J.
Mr. Muhammad Faisal Kamal Alam, J.

Dates of hearing	:	09.11.2020.
Appellant	:	M/s. EFU General Insurance Ltd., through Mr. S. Tanveer Ashraf, Advocate.
Respondent	:	Jahangir Moghul, through Ms. Shumaila Siddiqui, Advocate.

Case law relied upon by Appellant's Counsel

1. P L D 1973 Supreme Court page-49
   [***The State*** *versus* ***Zia-ur-Rahman and others***];

2. 1996 S C M R page-826
   [***Neimat Ali Goraya and 7 others*** *versus* ***Jafar Abbas, Inspector/Sergeant Traffic through S.P., Traffic Lahore and others***];

3. 1989 C L C page-1369
   [***M.D. Tahir*** *versus* ***Federal Government and 12 others***];

4. 2001 Y L R page-3243 Supreme Court [AJ&K]
   [***Abdul Ghafoor and Brothers Contractors*** *versus* ***Natural Food and Beverages Private Limited and 2 others***];

5. 2013 C L D Lahore page-2005
   [***Gulshan Textile Mills Ltd.*** *versus* ***Askari Bank Ltd. and others***];

6. 1990 C L C page-197 [Karachi]
   [***Trustees of the Port of Karachi*** *versus* ***Gujranwala Steel Industries and another***];

7. PLD 2010 Supreme Court 1965
   Mohammed wali Khan versus goal Sarwar Khan.

8. PLD 2010 Supreme Court 604 – Federation of Pakistan versus Zafar Khan Jaffer Khan JAFFER Khan.

9. 2011 S C M R page-1013
   [***State life Insurance Corporation of Pakistan and another*** *versus* ***Javaid Iqbal***]

10. 2013 C L D page-1470 [Peshawar]
    [***Mohammed Huzafa*** *versus* ***American Life Insurance Company (Pakistan) Ltd. (Alico) through Chairman/General manager/Managing Director and another***];

11. PLD 2013 Supreme Court 190. – Munir Ali Khan versus Faiz Rasool.

12. 1995 C L C page-1541 [Supreme Court (AJ&K)]
    [***Mohammad Meherban*** *versus* ***Sadrud Din and another***];

13. 2017 SCMR 902. – Malik Bahadur share Khan versus Haji Shah Alam.

14. P L D 1989 SC 568

15. (2000) 10 SCC 19
    [***United India Insurance Co. Ltd.*** *versus* ***Roshan Lal Oil Mills Ltd. and others***];

16. (2009) 7 SCC 777
    [***Sikka Papers Limited*** *versus* ***National Insurance Company Ltd. and others***]

17. 2017 C L D page-1091 [Sindh]
    [***Alpha Insurance Co. Ltd. through Authorized Representative*** *versus* ***Messrs Poly Foils (Pvt.) Ltd. through Owner and another***];

18. P L D 1967 Karachi 204

19. (2001) 4 SCC 342
    [***New India Assurance Company Shimla*** *versus* ***Kamla and others***];

20. 2019 C L D page-467 [Lahore]
    [***Ashiq Hussain*** *versus* ***UBL Insurers Limited through Chief Executive and another***];

21. 1984 C L C page-1009
    [***Mst. Latifa Khanum and others*** *versus* ***Syed Zahoorul Hassan (Represented by Legal Heirs)***];

22. 2007 S C M R page-605
    [***Ibrar Hussain and others*** *versus* ***The State and another***];

23. P L D 1968 SC 230

24. P L D 1972 Karachi 273

Case law relied upon by Respondent's Counsel

1. 2016 C L D page-410
   [***State Life Insurance Corporation of Pakistan*** *versus* ***Additional District Judge-I, Lahore and another***].

Other Record / Material

i. SRO 122(I)/2016, dated 12th February, 2016;

ii. Conditions of the Policy.

Law under discussion:

1. Insurance Ordinance, 2000.
2. Securities and Exchange Commission of Pakistan Act, 1997;
3. The Insurance Rules, 2002.
4. The Securities and Exchange Commission (Insurance) Rules, 2002.
5. The Qanoon-e-Shahadat Order, 1984 **{the Evidence Law}.**
6. Civil Procedure Code, 1908 (**"CPC"**)
7. The Motor Vehicle Act, 1939.

