IN THE HIGH COURT OF KARNATAKA AT BENGALURU DATED THIS THE 19TH DAY OF JUNE 2018

BEFORE

THE HON'BLE MR.JUSTICE S. SUNIL DUTT YADAV

M.F.A. NO.11803/2012 (MV)

S.N. Kenchanna,

v/s.

Smt. Anitha, W/ o Late R.P. Siddalingappa

JUDGMENT

The matter is admitted and taken up for final disposal with the consent of both the parties.

2. The present appeal is by the owner of the vehicle, who has challenged the order of the Tribunal in MVC No.987/2003, whereby the insurer was exonerated of its liability and instead was fastened on the appellant herein, who is the owner of the vehicle. 3. The parties are referred to by their ranking before the trial Court for the purpose of convenience.

4. The appeal is limited to the challenge as to imposition of liability on the owner and no grievance is made as regards the quantum of award of compensation by the learned Tribunal.

5. The facts made out are that on 19.09.2003, when the deceased was proceeding to Tumakuru from Gubbi after finishing his work on his Hero Honda Bike bearing registration No.KA-06- E-7564, at about 8.00 p.m., a bus bearing registration No.KA-06- B-9069 having its name " Prakasha " collided with the Bike of the deceased.The rider of the bike R.P. Siddalingappa succumbed to the injuries and died.A claim petition came to be preferred stating that the deceased was working as a proprietor of Gajanana Earth Movers, S.V.R Enterprises and was also involved in sand business, agricultural work and real estate business and was earning more than 50,000/- (Rupees Fifty Thousand) per month.

6. Alleging that the accident was exclusively due to rash and negligent driving of the bus by its driver, compensation was sought.After issuance of notice on the claim petition, the Insurer-respondent No.2 appeared and filed their written statement.Apart from a bare denial of averments of the claim petition, the only defence was with respect to violation of permit which is in issue and was pleaded as follows:

" The liability of this respondent to pay compensation depends upon the validity of the RC, FC and permit pertaining to the vehicle in question. "

7. Respondent No.1 i.e., the appellant herein filed statement of objections and had asserted that the accident was caused due to the rash and negligent riding of the Hero Honda Vehicle. It was asserted that respondent No.2-Insurance Company was liable to pay the compensation as the owner had insured his bus with respondent No.2-Insurance Company and the policy was in force and covered all risks.It was also averred at Para 9 to the effect that the bus in question had a permit to run from Chitradurga to K.B. Cross as specified in the permit and that on 19.09.2003, after the bus had arrived at K.B. Cross, as there was some repair that was to be attended to, it was taken to Tumakuru and left at H.S.V. Auto Diesel Work, B.H. Road, Tumakuru, for repair.The owner had further contended that on completion of repair work at 8.00 p.m., when the bus was returning towards K.B. Cross in order to resume its trips on the regular route, it appears that the claimants taking undue advantage of the passing of the bus in the said route have falsely implicated the bus belonging to

respondent No. 1 in collusion with the Gubbi Police Authorities in an alleged accident only for the purpose of claiming compensation under the policy.

8. The learned Tribunal after framing issues, took up the case for trial.The claimants led in evidence through PW- 1 and PW- 2 and marked police investigation records and other documents relating to repair as Ex.P.1 to P.14, while respondent No.2 led in evidence through RW.1 and got marked documents relating to the the Insurance Insurance policy, RC extract and endorsement.The respondent No.1 led in evidence through the owner-RW2, owner of the work shop-RW3 and the driver of the said bus, Lokesh, RW- 4.

9. The Tribunal after considering the evidence, documents marked at the time of the evidence and considering all contentions, held in the affirmative as regards the entitlement to the claim and had awarded compensation of ₹ 9,40,000/-with interest at 6% p.a. As regards the question of liability while observing that it was an admitted fact that accident had taken place at a location, which was not covered under the permit and holding that respondent No.1 had thereby violated terms and conditions of the policy, exonerated the liability of the insurer and fastened the same on the owner.

