

(2004) 12 AP CK 0126
In the Andhra Pradesh High Court
Case No : SA No. 916 of 2004

Divisional Manager, Oriental Insurance Co. Ltd., DMC and
Another

APPELLANT

Vs

Dwara Mani Kumari

RESPONDENT

Date of Decision : 14-12-2004

Acts Referred:

Contract Act, 1872 — Section 28
Limitation Act, 1963 — Section 14
Motor Vehicles Act, 1939 — Section 1, 2, 92A, 95

Citation : (2005) 4 ALD 86 : (2005) 4 ALT 524

Hon'ble Judges : Elipe Dharma Rao, J

Bench : Single Bench

Advocate : R. Briz Mohan Singh, for the Appellant; Subba Reddy, for K. Venkatesh, for the Respondent

Judgement

Elipe Dharma Rao, J.—The appellants herein who are the unsuccessful defendants have preferred this second appeal questioning the judgment and decree dated 24-3-2004 in AS No. 153 of 2002 on the file of the Court of Additional District Judge, (Fast Track Court) Rajahmundry of East Godavari District confirming the judgment and decree dated 12-2-2001 in OS No. 46 of 1993 on the file of the Court of Additional Senior Civil Judge, Rajahmundry, decreeing the suit for Rs. 80,000-00 together with proportionate costs and subsequent interest @ 12% p.a. thereon from the date of suit till its realization.

2. Originally the suit was filed for recovery of Rs. 1,00,000-00 against Defendants 1 and 2 jointly and severally being the damages sustained by the plaintiff towards the loss sustained by her in getting the vehicle repaired, as it was damaged in a "road accident, for subsequent interest and costs of suit.

3. For the purpose of convenience, the parties will be referred to as plaintiff and defendants as arrayed before the Additional Senior Civil Judge, Rajahmundry.

4. Before proceeding with the further discussion for proper appreciation of the

factual matrix, the respective pleadings of the parties may be relevant.

5. The facts leading to the filing of this second appeal can be summarised as follows:

The plaintiff owned a lorry bearing No. AHF-5868. It was insured with the second defendant company under Policy No. 43283/5/0/MV/3067/90 for a period of one year from 18-9-1989. The plaintiff paid a sum of Rs. 5,052-00 under that policy. The vehicle was insured for Rs. 3,63,000-00. The plaintiff's vehicle was involved in an accident on 15-2-1990 at 3:00 a.m., within the limits of Kanker Police Station. In that accident the driver and cleaner of the vehicle died instantaneously. The vehicle sustained total damage. The vehicle had become scrap. The plaintiff could get back the salvage from the accident spot with great difficulty. The plaintiff intimated the fact to the second defendant. One Mr. A.A. Khan, an authorised Surveyor was deputed by the second defendant for inspection of the damaged vehicle. The said Surveyor inspected the vehicle on 6-3-1990 and assessed the loss in a sum of Rs. 1,00,000-00. After the Surveyor's inspection, the plaintiff entrusted the vehicle to M/s. Surya Mechanical Works, Rajahmundry in order to make it roadworthy by getting the vehicle repaired. The plaintiff incurred an expenditure of Rs. 1,30,000-00 for the spare parts and the charges for effecting repairs and also for bringing the vehicle from the place of accident to Rajahmundry. The second defendant shall indemnify the plaintiff under the contract of insurance. The plaintiff received a letter dated 3-8-1990 from the second defendant stating that the plaintiff's claim was repudiated on the ground that the bills produced by the plaintiff were fake. That allegation is not correct. The plaintiff collected the bills from M/s. Surya Mechanical Works, Rajahmundry only after the vehicle was completely repaired. The plaintiff made several representations to the defendants to consider her claim and to consider her case on cash loss basis in case the defendants were not inclined to accept the bills produced by her. While so, one Mr. P. Anandam and Mr. Shiva Kumar, Surveyors of the defendants approached the plaintiff on 21-9-1990 and asked the mechanic who attended the repairs for production of salvage. The repairer, Surya Mechanical Works could not produce the salvage, as it is not readily available. The officers of the defendants obtained signatures of the plaintiff's husband on several papers with a promise to settle the claim made by her. The plaintiff received a letter dated 3-10-1990 from the second defendant stating that the case cannot be considered as on cash loss basis as the salvage could not be produced. The salvage is not worth more than Rs. 3,000/- as seen from the Surveyor's report. The defendant without settling the claim either on repair basis or on cash loss basis had repudiated the claim. Aggrieved by the repudiation of claim, the plaintiff filed a complaint before the District Consumer Forum in CD No. 503/90. That was dismissed observing that the controversy require thorough enquiry in a Civil Court. The plaintiff is entitled to claim the amount of Rs. 1,30,000-00 towards actual loss sustained by her in getting the vehicle roadworthy. However, the plaintiff is restricted her claim to Rs. 1,00,000-00 and interest from the date of the suit.

