2023 INSC 659

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 4758 OF 2023
[ARISING OUT OF SLP (CIVIL) NO. 25256 OF 2018]

Ashok Kumar …Appellant (s)

Versus

New India Assurance Co. Ltd. ...Respondent(s)

J U D G M E N T

K.V. Viswanathan, J.

1. Leave granted.

2. The present appeal arises from the final judgment and order dated 24.01.2018 passed by the National Consumer Disputes Redressal Commission (for short "the National Commission"), New Delhi in Revision Petition No. 3415 of 2016. By the said judgment, the National Commission reversed the concurrent judgments of the District Consumer Disputes Redressal Forum

(for short “the District Forum”) and the State Consumer Disputes Redressal Commission (for short “the State Commission”). The Fora below, while allowing the original complaint had directed the New India Assurance Company Limited (for short “the Insurance Company”) to indemnify the Claimant on non-standard basis to the extent of 75% of the sum assured, which was Rs.8,40,000/-.

Facts

3. The brief facts, necessary for adjudication of this Appeal, are as follows:-

a) The appellant was the owner of the truck (dumper) (hereinafter referred to as “the vehicle”) bearing Registration No. HR-55C-5385 and had a valid insurance policy (Policy No. 354101/31/07/01/00013342) for the Insured Declared Value of Rs.8,40,000/- for the period 20.02.2008 to 19.02.2009.

b) On 26.06.2008, the appellant’s driver – Mam Chand had to unload stone dust at Mittal’s Farm at *Shankar ki Dhani*. He parked the vehicle to find out the address. The admitted case is

that he left the key in the key hole when he got out of the vehicle to look around for the address.

c) In the letter of repudiation which referred to the statement of the driver Mam Chand, it was mentioned that Mam Chand alighted from the vehicle and went to enquire about Mittal's Farm, after leaving the key of the said vehicle inside the key hole. When he had gone some distance, he heard the sound of starting of the vehicle and he came back and noticed that two persons were sitting on the driver's seat of the vehicle and a car was at the back of the said vehicle in which three persons were there. He had further stated that they stole and took away the vehicle.

d) On 27.06.2008 itself, the appellant registered an FIR No. 77 at the Bilaspur Police Station, Gurgaon under Section 379 of the IPC. On 02.07.2008, the Appellant intimated the respondent-Insurance Company about the theft. On 11.06.2009, the appellant filed a complaint CPA No. 515 of 2009 before the District Forum, Gurgaon alleging that the respondent was delaying the settlement of the claim and, as such, committed deficiency in service. Para

4 of the said complaint and the prayers made are important, which are set out herein below:

> "4. That the complainant had already been submitted all the relevant papers/forms with the opposite party, but illegally, malafidely and without any right, title and interest, lingering the matter on one pretext to the another while the complainant has hired the services of the Opp. party by paying consideration of the premium for insured amount of Rs.8,40,000/- and therefore, the Opp. party has totally failed to render sufficient services to the complainant."
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> xxx xxx xxx
>
> "a) Direct the opposite party to pay the insured amount of the theft vehicle i.e Rs. 8,40,000/- along with interest @ 18% per annum from the date of theft till realization.
>
> b) Direct the opposite party to pay, a sum of Rs.20,000/- on account of mental agony, delay, the harassment etc. suffered by the complainant."

e) What is significant is that on the date of the complaint, the Insurance Company had not repudiated the claim. It appears from the record that the Insurance Company had appointed an agency named "*Delta Detectives*" to investigate the matter and the said agency, on 27.10.2008, had recommended repudiation of the claim.

f) After the complaint CPA No. 515 of 2009 was lodged on 11.06.2009, it was only on 15.10.2009 that the respondent-

Insurance Company issued a letter repudiating the claim. The relevant portion of the repudiation letter reads as follows:-

> "2. You, vide an intimation letter dt. 02.07.2008, informed, for the first time, that your above said Dumper No. HR-55C-5385 had been stolen on 26.06.2008.
>
> xxx xxx xxx
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> "5. That, thus, from the above facts as disclosed by you and your driver, it is quite clear that the theft of your Dumper No. HR-55C-5385 was totally the result of your and your driver Mam Chand's total negligence in not safeguarding the said vehicle properly. It is quite clear that had the said Dumper would not have been left un-attended and further the key of the said Dumper would not have been left inside the key hole of the said Dumper, then, the same could not have been taken away by any person. In view of above contraventions and violations of the terms and conditions of the subject insurance policy, the Co. is not liable to pay any claim in respect of the said Dumper. Therefore, the competent authority of the Co. has repudiated your claim. It may please be noted."