10. The said order is now challenged and it is contended that the Tribunal has not appreciated the contention that the rider of the bike was alone responsible for the accident, that the criminal case in C.C.No.765/2003 was registered against the driver of the bus but ended in acquittal and that the vehicle was falsely implicated.The only substantial argument of the appellant is that the vehicle was empty and was being driven back after repair from the garage and was proceeding back to K.B. Cross, so as to resume its trips as per the route permit when it was lugged into a false case. Moreover by virtue of Section 66 (3) (p) of the Motor Vehicles Act, 1988 (hereinafter referred to as the Act ' for short), it was permissible to have taken the vehicle for repair and if any accident had occurred during such time, the liability could not have been evaded by the Insurance Company.

11. The alternative contention advanced by the appellant during the course argument is that deviation in route permit was not a statutory defence available under Section 149 of the Act and hence liability of the Insurance Company could not have been exempted.

12. The Insurer, on the other hand, contended that it is an admitted position that there was no permit to ply the vehicle at Tumkur where the accident had occurred and that the absence of permit as regards the place where the accident had occurred not being disputed, such violation of permit amounts to a violation of the policy and exonerates the Insurance Company from its liability. It was further contended that there were in fact passengers in the bus, and that the owner of the bus and the garage owner being familiar with each other, as an after thought, had colluded at the instance of the rider of the bike to ensure that the false claim was lodged against the Insurer.It is also contended that a willful breach of the policy and such willful breach in so far as the vehicle was driven in a route where there was no permit, question of affixing the liability the Insurer did not arise.

13. The point for consideration is:

would extend to an accident that has occurred when the vehicle was returning from repair and when accident had occurred at a spot not covered by the route permit? "

" Whether the indemnity of the insurer

14. The pleadings of the appellant are unequivocal insofar as it is specifically stated in the written statement/statement of objections at para- 9 that the vehicle was proceeding empty from the repair shop and was returning back to K.B. Cross when the alleged accident is said to have occurred, if any.Para 9 of the written statement reads as follows:

" 9. It is further submitted that the bus in question i.e., Prakash bus bearing Reg. No.KA-06- B-9069 is having permit to run from Chitradurga to K.B. Cross and additional route K.B. Cross to Hosadurga and one single trip from K.B. Cross to Chitradurga.That on 19.09.2003 the said bus arrived at K.B. Cross at 12 noon.Since there was some repair work, the said bus was not operated in the regular route.But, it was taken to Tumkur and left the same at H.S.V. Auto Diesel Work, B.H. Road, Tumkur, Kuntammana thota for repair work.In the said workshop, the repair work was completed as 8 p.m., and the empty bus was returning towards K.B. Cross to go to regular route.But, taking undue advantage of passing of the said bus on B.H. Road via M.H. Patna, with an intention to have wrongful gain and with an intention to cause wrongful loss to this respondent, as an after thought, the petitioners in collusion with Gubbi police have falsely implicated this bus. It is pertinent to note here that there was some ill-will between this respondent and the then PSI of of Gubbi P.S. In the said background, the police and petitioners colluded together and after much deliberations, fixed the vehicle of this petitioner in this accident case.22

15. Though it had been asserted that the accident had actually not occurred and the bus was sought to be lugged in into a false case only for the purpose of claiming insurance, other records including the police investigation records would indicate that in fact the accident had occurred.The charge sheet has been filed against the driver of the bus and the bus was seized by the jurisdictional police, all of which points to the involvement of the bus in the accident.To substantiate his contention that the vehicle was taken for repair to H.S.V. Auto Diesel Work Shop, the owner of the said garage, Riyaz had been examined, who has stated that the bus was left at the garage for repair and on the same day, around 8.00 p.m., after attending to repair, it was sent back.The estimate for repair has been marked as Ex.D5 by respondent No.1 and RW.3 admits in the cross examination as regards to the issuance of Ex.D5 and nothing worthwhile has been elicited at the time of cross examination of RW.3 to contradict the version that vehicle was left for repair on the said day.It is however an admitted fact that the spot of accident was at a location not covered by the permit obtained.