6. The first defendant representing the Oriental Insurance Company Limited, Rajahmundry filed his written statement and the second defendant filed memo adopting the written statement in all material particulars. In the written statement, the first defendant submitted that the vehicle of the plaintiff bearing No. AHF-5868 was involved in an accident on 15-2-1990 within the limits of Kankar Police Station and it was validly insured with the first defendant through the second defendant. The policy taken by the plaintiff was issued to cover the risk of third parties who are involved in the accident due to the act of the employee of the plaintiff. The contract amounts to a contract of insurance, which is deemed to be a contract of indemnity. The policy was subject to terms and conditions as noted in the policy. In case of any damage occurred to the vehicle in any accident and if the Defendants 1 and 2 shall disclaim the liability, the plaintiff had to approach the competent Court within 12 calendar months from the date of disclaiming the liability. Otherwise, it is deemed that the plaintiff abandoned the claim and the plaintiff shall not recover the amount under policy. The second defendant addressed a letter to the plaintiff on 3-8-1990 intimating that the claim of the plaintiff was repudiated since the plaintiff submitted fake bills. On 21-9-1990 the Surveyor and investigators of defendant-company approached Surya Mechanical Works in whose shed the vehicle was handed over for effecting repairs. The request of the plaintiff was rejected on 3-10-1990. The suit is filed on 18-2-1993. So the plaintiff is not entitled to claim the amount, as the suit is filed after lapse of one year. On receiving intimation from the plaintiff, the first defendant deputed one Mr. Pukraj Jain of Rajpur to assess the damage caused to the plaintiff's vehicle at the spot of accident. The said Surveyor approached the accident spot to assess the damage and submitted his report on 20-2-1990. Another Surveyor, Mr. A.A. Khan was deputed to assess the net loss caused to the vehicle. He assessed the loss at a sum of Rs. 84,627-00 calculating; a sum of Rs. 79,602-00 towards replacement of spare parts and sum of Rs. 5,525/- towards labour charges. The said assessment was subject to production of real bills towards purchase of spare parts to the defendant and handing over either the scrap or condemned spare parts to the defendant. At the time of assessment by Mr. A.A. Khan, he approximately estimated the worth of damaged spare parts to an extent of Rs. 3,000-00. The plaintiff submitted bills and vouchers to the defendant. As the claim amount exceeded the limits of the first defendant, it was to be submitted with the entire file to the Engineer of the defendant company at Vijayawada to process the claim and to submit opinion about payment and replacement made by the plaintiff. The Engineer of the Company doubted the bills and vouchers submitted by the plaintiff. Then he appointed one, Mr. N. Sivakumar and one Mr. Munshi Prasad, Surveyors and lossness of the bills. The said Mr. Munshi Prasad submitted his report and according to that report, Mr. N. Shivakumar who made thorough enquiry at Rajahmundry along with Engineer of the Company, Mr. Anandam. It is revealed in that enquiry that the major spare parts for which bills were submitted were not actually replaced and that the vehicle was already sold away and it was transferred. The plaintiff somehow wanted to play fraud against the defendants