g) When the matter stood thus, the complaint CPA No. 515 of 2009 came up before the District Forum on 22.11.2020 when the following statement appears to have been recorded <u>of the advocate</u> for the appellant, in CPA No. 515 of 2009:

> "I, Surender Kumar Gulia, Advocate, state that I do not want to proceed with my case. It may be dismissed.
>
> Sd/- Sd/-
> Surender Kumar Gulia, Adv. Member
> RO & AC DCDRF, GGN"

Recording the statement, separately, the District Forum on 22.11.2010 disposed of the said complaint in the following terms:-

> "Statement of the learned counsel for the complainant for withdrawal of the complaint recorded, separately. In view of the statement, the complaint of the complainant is hereby dismissed as withdrawn. File be consigned to record room after due compliance."

h) Faced with the repudiation, which is dated 15.10.2009, the Claimant, desperate to indemnify himself and get the fruits of his insurance policy, filed a fresh complaint being C.C. No. 134 of 2012. In the said complaint, the appellant averred that, after filing the earlier complaint, since the counsel for the opposite party viz., the Insurance Company took numerous dates for arguments on one pretext or the other, his counsel got annoyed with the attitude of the said Advocate and, by mistake, withdrew the case on 22.11.2020. It was expressly pleaded that the withdrawal of the said complaint was unfortunate, and that the appellant should not be made to suffer for the wrong deeds of the counsel. In the complaint, the appellant prayed for a direction to the Insurance Company to pay the insured an amount of

Rs.8,40,000 with interest @ 18% p.a. and further prayed for an amount of Rs.20,000/- on account of mental agony, delay and harassment.

i) The Insurance Company, in its reply, objected to the maintainability of the present complaint in view of the earlier proceedings in CPA No. 515 of 2009. It also contended that the terms and conditions of the insurance policy were violated. Apart from this, the plea of limitation was also taken.

j) The objections were overruled by the District Forum. The plea of the complaint, being barred by limitation, was addressed by recording a finding that the delay, if any, was already condoned, by the Forum, by order dated 06.03.2012 under Section 24A of the Consumer Protection Act. The plea about violation of the conditions of the policy was overruled and on non-standard basis, a sum to the extent of 75% of the sum assured was awarded. No finding was recorded on the aspect of the bar in filing the present complaint after the order dated 22.11.2010 dismissing CPA No. 515 of 2009 as withdrawn. The

Insurance Company carried the matter in Appeal to the State Commission.

k) Before the State Commission, only two contentions were urged. There was no contention raised on the issue of the withdrawal of the earlier complaint. It was contended that the intimation of the theft was given to the Insurance Company only on 02.07.2008 i.e., six days after the theft, therefore it was argued that Condition No.1 of the insurance policy was violated. Apart from this, violation of Condition Nos. 5 of the policy was also argued. Their point about the delay of six days in intimation was brushed aside by referring to the Circular Ref: IRDA/ HLTH/ MISC/ CIR/ 216/ 09/ 2011 dated September 20th, 2011 issued by Insurance Regulatory Development Authority (for short "IRDA"), which stated that even if there was a condition in the policy regarding delay in intimation, the insurer cannot take it's shelter to repudiate the claim, which is otherwise proved to be genuine.

l) To appreciate the State Commission's finding with regard to violations of the conditions of the policy, it is necessary to extract Condition Nos. 1 and 5 of the policy, which reads as follows:

> "l. Notice shall be given in writing to the Company immediately upon the occurrence of any accidental loss or damage and in the event of any claim and thereafter the insured shall give all such information and assistance as the Company shall require. Every letter claim writ summons and/or process or copy thereof shall be forwarded to the Company immediately on receipt by the insured. Notice shall also be given in writing to the Company immediately the insured shall have knowledge of any impending prosecution inquest or Fatal Inquiry in respect of any occurrence which may give rise to a claim under this policy, in case of theft or criminal act which may be the subject of a claim under this Policy the insured shall give immediate notice to the police and co-operate with the Company, in securing the conviction of the offender.
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> xxx xxx xxx
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> 5. The Insured shall take all reasonable steps to safeguard the vehicle insured from loss or 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 or employee of the insured. In the event of any accident or breakdown, the vehicle insured shall not be left unattended without proper precautions being taken to prevent further damage or loss and if the 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."