16. Section 66 of the Act provides that no owner of the motor vehicle shall use or permit the use of the vehicle as a transport vehicle in any public place whether or not such vehicle is actually carrying any passengers or goods save as permitted by the conditions prescribed in the permit or otherwise granted in sub Section (3) of the Act, which is in the nature of the proviso, however, Section 66 further provides that the prohibition under the Section would not apply to specified categories of vehicles and further when vehicles are put to specific use.

What is relevant to the present case is Section 66 (1) and 66 (3) (p) of the Act, relevant extracts are as follows:

66 (1).No owner of a motor vehicle shall use or permit the use of the vehicle as a transport vehicle in any public place whether or not such vehicle is actually carrying any passengers or goods save in accordance with the conditions of a permit granted or countersigned by a Regional or State Transport Authority or any prescribed authority authorizing him the use of the vehicle in that place in the manner in which the vehicle is being used:.....

(3). The provisions of sub-section 1 shall not apply ..... (p) " to any transport vehicle while proceeding empty to any place for purpose of repair. " 17. While the appellant had strenuously argued that the policy would be in force and would cover the accident that is alleged to have occurred when the vehicle was coming back from the work shop to K.B. Cross to resume its route trip, the learned counsel for the respondent No.4 had argued that plain reading of Section 66 (3) (p) of the Act is to the effect that exemption from the prohibition would operate only where the vehicle was proceeding without passengers " to any transport vehicle while proceeding empty to any place for purpose of repair ".In the light of the admitted position that bus was returning from the workshop which is the case of the appellant, it is argued that the benefit of Section 66 (3) (

p) of the Act cannot be extended.The respondent No.4 would also argue that the benefit under Section 66 (3) (p) of the Act would not be applicable as there were passengers in the bus.

18. Though the plain reading of the Section appears to indicate that the exemption under the proviso to the prohibition of Section 66 (3) (p) of the Act would apply to the transport vehicle while proceeding " to any place for purpose of repair ", looking at the context in which the proviso under Section 66 (3) of the Act finds a place, Section 66 (3) (p) of the Act cannot be construed as a proviso in its strict sense but is in the nature of a ' saving clause '.Section 66 of the Act starts with a prohibition that motor vehicles shall not be used or be permitted to be used as a transport vehicle in a public place.The proviso under Section 66 (3) of the Act contains under various sub-clauses, categories of transport vehicles or specific use of vehicles which are exempted from the requirement of obtaining a permit.For instance, the exemption includes:

Transport vehicles owned by Central Government, or State Government, used for Government, purposes unconnected with any commercial enterprise [3 (a)], transport vehicle used for towing a disabled vehicle or for removing vehicle from a disabled vehicle to a place of safety [3 (e)], to any transport vehicle which has been temporarily registered while proceeding empty to any place for the purpose of registration of the vehicle [3 (k)], to any transport vehicle which which,, owing to flood, earthquake or any other natural calamity, obstruction on road, or unforeseen circumstances, is required to be diverted to any other route to enable it to reach its destination [3 (m)] and lastly, to any transport vehicle while proceeding empty to any place for the purpose of repair [3 (p)].

On a close scrutiny of these exemptions, it becomes apparent that the requirement of a permit cannot be intended to be extended with respect to vehicles used for specified purposes as above. in fact, even in the absence of such an exemption it is but logical that permit cannot be insisted upon for the uses of the vehicle for the aforesaid purposes as inherently, the word ' permit ' denotes “ use of the vehicle as a transport vehicle in any public place ".Hence, the proviso to Section 66 (3) as regards uses mentioned aforesaid merely saves such use from the prohibition contained under Section 66 (1).Hence, Section 66 (3) (p) for all purposes is ' saving clause '.In fact, the saving clause is typically used to preserve from destruction of rights which otherwise already exits and require to be expressly reserved when by a statutory introduction of a provision there may be an ambiguity as regards their continuance.

