

**IN THE HIGH COURT OF SINDH,
AT KARACHI**

Present:

Nadeem Akhtar and
Yousuf Ali Sayeed, JJ

M. A. No. 06 of 2016

M/s. Asia Insurance Company Limited.....Appellant

Versus

M/s. Xibercom (Pvt.) Limited.....Respondent

Mr. Muhammad Imtiaz Khan, Advocate, for the Appellant.
Mr. Muneer Ahmed Malik, Advocate, for the Respondent.

Date of hearing : 04.10.2023

ORDER

YOUSUF ALI SAYEED, J. - The Appellant has impugned the Judgment and Decree passed on 04.02.2016 in Tribunal Suit No.20/2011 (Old application No.2/2000, renumbered as High Court Suit No.1595/2006) by the learned District & Sessions Judge Karachi Central, whilst presiding as the Insurance Tribunal, whereby a claim for recovery of Rs.3,300,000/- preferred by the Respondent under Section 47-C of the erstwhile Insurance Act 1938 was allowed.

2. The backdrop to the matter is that Indus International Insurance Company Limited (the “**Insurer**”, as has subsequently merged with the Appellant, had issued a Policy in favour of the Respondent so as to insure a 1996 Model Toyota Hilux Surf bearing Registration No. BC-8967, having Chassis No.KZN-185-0031940, and Engine No. IKZ 0349678 (the “**Subject Vehicle**”) in the aforesaid sum.

3. The Subject Vehicle had apparently been purchased by the Respondent through an intermediary from one Khadim Hussain, and as the same was to be imported by the latter under the personal baggage scheme, it is said that they agreed that the amount payable would be the prevalent market price in Karachi as on the date of shipment, with all expenses relating to the import of the vehicle and its delivery, apart from the customs duty, to be borne by the seller, so that after making all deductions from market value as prevailing on the date of shipment, the balance would be paid to him by the Respondent.

4. Per the Respondent, as a precursor to shipment, he paid a sum of Rs.790,000 by cheque No.01271664 dated 20.12.1997, drawn on American Express Bank Ltd to Abdul Samad Khan, the attorney of Khadim Hussain. Shipment is said to have then taken place on 21.06.1998, with the Subject Vehicle being cleared from Karachi Port on 16.07.1998 on behalf of Khadim Hussain through his attorney, and the fair market value of the Subject Vehicle, ex-Karachi, being fixed at Rs.22,50,000/-, and the following payments said to have been made towards its purchase:

• On 20.12.1997 to Abdul Samad Khan, attorney of Khadim Hussain.	Rs.790,000/-
• Sales Tax	Rs.118,901/-
• Withholding .	Rs.53,436/-
• CVT.	Rs.83,638/-
• Octori.	Rs.24,120/-
• Wharfage.	Rs.5,966/-
• Container Service.	Rs.6,150/-
• Misc. clearing charges & brokerage	Rs.57,789/-
• Promissory Note dated 16.07.1998	Rs.1,043,500/-
• Income tax withholding	Rs.33,950/-
• Income tax withholding	<u>Rs.32,550/-</u>
	<u>Rs.2250,000/-</u>

The amount of the promissory note dated 16.07.1998 was settled through two cheques, bearing Nos.01311291 and 01324700 drawn on American Express Bank Ltd. for Rs.1,46,050/- and Rs.8,97,450/- respectively, whereas the income tax withholding on the said amount was deposited in the Federal Treasury on 31.08.1998 and 30.10.1998 respectively.

5. The sale of the vehicle stood completed on 16.07.1998 and title passed to the Respondent. Per the claim, almost immediately after delivery, the market value of the Subject Vehicle increased enormously as customs duty on luxury cars, such as it was, increased by 100 percent and as such the prevalent market value of the Subject Vehicle on the said date came to be Rs. 3,300,000/-.
6. Having purchased the Subject Vehicle, the Respondent proceeded to comprehensively insure the same against all risks, including theft, for the aforesaid sum through the Insurer, who issued its Insurance Policy dated 22.7.1998 after receiving a premium of Rs.136,396/-.

7. As it transpired, the Subject Vehicle came to be snatched at gun point on 30.09.1998, with an FIR then being registered with the police and a claim lodged with the Insurer under the Policy on 02.10.1998, which remained unsettled, hence the Suit.

8. The Insurer contested the matter and disputed the Respondent's ownership of the Subject Vehicle as well as the valuation placed thereon for purpose of the Insurance Policy, with it being alleged that its market value was far less than the sum insured. It was said that as soon as the insurance documents were received at the Head Office of the Insurer at Lahore, the discrepancy was noted and a letter dated 31.08.1998 was written to the Respondent so as to highlight the matter and require a correction.

9. From the pleadings of the parties, the following issues were framed:-
 1. Whether the applicant entered into any lawful transaction for purchase of vehicle with the real importer? OPA.
 2. Whether vehicle was insured far in excess of its market worth? OPD.
 3. Whether seeking insurance by applicant was a malafide act to defraud defendant by way of false claim? OPD.
 4. Whether any joint survey report was made and to what effect? OPD.
 5. Relief.