m) The State Commission clearly recorded that, soon after the theft of the vehicle on 26.06.2008, the FIR was lodged on 27.06.2008 with the Police and the Insurance Company was

informed. It was also recorded that no cogent evidence was produced by the Insurance Company to prove that there was a delay of six days in giving intimation. Going further, the State Commission recorded that Condition No.1 of the Insurance policy applied only to occurrence of an accident and not to theft cases. Insofar as Condition No.5 was concerned, it was held relying on the judgments of this Court in ***National Insurance Company Limited vs. Nitin Khandelwal,*** **[(2008) 11 SCC 259]** and ***Amalendu Sahoo vs. Oriental Insurance Company Limited,*** **[(2010) 4 SCC 536]** that even if there was a breach of that clause, the claim could not have been repudiated in toto and, applying the yardstick in ***Amalendu Sahoo (supra)***, 75% of the claim as the admissible amount, on non-standard basis, was awarded. Holding thus, the State Commission dismissed the Appeal of the Insurance Company.

n) Undaunted, the Insurance Company carried the matter in revision to the National Commission. Here, it was primarily argued that the withdrawal of Complaint No. 515 of 2009 foreclosed the Complainant from filing a fresh complaint. This

plea was accepted relying on the bar under Order XXIII Rule (1) (4) of the Code of Civil Procedure[1](CPC). Further, dealing with the merits about the breach of Condition No.5, the National Commission found that Condition No.5 was breached because the vehicle was unattended on the road side with keys in the key hole. However, there was no further discussion on the applicable law with regard to the consequences of the breach and there is no whisper in the order of the National Commission about the precedents discussed in the orders of the fora below. Equally so, with regard to the argument on the breach of Condition No.1, it was recorded that there was an obligation of the claimant to give intimation in writing of the theft of the vehicle. The National Commission, thus, allowed the Revision Petition.

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1 Withdrawal of suit or abandonment of part of claim.- (1) At any time after the institution of a suit, the plaintiff may as against all or any of the defendants abandon his suit or abandon a part of his claim:

Provided that where the plaintiff is a minor or other person to whom the provisions contained in Rules 1 to 14 of Order XXXII extend, neither the suit nor any part of the claim shall be abandoned without the leave of the Court.

(4) Where the plaintiff-

(a) abandons any suit or part of claim under sub-rule(1), or

(b) withdraws from a suit or part of a claim without the permission referred to in sub-rule (3),

he shall be liable for any such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim.

4) We have heard Ms. Kunika, learned counsel for the appellant, who presented the case very ably before us and Mr. J.P. Sheokand, learned counsel for the respondent-Insurance Company, who left no stone unturned while making his submissions.

Withdrawal of the earlier complaint

5) At the very outset, we would like to record that, having not argued, before the State Commission, the point of the present complaint being barred in view of the withdrawal of the earlier complaint, the National Commission was not justified, on the facts of the present case, in allowing the respondent-Insurance Company to urge that point therefrom. It is very clear from the order of the State Commission that only two points were argued by the Insurance Company.

6) Para 6 of the order of the State Commission is extracted hereinbelow:-

> "Learned counsel for the Appellant-Insurance Company has assailed the order of the District Forum by raising two-fold arguments. Firstly, that there was delay of 6 days in giving intimation to the Insurance Company and secondly that the

ignition key was left in the truck by driver and the truck was left unattended on the road."

7) In any event, we are convinced that interest of justice requires that the appellant, in the peculiar facts and circumstances of this case, should not be non-suited on the ground that his earlier complaint was withdrawn. We say so for the following reasons:-

(i) *Firstly*, the original Complaint No. 515 was filed on 11.06.2009 when the Insurance Company had not taken any decision on the claim. In fact, the Complainant had alleged that the Insurance Company was lingering on with the issue and had complained of not rendering "sufficient service";

(ii) *Secondly*, pending that complaint, it was on 15.10.2009 that the repudiation letter was issued on purported breach of Condition Nos. 1 & 5 of the Policy;

(iii) *Thirdly*, we find that a separate proceeding has been drawn up recording the statement of only the lawyer of the Complainant. The statement of the lawyer stated that "*I, Surender Kumar Gulia, Advocate, state that I do not want to proceed with my case. It may be dismissed*".