by submitting fake bills to recover more amounts. So the first defendant as per the rules of the company directed the second defendant to reject the claim of the plaintiff. A letter to that effect was addressed on 3-8-1990 by the second defendant repudiating the claim of the plaintiff. The plaintiff did not incur expenditure of Rs. 1,30,000-00 towards value of spare parts, labour charges etc. Mr. P. Anandam and Mr. Shivakumar approached the plaintiff on 21-9-1990 and asked the mechanic to produce the salvage. But the owner of Surya Mechanical Works could not produce the salvage. The said Mr. Shivakumar and Mr. Anandam approached the plaintiff and Surya Mechanical Works with an intention to somehow or otherwise settle the claim of the plaintiff for verification of the vehicle and job of the spare parts. It was found that most of the spare parts were not replaced. The amount assessed by Mr. A.A. Khan was only an estimate relating to the scrap material of the vehicle. To arrive at the correct calculation of the amount, the real and genuine bills towards replacement of spare parts are necessary to process the claim. The plaintiff having produced fake bills is not entitled to any relief. The plaintiff is also not entitled to interest, as claimed in the plaint.

7. On the basis of the above pleadings, the Trial Court framed the following issues for trial:

1. Whether the plaintiff is entitled for suit claim to a sum of Rs. 1,00,000-00 as prayed?
2. Whether the plaintiff is entitled for interest as prayed?
3. Whether there is no cause of action for the suit?
4. Whether the interest claimed is excessive?
5. To what relief?

To buttress the claim, the plaintiff examined PW1 D. V. Anandam and marked Ex.A1 Copy of Insurance Policy, Ex.A2 Copy of letter dated 3-8-1990 addressed by the second defendant to the plaintiff, Ex.A3 a letter dated 3-10-1990 addressed by the second defendant to the plaintiff. On behalf of the defendants, DW1 Asst. Divisional Manager of the defendant company, DW2 licensed Surveyor, DW3 Senior Branch Manager of the defendant Company and DW4 Private Professional Surveyor were examined and marked Ex.B1 to B10 are the bills and vouchers submitted by the plaintiff, Ex.B11 duplicate commercial vehicle comprehensive policy, Ex.B.12 report dated 22-2-1990 of the Surveyor, Pukhraj, Ex.B13 copy of estimation given by Surya Mechanical Works to the Branch Manager for the second defendant, Ex.B14 report dated 30-4-1990 submitted by Mr. A.A. Khan, an Insurance Surveyor, Ex.B15 report dated 13-7-1990 submitted by Mr. V. Munshi Prasad, Surveyor, Eluru, Ex.B16 letter dated 24-10-1990 sent by the Surveyor, Mr. Shivakumar to the Regional Office of the Defendant Company, Ex.B17 letter of the plaintiff sent to the defendant and Ex.B18 letter dated 21-9-1990 from the husband of the plaintiff to the first defendant.

8. Considering the oral and documentary evidence adduced on either side, the learned Trial Judge as against the claim of Rs. 1,00,000-00 decreed the suit of the plaintiff for Rs. 80,000-00 together with proportionate costs and subsequent interest @ 12 % p.a., thereon from the date of suit till its realization.

9. Aggrieved by the judgment and decree dated 12-2-2001 in OS No. 46 of 1993 on the file of the Court of Additional Senior Civil Judge, Rajahmundry of East Godavari District, the defendants preferred AS No. 153 of 2002 on the file of the Court of VIII-Additional District Judge (Fast Track Court), Rajahmundry contending that the Trial Court erroneously held that the defendants are liable to pay the amount as decreed in the suit and the Trial Court brushed aside the fact that the bills, which are furnished by the plaintiff's husband marked under Ex.B1 to Ex.B10 are fake bills. Further the Trial Court grossly erred in pointing out that non-examination of the owner of spare parts shop is fatal to the case of the defendants. The Trial Court erred that there is no clause in the policy that the bills have to be produced and scrutinized by the defendants and after receiving the salvage the defendants have to pay the amount irrespective of the fact that whether the vehicle was repaired or not. The judgment and decree of the Trial Court is vitiated, as the entire findings of the Trial Court are based on presumptions and that non-examination of the mechanic, who caused repairs to the vehicle of the plaintiff is fatal to the plaintiff's case. The Trial Court ought to have seen that the plaintiff is not entitled to maintain the suit, as the suit is barred by limitation. Moreover, the Trial Court erred in awarding interest @ 12 % p.a. over Rs. 80,000-00 from the date of suit till the date of realization, which is not tenable under law. The plaintiff, therefore, not entitled for proportionate costs and subsequently the costs awarded by the Trial Court according to the reasons assigned in the judgment and decree is not tenable under law.