J U D G M E N T

***Muhammad Faisal Kamal Alam, J*:** Through this Miscellaneous Appeal, Appellant Insurance Company has challenged the Judgment and Decree dated 18.08.2016 (the "**Impugned Judgment**") passed by the learned District and Sessions Judge, Karachi (Central) being the Link Judge of the Insurance Tribunal for Sindh (learned "**Tribunal**"), whereby, the Tribunal has decreed the Suit No. 14 of 2012 instituted by present Respondent in respect of the Insurance Policy, with the prayer that impugned judgment and decree be set aside and the above suit be dismissed.

2. The subject matter of present Appeal is the Insurance Policy No.92/04/00861, which was admittedly issued by Appellant to Respondent covering the period from 22.11.2010 to 21.11.2011 for vehicle of Respondent, viz. Mercedes Benz, Model 2002, registration No.AMX 786 (the "**Subject Vehicle**"). Insurance Policy was issued under the Motor Vehicle Act, 1939.

3. Relevant facts of the Appeal are that above named Respondent on 10.10.2011, informed the Appellant on telephone about the theft of parts

from his subject vehicle, which was latter surveyed / inspected by Rehan Mobin & Company Private Limited (the "**Surveyor**")**,** appointed by Appellant for assessing the loss in respect of the claim.

4. Learned counsel for the Appellant states that the Impugned Judgment contains material irregularity, because no finding was given on the maintainability of the suit and in this regard an application under Order VII Rule 11 of CPC was filed before the learned Tribunal; contended that the Suit No.14 of 2012 in respect of the insurance claim had to be out rightly rejected by the learned Tribunal, because sanction under Section 162 of the Insurance Ordinance, 2000, was not obtained by the Respondent before filing the above suit; that in terms of SRO 122(I)/2016 dated 12.02.2016, issued by Securities and Commission of Pakistan ("**SECP**"), it is the Commissioner of SECP, who is the competent authority to issue such sanction for filing a proceeding against an Insurance Company, in the instant case, present Appellant; that once the Surveyor after surveying the Subject Vehicle has rejected the claim of the Respondent, the same could not be entertained by the Appellant and it was correctly rejected. These material aspects were overlooked in the Impugned Judgment. Since the said survey report was not challenged by the Respondent in terms of Rule 22(5) of the Insurance Rules, 2002, read with Section 24(1) of the Securities and Exchange Commission (Insurance) Rules, 2002, thus having attained finality, the same factual aspect cannot be reopened by filing a suit proceeding. Since the Respondent never approached the SECP for appointment of an independent Surveyor in terms of Rule 24 of the Securities and Exchange Commission (Insurance) Rules, 2002, therefore the survey report given by the Surveyor has attained finality. In the second part of his arguments, he has read the evidence in order to highlight the contradictions [allegedly] in the testimony of the Respondent, which, per

learned counsel for the Appellant, if would have been properly evaluated by the learned Tribunal, the finding of the Impugned Judgment could have been otherwise. In support of his arguments, learned counsel for the Appellant has relied upon the case law mentioned in the opening part of this Decision.

5. On the other hand, learned counsel for the Respondent has controverted the arguments of Appellant's Advocate. She has stated that prior sanction of SECP is only required for criminal prosecution and not for filing a suit in respect of an Insurance claim. Further contended that even a requisite sanction was also obtained during pendency of suit proceeding, which has been mentioned in the Impugned Judgment as well as order dated 18.09.2014 passed on the application filed by present Appellant under Order VII rule 11 of CPC, which was dismissed. Further supported the Impugned Judgment, which, per learned counsel, has been handed down after appraisal of evidence, which was led in pursuance of the Issues framed and there is no illegality in the entire proceeding. Case law relied upon by learned Advocate for Respondent is mentioned in the opening part of this judgment.