(iv) *Fourthly*, in the complaint filed on 06.03.2012, the appellant avers that since the lawyer for the opposite party – Insurance Company was taking numerous dates for arguments, his counsel getting annoyed with the attitude of the advocate of the opposite party withdrew the above said case by mistake.

(v) *Fifthly*, the appellant further avers that the withdrawal was unfortunate and he ought not to have prejudiced for the deeds of his lawyer.

(vi) *Sixthly,* the finding of the National Commission is also factually erroneous, on this score. The learned counsel for the appellant drew our attention to para 9 of the order of the National Commission wherein the following erroneous finding was recorded.

> "9. It is not disputed that earlier also, the complainant had filed consumer complaint no. 515 of 2009 against the opposite party/Insurance company on the same cause of action. Perusal of record would show that aforesaid complaint filed by the complainant in respect of repudiation of insurance claim regarding the same theft was withdrawn by the complainant unconditionally on 22.11.2010. Copy of the relevant order in CC No. 515 of 2009 is on the record. The order is reproduced as under:
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> > "Statement of learned counsel for the complainant for withdrawal of the complaint recorded separately. In view of the statement, the complaint of the

> complainant is hereby dismissed as withdrawn. File be consigned to record room after due compliance."

It will be noticed that the National Commission was under the wrong impression that the original Complaint No. 515 of 2009 was filed in respect of repudiation of the insurance claim and it proceeded on the erroneous premise that having challenged the repudiation in Complaint No. 515, the withdrawal of the complaint unconditionally on 22.11.2010 was fatal to the appellant. The original Complaint No. 515 of 2009 was filed on 11.06.2009 and the respondent-Insurance Company repudiated the claim only on 15.10.2009.

8) In view of the foregoing, it has to be reiterated that the complaint No. 515 was filed after theft due to non-settlement of claim by the Insurance Company. The repudiation of the claim was made during the pendency of the said complaint, purportedly due to breach of condition no. 1 and 5. The said complaint was withdrawn by the advocate of the complainant on the pretext of the case being prolonged by the advocate of the Insurance Company, without having express instructions for

withdrawal of the said complaint. However, for the fault of the advocate, the complainant cannot be made to suffer. Finally, the dismissal of the complaint was made by the National Commission under the wrong pretext that the earlier complaint had challenged the order of repudiation. Thus, in our view, the complaint cannot be thrown out on the threshold of Order XXIII Rule (1)(4) CPC and in the peculiar facts, it requires consideration on merits.

In the facts of the present case, the main question that falls for consideration is: *Whether the delay of 6 days in intimating the Insurance Company about the theft comes within the purview of breach of Condition No. 1 and also whether on facts there was breach of condition No. 5 of the insurance policy to justify the rejection of the claim in toto?*

9) A careful perusal of Condition No.1 shows that notice is to be given in writing to the Insurance Company immediately upon occurrence of any accidental loss or damage. The later part of the clause says that in case of theft or criminal act, which may

be subject of a claim under the policy, the insured shall give immediate notice to the police and cooperate with the Insurance Company in securing the conviction of the offender. In support of this interpretation to Condition No.1 and to bolster her plea that the appellant-Claimant did not breach Condition No.1, learned counsel for the appellant relied on the recent judgment of this Court in ***Jaina Construction Company vs. Oriental Insurance Company Limited and Another,*** **[(2022) 4 SCC 527]**, wherein relying on and reiterating the judgment of a three-Judge Bench in ***Gurshinder Singh vs. Shriram General Insurance Co. Ltd.*** **[(2020) 11 SCC 612]**, this Court held as follows:-