10. On appreciation of the oral and documentary evidence placed on record, the learned VIII-Additional District Judge (Fast Track Court), Rajahmundry and confirmed the judgment and decree dated 12-2-2001 in OS No. 46 of 1993 on the file of the Court of Additional Senior Civil Judge, Rajahmundry of East Godavari District, dismissed the first appeal without costs.

11. Aggrieved by the judgment and decree dated 24-3-2004 in AS No. 153 of 2002 on the file of the Court of learned VIII-Additional District Judge (Fast Track Court) Rajahmundry, the appellants-defendants have filed the present second appeal. In this second appeal, the defendants have firstly contended that the Trial Court as well as the first Appellate Court having noted the admitted factual position that the terms and conditions of policy laid down that if the claim is rejected, the suit shall be instituted within one year therefrom and the instant suit is filed after the said period, committed a serious error in holding that the suit is within time and is not barred. Secondly, the Court below failed to see fairly well settled law down by the Supreme Court in the case of The Vulcan Insurance Co. Ltd. Vs. Maharaj Singh and Another, , and National Insurance Company v. Sujir Ganesh Nayak and Company, reported in 2 (1997) CPJ 1 (SC), that when

the policy of Insurance provided that if a claim is made and rejected and no action is commenced within the time stated in the policy, the benefits flowing from the policy shall stand extinguish and any subsequent action would be time barred. Thirdly, the first Appellate Court having given a finding that the bills submitted by the plaintiff were admittedly fake, committed a serious error in confirming the judgment and decree of the Trial Court. Fourthly, the first Appellate Court erred in holding that the bills being fake would not alter the liability of the defendant-company on the ground that nowhere in the terms and conditions of the policy it is stated that the defendant-company could repudiate the claim on this ground. Fifthly, the first Appellate Court failed to read that submission of fake bills along with claim form is a fraud and fraud goes to the root of the claim. Sixthly, the first Appellate Court failed to see the nature of contract of Insurance and claim made thereunder is a contract uberrima fides (contract in utmost good faith) and admitted subject of fake bills in a claim is a clear proof of the fraudulent act on the part of the plaintiff and lack of uberrima fides on the part of plaintiff and therefore, the defendants could avoid all its liability under its policy. In this second appeal, the following substantial questions of law were framed.

1. Whether or not the appellant could curtail the normal period of limitation by imposing a shorter period of remedy in the terms and conditions of the policy?
2. Whether or not such a condition is void u/s 28 of the Indian Contract Act?
3. Whether on the admitted fraudulent act of submission of fake bills in a claim of Insurance, whether the insurer could repudiate the claim on account of the same or not?