6. Arguments heard and record perused.

7. From the pleadings of the parties the Tribunal has framed the following Issues_

1. ***Whether the suit is maintainable?***
2. ***Whether any cause of action has accrued to the plaintiff?***
3. ***Whether the suit is barred under Order I Rule 3 CPC by mis joinder and non joinder of necessary and proper parties?***
4. ***Whether the defendant failed to disclose/ mention proper Clause to the plaintiff under which plaintiff's claim does not fall within the purview of the Insurance Policy?***
5. ***Whether the plaintiff lodged the First Information Report against the stolen accessories of the car?***

6. Whether the defendant without any authority denied the plaintiff's claim with a predetermined mind?

7. *What should the decree be?*

8. In support of his arguments, learned counsel for the Appellant has cited 24 reported judgements, crux of which is that the general provisions of a statute shall yield to special provisions for meeting a particular situation if the same is governed by the provisions of a special statute; a certain amount of money as well as liquidated damages cannot be awarded or decreed without proving the same through positive evidence; cause of action would mean the whole bundle of material facts which should be proved by plaintiff in order to succeed in his claim and if a plaint does not disclose any cause of action, *inter alia*, expressly mentioning the breach of duty owing by another person, then it is obligatory on the Court to reject such plaint and the **docket** should not be burdened by such frivolous litigation; the documents which are not exhibited during evidence, the same cannot be considered **{**to support the contention that since purported Sanction under Section 162 of the Insurance Ordinance, 2000, was not produced in the evidence, then the same should be rejected and the entire suit should have been dismissed**}**; in terms of Section 162 of the Insurance Ordinance, 2000, a Notification – SRO122(I)/2016, dated 12.02.2016 was issued, whereby, such sanction for filing the proceeding is to be given by the Commissioner and hence, a Deputy Director of **SECP [**Securities and Exchange Commission of Pakistan**]** cannot give such permission and hence the above Suit was filed unauthorisedly; Impugned Judgement of the learned Tribunal is *per in curium* because it has not considered the case law of the Superior Courts; appraisal of evidence was not proper and the impugned judgement is to be set aside; non-production of the witnesses by present Respondent has made the claim suspicious as the same is hit by the

principle of 'best evidence rule', envisaged in Article 129 illustration(g) of the Evidence Law and has been judicially interpreted in number of cases.

9. Learned Advocate for Respondent has cited the above decision of State Life Insurance Corporation, in support of her arguments, that prior Sanction under above Section 162 of the Insurance Ordinance, 2000, is applicable to criminal prosecution intended to be taken against an insurance company or its employees and not for filing insurance claims.

10. Adverting to the question of maintainability first. Above referred Notification – SRO 122(I)/2016 has been perused. It states that delegated powers and functions of the SECP relating to the insurance companies and insurance brokers, shall be exercised by the Commissioners **and Officers** [underlined for emphasis] of the SECP. Record of the present Appeal shows that learned Tribunal earlier vide its order dated 18.09.2014 decided the application of present Appellant filed under Order VII Rule 11 of CPC [as stated above], wherein it was mentioned that permission (sanction) was obtained and filed along with the Statement in the proceeding. Similarly, the order dated 28.08.2018 of this Appeal, observes that a Sanction Letter in compliance of earlier order of 09.08.2018 has been submitted and taken on record.The Statement dated 28.08.2018 filed by Respondent's counsel along with the document dated 09.04.2014 is considered.This document is issued by the Deputy Director of SECP (Insurance Division Karachi), wherein, it is stated that upon request of present Respondent the Sanction has been granted.

11. Appellant's counsel has not disputed the authenticity of the above document/Sanction but his arguments are that *firstly*, the said Sanction should have been issued by the Commissioner of SECP and *secondly*, since it is not exhibited in the evidence, therefore, this Sanction is to be discarded