> "10. At the outset, it may be noted that there being a conflict of decisions of the Bench of two Judges of this Court in ***Om Prakash v. Reliance General Insurance,*** **[(2017) 9 SCC 724]** and in ***Oriental Insurance Co. Ltd. v. Parvesh Chander Chadha***, **[(2018) 9 SCC 798]**, on the question as to whether the delay occurred in informing the Insurance Company about the occurrence of the theft of the vehicle, though the FIR was registered immediately, would disentitle the claimant of the insurance claim, the matter was referred to a three-Judge Bench.
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> 11. The three-Judge Bench in ***Gurshinder Singh v. Shriram General Insurance Co. Ltd.,*** **[(2020) 11 SCC 612]** in similar case as on hand, interpreted the very Condition 1 of the insurance contract and observed as under : (SCC pp. 618-21, paras 9-15, 17 & 20)

12. In our view, applying the aforesaid principles, Condition 1 of the standard form for commercial vehicles package policy will have to be divided into two parts. The perusal of the first part of Condition 1 would reveal that it provides that "a notice shall be given in writing to the company immediately upon the occurrence of any accidental loss or damage". It further provides that in the event of any claim and thereafter, the insured shall give all such information and assistance as the company shall require. It provides that every letter, claim, writ, summons and/or process or copy thereof shall be forwarded to the insurance company immediately on receipt by the insured. It further provides that a notice shall also be given in writing to the company immediately by the insured if he shall have knowledge of any impending prosecution inquest or fatal inquiry in respect of any occurrence, which may give rise to a claim under this policy.

13. ***

14. We find that the second part of Condition 1 deals with the 'theft or criminal act other than the accident'. It provides that in case of theft or criminal act which may be the subject of a claim under the policy, the insured shall give immediate notice to the police and cooperate with the company in securing the conviction of the offender. The object behind giving immediate notice to the police appears to be that if the police is immediately informed about the theft or any criminal act, the police machinery can be set in motion and steps for recovery of the vehicle could be expedited. In a case of theft, the insurance company or a surveyor would have a limited role. It is the police, who acting on the FIR of the insured, will be required to take immediate steps for tracing and recovering the vehicle. Per contra, the surveyor of the insurance company, at the most, could ascertain the factum regarding the theft of the vehicle.

15. It is further to be noted that, in the event, after the registration of an FIR, the police successfully recovering the vehicle and returning the same to the insured, there would be no occasion to lodge a claim for compensation on account of the policy. It is only when the police are not in a position to trace and recover the vehicle and the final report is lodged by the police after the vehicle is not traced, the insured would be in a position to lodge his claim for compensation.

16. ***

> 17. That the term "cooperate" as used under the contract needs to be assessed in the facts and circumstances. While assessing the "duty to cooperate" for the insured, inter alia, the court should have regard to those breaches by the insured which are prejudicial to the insurance company. Usually, mere delay in informing the theft to the insurer, when the same was already informed to the law enforcement authorities, cannot amount to a breach of "duty to cooperate" of the insured.
>
> 18.-19. ***
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> 20. We, therefore, hold that when an insured has lodged the FIR immediately after the theft of a vehicle occurred and when the police after investigation have lodged a final report after the vehicle was not traced and when the surveyors/investigators appointed by the insurance company have found the claim of the theft to be genuine, then mere delay in intimating the insurance company about the occurrence of the theft cannot be a ground to deny the claim of the insured."

> 12. In the opinion of the Court the aforestated ratio of the judgment clinches the issue involved in the case on hand. In the instant case also, the FIR was lodged immediately on the next day of the occurrence of theft of the vehicle by the complainant. The accused were also arrested and charge-sheeted, however, the vehicle could not be traced out. Of course, it is true that there was a delay of about five months on the part of the complainant in informing and lodging its claim before the Insurance Company, nonetheless, it is pertinent to note that the Insurance Company has not repudiated the claim on the ground that it was not genuine. It has repudiated only on the ground of delay. When the complainant had lodged the FIR immediately after the theft of the vehicle, and when the police after the investigation had arrested the accused and also filed challan before the court concerned, and when the claim of the insured was not found to be not genuine, the Insurance Company could not have repudiated the claim merely on the ground that there was a delay in intimating the Insurance Company about the occurrence of the theft."

10) The above judgments put the matter and the controversy to rest. There was no breach of Condition No.1 in the present case.

In the present case, after the incident of theft on 26.06.2008, FIR was registered on 27.06.2008. The intimation was also given to the Insurance Company admittedly on 02.07.2008. The Police have also reported the vehicle as untraced as the records indicate.