19. The intention appears to be that where a transport vehicle is taken for the purpose of repair in deviation of the conditions of the permit, still such use of the vehicle to ferry to the place of repair was to be construed as a legitimate exemption from adherence to the condition of a permit. What is good for the purpose of granting exemption while the vehicle is being taken to a place for repair ought to be good and subsisting when the vehicle is being brought from the place of repair to the place where it would resume its trips, and that appears to be an intention of the legislature.If Section 66 (3) (p) is to be construed as a clause in the nature of the saving clause, it would have the effect of preserving and clarifying rights which but for the saving, would be lost.In fact, while looking at the intention of Section 66 of the Act, it can be safely said that it was never intended to prohibit the use of vehicle when it is being taken for the purpose of repair.The observations of the Supreme Court while dealing with levy of tax on vehicles in State of Orissa and Ors. v.Bijaya.C. Tripathy reported in AIR 2005 SC 1431 in Para 10 throws light on the scope of Section 66:

" 10. The High Court also appears to have misread Section 66 of the Motor Vehicles Act. All that Section 66 of the Motor Vehicles Act provides is that the owner of a motor vehicle cannot use the vehicle as a transport vehicle in any public place without a permit.

Section 66, therefore, merely prevents use of such vehicle as a transport vehicle without a permit.It does not prohibit driving of such a vehicle on a public road.The vehicle can be driven on a public road so long as it is not used as a transport vehicle.To take an extreme example, the owner of such vehicle may use that vehicle for taking his family out for a picnic.Section 66 will not bar such a use. "

20. As such, the use of the vehicle in the present case being one of inevitable necessity is a fair and just exemption that is granted from the prohibition of deviating from the permit.The narrow interpretation that is normally assigned in case of the proviso cannot be extended to the present clause as the present clause is not in the nature of a mere proviso.

21. The aspect as to the interpretation of clause as in the present case where though it appears to be a proviso is in essence a saving clause has been explained in the case of Shah Bhojraj Kuverji Oil Mills and Ginning Factory Vs. Subbash Chandra Yograj Sinha reported in AIR 1961 SC 1596, in para 10 as follows:

" 10. The law with regard to provisos is well-settled and well-understood.As a general rule, a proviso is added to an enactment to qualify or create an exception to what is in the enactment, and ordinarily, ' a proviso is not interpreted as stating a general rule.But, provisos are often added not as exceptions or qualifications to the main enactment but as savings clauses, in which cases they will not be construed as controlled by the section.The proviso which has been added to Section 50 of the Act deals with the effect of repeal.The substantive part of the section repealed two Acts which were in force in the State of Bombay.If nothing more had been said, Section 7 of the Bombay General Clauses Act would have applied, and all pending suits and proceedings would have continued under the old law, as if the repealing Act had not been passed.

The effect of the proviso was to take the matter out of Section 7 of the Bombay General Clauses Act

and to provide for a special saving.It cannot be used to decide whether Section 12 of the Act is retrospective.It was observed by Wood, V. C., in Fitzgerald v. Champneys that saving clauses are seldom used to construe Acts.These clauses are introduced into Acts which repeal others, to safeguard rights which, but for the savings, would be lost.The proviso here saves pending suits and proceedings, and further enacts that suits and proceedings then pending are to be transferred to the Courts designated in the Act and are to continue under the Act and any or all the provisions of the Act are to apply to them.The learned Solicitor-General contends that the savings clause enacted by the proviso, even if treated as substantive law, must be taken to apply only to suits and proceedings pending at the time of the repeal which, but for the proviso, would be governed by the Act repealed.According to the learned Attorney General, the effect of the savings is much wider, and it applies to such cases as come within the words of the proviso, whenever the Act is extended to new areas. "

22. The observations as to the nature of interpretation of proviso and when not to be construed as a mere proviso as in its classical notion is explained in the case of Jennings Vs. Kelly reported in 1939 (4) All England Law Reports 470 as follows:

" We are not dealing here with a true proviso, or, at any rate, not with such a proviso as this House was considering in the West Derby Union case (2).It cannot, I think, be disputed that, in construing a section of an Act of Parliament, it is constantly necessary to explain the meaning of the words by an examination of the purport and effect of the other sections in the same Act. A number of striking examples will be found in MAXWELL ON THE INTERPRETATION OF STATUTES, 8th Edn., pp. 27, 28. This principle is equally applicable in the case of different parts of a single section, and none the less so because the latter part is introduced by the words " provided that, " or like words. There can, I think, be no doubt that the view expressed in KENT'S COMMENTARIES ON AMERICAN LAW, 12th Edn., Vol.1,p. 463, n (cited with approval in MAXWELL ON THE INTERPRETATION OF STATUTES, 8th Edn.,p.140), is correct:

" The true principle undoubtedly is, that the sound interpretation and meaning of the statute, on a view of the enacting clause, saving clause, and proviso, taken and construed together, is to prevail. "

23. Thus, the interpretation of Section 66 (3) (p) would be such that the exemption obtained therein would be extended to when the transport vehicle was also proceeding back from the place of repair and cannot be merely limited to when it was proceeding to the place of repair.Such an interpretation would be in keeping with the true intention of the exemption, which was to save rights of use of vehicle for repair.

24. Coming to the contention that the vehicle had passengers, it is contended by the injured that in fact there were passengers in the bus and PW.2 Shashikala states that she was present in the bus when the accident had occurred and other passengers were also present, which appears to indicate that there were other passengers also in the bus.However, it is relevant to know that the evidence of PW2 had been discarded as PW2 had not subjected herself to cross examination and this has been noticed by the Tribunal at para 16 at internal page 15 of the judgment, and hence reserves no further consideration.

25. As regards the contention that deviation of route permit would not absolve the liability of the insurer in so far as Section 149 (2) of the Motor Vehicles Act provides for exoneration of liability of the insurer in accordance with the defences specified therein, it is argued that a distinction ought to be made between absence of permit and deviation from the terms of the permit. It is submitted that while absence of permit could be a ground to avoid statutory liability under Section 149 (2) of the Act violation of conditions of permit including regarding route would not come within the purview of Section 142 of the Act.

26. The appellant relies on the judgment in K.V.Thimmegowda Vs. Kamalamma reported in ILR 1991 KAR 4127 while respondent No.4 on the other hand relies on the judgment of the division bench in the case of B.T.Venkatesh Vs. Jagadish Kumar and others in MFA.NO.9582/2007 and has also relied on the judgment in National Insurance Co. Ltd. Vs. Chella Bharathamma and others reported in AIR 2004 SC 4882. It is relevant to take note of the judgment of the coordinate Bench in the case of Divisional Manager, United India Insurance Co. Ltd. Vs. Smt.Jayamma and others reported in ILR 2018 KAR 1849 which had considered all the judgments referred to above and had come to the conclusion that where there is a violation as regards to the limit of permit or as regards violation of permit conditions as contemplated under Section 86, the consequences that would visit such violation would be penalty under Section 192- A or action to be initiated under Section 207 (1) of the Act. This Court in the above mentioned judgment distinguishes the judgment in Chella Bharathamma's case as not being applicable as it dealt with a case where there was no permit which falls within a category of statutory defence under Section 149 (2) and hence held that the law laid down in the Chella Bharathamma's case would not be applicable as regards violation in conditions of permit.The court also upheld the applicability of Thimmegowda's case which held that deviation of route permit would not absolve the liability of the insurer as the same did not come within the purview of Section 149 (2) of the Act. While holding so, this Court declared inapplicable the judgment in the case of B.T. Venkatesh by holding that the same was in the peculiar facts of that case and that further the judgment in Thimmegowda's case being an earlier judgment of the division bench was not considered.

27. We accept the interpretation placed on the judgments referred to above in the case of Jayamma referred to supra and hold that apart from the fact that the exemption under Section 66 (2) (p) would be applicable in the present facts, even otherwise, violation of permit conditions such as violation of route permit would not result in exoneration of the liability of the insurer.

28. Accordingly, the judgment and award of the Tribunal dated 05.10.2012 in M.V.C. No.987/2003, is set aside insofar as it relates to fastening of liability on the owner.

The Insurer would have to bear the liability in the present case, in the light of the discussion as made above.

29. Accordingly, appeal is allowed while leaving undisturbed the remaining portion of the award which has not been challenged.

In view of the disposal of the main appeal, I.A.No.1/2012 does not survive for consideration.Accordingly, it is disposed of.

The amount in deposit is ordered to be refunded to the appellant.