and the entire suit proceeding was *void*. The arguments, on behalf of the Appellant, are meritless for the reasons that *firstly*, the above Notification/SRO 122(I)/2016 has used the term Commissioner or Officers; the above Sanction dated 09.04.2014 has been issued by the Deputy Director, who is an Officer of SECP and, thus, we are of the view that the compliance of Section 162 of the Insurance Ordinance, 2000, with regard to seeking prior sanction for filing a suit/proceeding, has been fulfilled. *Secondly*, since it is admittedly an official document issued by a Competent Authority, thus, the above Sanction Letter bears the presumption of genuineness in terms of Article 92 read with Article 129(e) of the Evidence Law (that official acts have been regularly performed). Although, the said Sanction Letter should have been exhibited in the evidence but this omission is not fatal to the case of Respondent. The reported decision of State life insurance [(***ibid***), 2011 SCMR page-1013] is distinguishable from the facts of the present case, because in the reported case certificate purportedly issued by a doctor was not exhibited and thus the same was not considered; reason being that a certificate issued by a doctor is not an official document and its evidential value cannot be equated with that of the aforementioned Sanction Letter issued by a Competent Authority in exercise of its official acts coupled with presumption as discussed above. Therefore, we hold that the suit proceeding was not hit by any of the provisions of law and it was maintainable. Finding of learned Tribunal in this regard is correct.

12. The incident of theft of car accessories occurred on 29.09.2011 and it was reported on the next day, that is, 30.09.2011. In this regard, evidence of sole witness of Respondent (Haris Mughal son of Respondent) is straightforward. Most of the questions put to him in cross-examination apparently were with the intent to falsify his version as mentioned in FIR

and as stated in his above suit. The said witness was asked about the number of places he visited on the date of incident, name of Driver and the number of persons he met on that day. He categorically denied the question that the theft incident never happened. The above Respondent witness has specifically asserted in his testimony that when he along with his cousin returned from dinner, he saw that the accessories of subject Vehicle was stolen, that is, its right side quarter glass and the rear view mirror were broken; driving seat was completely damaged and central control panel and the wooden panel of the doors were missing. On this material statement the said Respondent witness was not cross examined. It means that this material aspect of the case about theft of above accessories and other items has been accepted by the Appellant.

Mr. Naeemudin Farooqi, appeared as witness Of present Appellant. To a specific question that Appellant did not deny "the accessories of the car were stolen", the said witness replied, "yes it is correct". To another question, the said witness had answered in affirmative that no reference was made to insurance clause while rejecting the claim of Respondent.

13. Since the main reason for rejecting the claim of Respondent by Appellant is based on the Surveyor Report, therefore, the same is considered along with the testimony of one of the representatives [Iqbal Saleem son of Muhammad Saleem] of the aforenamed Surveyor company. To a specific question, the said witness replied in affirmative that duty of the Surveyor is to assess the loss of the claim. To another question, the said witness has admitted that the estimate given by M/s. Shahnawaz Motors was for Rs.28,75,500/-. He **admitted** that in their preliminary and final Survey Reports, the said Surveyors have not mentioned a single line about the loss, which has occurred.

The Motor Survey Report dated 21.02.2012 is available in record, which was exhibited as **Ex-D-W/11.** Whereas, the preliminary findings of the Survey Report is of 06.02.2012, exhibited as **DW/10.** Both Reports have laid much emphasis to highlight some minor contradictions in the claim of Respondent; for instance, it is stated that name of Driver, who lodged the FIR, was mentioned as Saqib son of Khalid, but the Respondent mentioned his driver's name as Waqas in the questionnaire (given by the said Surveyor to Respondent). Similarly, it is mentioned in the Survey Report that the relative of Respondent did not arrange any party at his residence and the said relative had no knowledge of any such incident. The entire pleading of the Lis of present Respondent has never stated that there was some party at the residence of his relative, but it is averred that Plaintiff and his family along with relatives went to Boat Basin for dinner and on their return, they saw that accessories of the Subject Vehicle were stolen besides other parts as already mentioned above. The Survey Report does not contain an opinion/assessment about the above facts which are the main subject of the dispute, nor they [the Surveyors] have made any independent assessment of the losses claimed by Respondent in his above suit.

14. Admittedly, as per the Survey Report itself, Survey Company received the application of survey on 10.10.2011 and the two reports were submitted on the aforementioned dates, that is, after four months; ***whereas,*** in terms of sub-rule 4 of Rule 22 of Insurance Rules, 2002 [at the relevant time (**as it is now replaced by Insurance Rules, 2017**)], a Surveyor report has to be finalized as early as possible, but within the period of thirty days. No plausible reason or evidence has been brought on record by Appellant and the above Witness of Surveyor that why the Report was not finalised and given within the above statutory period of one month. ***Secondly,*** the

main subject matter of the dispute has not been discussed in the Survey Report [exhibit DW/11]. Undisputedly, it is not mentioned that whether an actual damage was done to the insured Subject Vehicle or accessories were missing and whether the claim as lodged by Respondent, particularly, in monetary term, was genuine or not. **Admittedly,** photographs of the Subject Vehicle at the time of inspection were neither produced in the Surveyor Report nor in the evidence, in order to dislodge the claim of Respondent.