11) Insofar as the alleged breach of Condition No.5 is concerned, it is seen from the record that the driver of the claimant left the key in the keyhole of the vehicle when he got down to search the location of "Mittal Farm", where he had to unload the stone dust. The investigator recommended the repudiation of claim because, according to him, steps to safeguard the vehicle insured were not taken by the driver. It is contended by the appellant that breach of condition No.5, if any, cannot result in total repudiation of the claim. It is argued that the claim ought to be settled on non-standard basis, as was ordered by the District Forum and the State Commission. Reliance is placed on ***Nitin Khandelwal (supra)*** and ***Amalendu Sahoo (supra)***.

12) The learned Counsel for the Insurance-Company vehemently opposed these submissions and prayed for dismissal of the Appeal. It is argued by him that, while in ***Nitin Khandelwal (supra)*** and in ***Amalendu Sahoo (supra)*** the cause of repudiation was not germane to the theft, in the present case, the cause was germane to the theft. The learned Counsel supported the findings as recorded in the order impugned.

13) A reading of the facts of the case in ***Nitin Khandelwal (supra)***, reveal that the repudiation was on the ground that the vehicle was being used as a taxi and in ***Amalendu Sahoo (supra)***, it was on the ground that the vehicle was being used on hire. In our view, that would not make any difference to the ratio that is deducible from those judgments.

14) 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 vs. National Insurance Company Limited and Another,*** **[(2018) 2 SCC 108]**; ***B.V. Nagaraju vs. Oriental***

***Insurance Co. Ltd., Divisional Officer, Hassan,* [*(1996) 4 SCC 647*], *National Insurance Co. Ltd. Vs. Swaran Singh and Others,* [(2004) 3 SCC 297] *and* *Lakhmi Chand vs. Reliance General Insurance,* [(2016) 3 SCC 100]]**

15) 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 of the 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."

As will be seen from the definition, theft occurs when any person intended 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. 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 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 ignition? On the facts of this case, the answer has to be in the negative. It is noticed in the repudiation letter that the driver Mam Chand had, after alighting from the vehicle, gone to enquire about the location of Mittal's Farm and that after he went some distance, he heard the sound of the starting of the vehicle and it being stolen away. The time gap between the driver alighting from the vehicle and noticing the theft, is very short as is clear from the facts of the case. It cannot be said, in such circumstances, that leaving the key of the vehicle in the ignition was an open invitation to steal the vehicle.

16) The Court of Appeal in England, in the case of ***David Topp* vs. *London Country Bus (South West) Limited*, [1993] EWCA Civ 15** had occasion to consider the issue, though in the context of liability of the owner of the vehicle for a fatal accident. The facts as set out in the judgment are as follows:-

> "In accordance with usual practice, the driver, Mr. Green, left the bus in that lay-by at the bus stop at about 2.35 p.m. on 24th April 1988. He left it unlocked, with the ignition key in it. He had then a 40 minute rest period before resuming his duties, driving a different bus. There was an arrangement under which the drivers could spend their rest period in the hospital.

> The expectation was that another driver, about eight minutes after Mr. Green had left the bus in the lay-by, would pick the bus up and drive the same route. But the other driver, who should have picked the bus up at about 2.43 p.m., did not do so because he was feeling unwell. His shift would have been non-compulsory overtime, and he did not report for his overtime. The bus therefore remained in the lay-by. Mr. Green saw it there later and reported that it was still standing there. Therefore, there is no doubt that the depot knew that the bus was there. But, possibly because of shortage of drivers or available staff, nothing was done to pick the bus up that evening. It was taken by somebody who has never been traced just before 11.15 at night, driven for a relatively short distance until the point where Mrs. Topp was knocked down and killed, and it was abandoned round the corner from there."