10. The authorized representative of the Respondent, namely Dr. Altamash Kamal, filed his Affidavit in Evidence as Ex.6. He produced certain documents from Ex.7 to Ex.46 respectively. The Respondent also filed the Affidavit in Evidence of his witness, who was the car dealer, as Ex.47. The Manager and Head of the General Banking American Express Bank examined himself as Ex.48. He produced cheque No.1311291 dated 28.7.1998 for Rs.146,050/- in the name of A. Samad Khan as Ex.49 and another cheque No.1324700 dated 24.10.1998 for Rs.897,450/as Ex.50. Muhammad Murad, Inspector Excise & Taxation Department, Karachi, examined himself as Ex.52. Muhammad Anwer Khan, Collector Custom examined himself as Ex.53. He produced original copies of the bill of entry dated 26.6.1998 bearing IGM No.931 of 98 Index No.78 as Ex.54. Tahir Mahmood, the clearing agent examined himself as Ex.55. He produced photo copy of the bill of entry (Original lies with the Customs) as Ex.56, bill of entry as Ex.57, tax payment receipt as Ex.58, bill of additional duties and miscellaneous receipts as Ex.59, another tax payment receipt as Ex.60, receipts of Karachi Port Trust as Ex. 61 and 62, transfer letter as Ex.63, application for a new registration as Ex.64.

11. From the side of the Insurer, the Affidavit of Muhammad Arif Basir, Vice President, Indus International Insurance Company was filed as Ex.66. He produced authority letter as Ex.67. The surveyor, namely Tariq Alvi, examined himself as Ex.68. He produced addendum as Ex.68. Lastly another surveyor, Saleem Abdul Sattar, examined himself as Ex.70. He produced authority letter as Ex.71. He produced survey report dated 01.10.1998 as Ex. 72.

12. After hearing the parties, the matter proceeded to judgment, with Issue No.1 being decided in the affirmative, and Issues Nos. 2 to 4 answered in the negative, and the Suit thus being decreed accordingly.

13. Proceeding with his submissions, learned counsel for the Appellant confined the scope of the challenge to the subject of valuation, and argued that the Subject Vehicle had been overvalued, hence the Appellant was within its rights to deny the claim for indemnification at the upper threshold of the policy amount, as had been sought by the Respondent. He contended that the learned trial Court had failed to appreciate that aspect of the matter and erred in its decision on Issue No.2. However, on query posed as whether any timely step had been taken by the Appellant to bring the subject of alleged overvaluation to the attention of the Respondent, he placed reliance solely on a letter dated 31.08.1998, a copy of which has been filed with the Memo of Appeal. The same reads as follows:

August 31, 1998

Mr. Altamash Kamal
Xibercm (Pvt.) Ltd.,
Haroon House, 2nd loor,
Karachi.

Dear Sir,

Re: MOTOR INSURANCE OF YOUR
TOYOTA HILUX SURF

Reference telephonic conversation of Mr. Khalid Rashid, our Managing Director with you on 8th August 1998 followed by our today`s telephonic conversation regarding Motor Insurance of your abovementioned vehicle.

As explained to you, we write to place on record that you have bought Insurance Policy # ZOK/PCP-1044/98 for Rs.3.300 Million for the above vehicle from our Karachi Office which is highly exaggerated. We wish you to go through the Market Value Clause attached with this Policy very carefully which we have already explained to you over telephone.

Since the present sum insured of your vehicle is out of our treaty limit, therefore, we have allocated this risk to other co-Insurance companies as per attached copy of the Endorsement #:ZOK/PCE-0208/98 dated 7th August 1998 issued by us against the above Policy for your information and record.

We now wait for your fresh instruction for the revised sum Insured, according to the actual market value of this vehicle, to enable us to issue necessary endorsement for refund premium.

Thanking you,
Yours truly,

Muhammad Arif Bashir
Vice President”

14. He contended that the Respondent had failed to answer back, but lodged the claim shortly thereafter seeking to be compensated at the full amount for which the policy had been issued. He argued that the Issuer had acted in good faith while issuing the policy, but had then come forward at the earliest so as to rectify the same, thus ought not to be bound to indemnify the Respondent for what was an exaggerated claim. He prayed that the Appeal be allowed and that the impugned Judgment and Decree be set aside.

15. Conversely, learned counsel for the Respondent argued that the document purporting to be a letter dated 31.08.1998 was in fact a fabrication and the same had never been sent to the Respondent or produced or exhibited in evidence before the trial Court. He submitted that the narrative set out therein was also fabricated, and contended that the Respondent had never been approached by the Issuer in the manner that the document suggested. He submitted that the plea taken by the Issuer and now sought to be advanced by the Appellant was fallacious, and prayed for dismissal of the Appeal.

16. We have heard and considered matter in light of the material on record. In the context of the arguments advanced, circumscribing the scope of the appeal accordingly, the only point arising for determination is in relation to Issue No.2, the onus of which was on the Issuer, and whether the same was rightly decided by the trial Court.

17. In that regard, it is manifest from a perusal of the record that there is no narration in the Affidavit in Evidence of the Appellants witness to suggest that the Letter sought to be relied upon by the Appellant was filed/appended therewith. On the contrary, under cross-examination, it was admitted by the Issuer's witness that the Letter was not present. Whilst it was voluntarily stated that the same had otherwise been placed on record, a perusal of the written statement reflects that while it mentions such a letter, there is nothing to show that it was filed as an annexure even at that stage. The impugned Judgment also does not record its production at the stage of evidence, and the

copy thereof filed along with the Appeal is also bereft of any marking as an exhibit, separating it from the other documents that have been filed, all of which suggests that the same was never produced at the relevant stage before the trial Court, hence is of no avail to the Appellant as regards the subject of Issue No.2. Furthermore, having accepted the premium amount, the Issuer was estopped from questioning the valuation. Even otherwise, nothing was placed on record to indicate that payment had been tendered for purpose of settlement at a lesser valuation.

18. As such, the Appeal fails and stands dismissed accordingly, but with no order as to costs.

JUDGE

JUDGE

Karachi
Dated