15. In view of the above, the above Survey Report is in violation of the statutory rules and thus cannot be said to have been undertaken, prepared and issued by adhering to professional standard and exercising due diligence as envisaged by the statutory mandate contained in Rule 22 (of the Insurance Rules, 2002 of the relevant period), particularly, Sub-Rule (4). Consequently, the above Survey Report cannot be considered.

16. The testimonies of Appellant and Surveyors themselves confirm that the Respondent even provided relevant documents to the Surveyor Company for undertaking the inspection. Hence, no illegality can be attributed towards the conduct of Respondent.

17. The reported decision handed down by the learned Division Bench of this Court in *Alpha Insurance case* **[supra, 2017 CLD 1091 (Sindh)]**, is distinguishable, because in the said reported case it was brought on record through evidence, that the insured did not provide invoice of the machinery burnt in the incident; factory in which the incident occurred, was never put to successful operation and parties/ insured attempted to hide specific details of the total assets and stocks available; ***whereas,*** in the present case in view of the above evidence, it cannot be said, that present Respondent has withheld any information, but the record shows that the latter provided

requisite information to the Surveyor; ***secondly***, in the present case the Survey Report itself is defective and cannot be considered as it is not in conformity with the statutory provisions (as already discussed above).

18. Fact of the matter is that subject policy is an admitted document, which was subsisting when the above incident of theft occurred. The basis of an insurance contract, viz. *uberrimae fidei*, that is, the utmost goodfaith, which now also has a statutory recognition as mentioned in Section 75 of the Insurance Ordinance, 2000, regretfully has not been adhered to by the Appellant. Section 79 of the said Ordinance is also worth mentioning here, where, even if the complete disclosure is not made by an insured, subject to certain conditions, as mentioned in the Section 79 itself, contract of insurance may not be avoided. In the present case, Appellant has not stated that the Respondent had made any misrepresentation or failed to comply with his duty of disclosure at the time of entering upon the insurance contract. Consequently, the Appellant does not have any good reason for not settling the amount claimed by the Respondent. Accordingly, finding of the learned Tribunal with regard to the main claim of Respondent is correct and does not warrant any interference in this Appeal.

19. Adverting to the issue of awarding liquidated damages. Learned counsel for the Appellant argued that Section 118 of the Insurance Ordinance, 2000, has been wrongly applied in the present case, as the said provision relates to life insurance policies only. Secondly, he has further stated that since the Surveyor rejected the claim of Respondent and the matter went into litigation, therefore, the amount of claim never became due and payable, hence, the said provision will not apply and the learned Tribunal erred in awarding damages.

Section 118 of the Insurance Ordinance, 2000, clearly states that *"it shall be an implied term of every contract of insurance . . . . . ."*, which

means that it is not confined only to life insurance policies and includes the subject insurance contract relating to private car comprehensive policy. *Secondly*, the Appellant cannot take shelter of pending litigation for settling the claim of Respondent in view of its overall conduct as discussed herein-above and particularly, the faulty survey report. The evidence that has been brought on record, undisputedly, the claim was lodged on 30.10.2011, whereas, above Insurance Suit No.14 of 2012 was filed on 30.07.2012, that is, after nine months from lodging of the claim. In the intervening period, Appellant had sufficient time to verify the genuineness of claim and settle the same, but the matter was delayed. These facts cannot be construed as circumstances beyond the control of the Appellant. As per Section 118 (*ibid*), a claim is to be settled within ninety days, subject to certain conditions contained in the above provision. Consequently, finding of learned Tribunal, even on this issue, does not justify any interference.

20. Upshot of the above is that the present Appeal is dismissed.

21. Parties to bear their respective costs.

Judge

Judge

Karachi, dated: 09.02.2021.

Riaz / P.S.