Referring to the judgment of Lord Justice Robert Goff in ***P.Perl (Exporters) Ltd. vs. Camden London Borough Council*** **[1984] QB 342**, the Court of Appeal held as under:-

> "In so far as the case is put on the basis that to leave the bus unlocked and with the key in the ignition on the Highway near a public house is to create a special risk in a special category, it is pertinent to refer to a passage in the judgment of Lord Justice Robert Goff (as he then was) in *P. Perl (Exporters) Ltd. V. Camden London Borough Council* [1984] QB 342 at page 359E-F where he said:
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> > "In particular, I have in mind certain cases where the defendant presents the wrongdoer with the means to commit the wrong, in circumstances where it is obvious or very likely that he will do so – as, for example, where he hands over a car to be driven by a person who is drunk, or plainly incompetent, who then runs over the plaintiff…"
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> But the sort of cases to which Lord Justice Robert Goff was there referring are far different from the present case. It may be added that that there is no evidence that the malefactor had been frequenting the public house that is shown in the picture; we do not know who he was, nor is there any evidence or presumption that persons who do frequent that particular public house are particularly likely to steal vehicles and engage in joy-riding."
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> (**underlining is ours**)

The above reasoning appeals to us to conclude that the present case was an eminently fit case, where the claim at 75% ought to have been awarded on a non-standard basis. Even if there was some carelessness, on the peculiar facts of this case, it was not a fundamental breach of Condition No.5 warranting total repudiation. It was rightly so ordered by the District Forum and affirmed by the State Commission.

17) Learned counsel for the Insurance Company, in his written submissions, has placed before us an unreported order dated 29.03.2022 passed by this Court in SLP (C) No. 6518 of 2018 titled ***Kanwarjit Singh Kang vs. M/s ICICI Lombard General Insurance Co. Ltd. & Anr.*** to support his case on the breach of Condition No.5.

We have carefully perused the order. In the said order, it is recorded that concurrently the Claimant lost before the fora below and it is also recorded that the State Commission did not find the ground of leaving the ignition keys in the vehicle to be a valid reason to repudiate the claim. However, on the ground of

unexplained and inordinate delay in lodging the FIR, the repudiation was upheld. In that case, while the loss was on 25.03.2010, the intimation to Police was only on 02.04.2010 so clearly it was a breach of Condition No.1. No doubt, in the penultimate paragraph of the order it is recorded that the want of reasonable care on the part of the petitioner in that case operated heavily against the petitioner and it was concluded that the repudiation could not be faulted. However, the primary reason for repudiation was the violation of condition No.1 *viz*. the delay in intimation to the Police. Further since there was a fundamental breach of Condition No.1, there was no occasion to raise points for settlement of claim on non-standard basis. There is no whisper about the breach of Condition No.5 being not a fundamental breach. We find the present case, on facts, completely different as there is no breach of Condition No.1 because the intimation to the police was immediate. There have been concurrent awards by the District Forum and State Commission on non-standard basis by applying ***Nitin***

Khandelwal (supra) and ***Amalendu Sahoo (supra)*****.** Hence, the order will in no manner assist the respondent-Company.

18) In ***Amalendu Sahoo (supra)***, this Court noticed the guidelines issued by the New India Assurance Co. Ltd. in settling claims on non-standard basis. The guidelines read as under:-

Sl.No.	Description	Percentage of settlement
(i)	Under declaration of licensed carrying capacity.	Deduct 3 years' difference in premium from the amount of claim or deduct 25% of claim amount, whichever is higher.
(ii)	Overloading of vehicles beyond licensed carrying capacity.	Pay claims not exceeding 75% of admissible claim.
(iii)	Any other breach of warranty/condition of policy including limitation as to use.	Pay up to 75% of admissible claim."

The above guidelines were followed by this Court in ***Amalendu Sahoo (supra)*** as is clear from para 14 of the said judgment.

The District Forum and the State Commission have rightly applied ***Amalendu Sahoo (supra)*** to the facts of the present case and awarded 75% on non-standard basis.

19) ***Nitin Khandelwal (supra)*** and ***Amalendu Sahoo (supra)*** lay down the correct formula that where there is some

contributory factor, a proportionate deduction from the assured amount would be all that the Insurance Company can aspire to deduct. We are inclined to accept the plea of the appellant that in the case at hand, on the facts governing the scenario, Clause (iii) of the table set out in para 14 of ***Amalendu Sahoo (supra)*** is attracted and the District Forum and the State Commission were justified in awarding the entire 75% of the admissible claim.

20) For the aforesaid reasons, the Appeal is allowed. We set aside the judgment of the National Commission and restore that of the District Forum as affirmed by the State Commission. No order as to costs.

…..……J.
(J.K. Maheshwari)

…..……J.
(K.V. Viswanathan)

New Delhi;
July 31, 2023.