12. Heard the learned Counsel appearing on behalf of the appellants-defendants, Mr. R. Briz Mohan Singh and Mr. Subba Reddy, the learned Senior Counsel representing Mr. K. Venkatesh, learned Counsel appearing on behalf of the respondent-plaintiff. I have reproduced the relevant parts of the pleadings of the plaintiff in the plaint and of the defendants in the written statement to show the rival contention respectively set up by the contesting parties. I have gone through the entire oral and documentary evidence placed on record and perused the evidence of PW1 and the documentary evidence exhibited as Ex.A1 Copy of Insurance Policy, Ex.A2 Copy of letter dated 3-8-1990 addressed by the second defendant to the plaintiff, Ex.A3 a letter dated 3-10-1990 addressed by the second defendant to the plaintiff. On the other hand perused the evidence of DW.1 Asst. Divisional Manager of the defendant company, DW2 licensed Surveyor, DW3 Senior Branch Manager of the defendant Company and DW4 Private Professional Surveyor were examined and marked Exs.B1 to B10 are the bills and vouchers submitted by the plaintiff, Ex.B11 duplicate commercial vehicle comprehensive policy, Ex.B12 report dated 22-2-1990 of the Surveyor, Pukhraj, Ex.B.13 copy of estimation given by M/s. Surya Mechanical Works to the Branch Manager for the second defendant, Ex.B14 report dated 30-4-1990 submitted by Mr. A.A. Khan, an Insurance Surveyor, Ex.B15 report dated 13-7-1990 submitted

by Mr. V. Munshi Prasad, Surveyor, Eluru, Ex.B16 letter dated 24-10-1990 sent by the Surveyor, Mr. Shiva Kumar to the Regional Office of the Defendant Company, Ex.B.17 letter of the plaintiff sent to the defendant and Ex.B18 letter dated 21-9-1990 from the husband of the plaintiff to the first defendant.

13. Mr. R. Briz Mohan Singh, the learned Counsel for the appellants-defendants drawn attention of this Court in respect of the evidence adduced by the Insurance Company and the documentary evidence placed on record. He has submitted that the defendants do not admit the extent of damage as originally claimed by the plaintiff. According to the conditions of the Insurance policy, he further submit that the defendants-company must have been informed of the occurrence of any accident or loss or damage immediately after such occurrence or loss.

Condition No. 4 of the policy contemplates that the Insurance Company may at its own option repair, reinstate or replace the motor vehicle or any part thereof or accessories or may pay in cash the amount of loss or damage and the liability of the Insurance Company shall not exceed the actual value of the parts damaged or lost plus the reasonable cost of fitting shall in no case exceed the insured's estimate of the value of the motor vehicle at the time of loss or damage.

Condition No. 5 of the policy stipulates that the insured shall take all reasonable steps to safeguard the motor vehicle from loss or damage and to maintain it in efficient condition and the company shall have access to examine the vehicle at any time.

14. Moreover, there is no specific condition entered in the policy that the defendant company shall be liable to pay only the amounts that are covered by the bills. No such exception is made under the general exceptions of Ex.A1 corresponding to original of Ex.B 11 that the company would not be liable under the policy if the bills for the spare parts were not submitted to the company.

15. According to Section 1 of the Policy, the liability of the Insurance Company refers Ex.B11 with regard to the loss or damage for which the company would stand as indemnity. The four relevant clauses of Section 1 of Ex.B11 Commercial Vehicle Comprehensive Policy (INDIA), reads as follows:

Section-1: Loss or damage :--(1) The Company will indemnify the insured against loss or damage to the Motor Vehicle and for its accessories whilst thereon--

(a) by accidental external means;

(b) by fire external explosion, self-ignition or lightening or burglary, house-breaking or theft;

(c) malicious act;

(d) whilst in transit by road, rail, inland, waterway, lift elevator or air.

(2) The Company shall not be liable to make any payment in respect of (a) consequential loss, depreciation, wear and tear, mechanical or electrical breakdowns, failures or breakages nor for damage caused by overloading or strain or by explosion of the boiler of the Motor Vehicle nor for loss of or damage to accessories by burglary, house-breaking or theft unless such Motor Vehicle is stolen at the same time or (b) damage to tyres unless such Motor Vehicle is damaged at the same time when the liability of the Company is limited to 50% of the cost of the replacement.

(3) In the event of the Motor Vehicle being disabled by reason of loss or damage covered under this policy, the Company will bear the reasonable cost of protection and removal to the nearest repairers and of re-delivery to the insured but not exceeding in all Rs. 500/- in respect of any one accident.

(4) The insured may authorise the repair of the Motor Vehicle necessitated by damage, for which the Company may be liable under this Policy provided that:

(a) the estimated cost of such repair does not exceed to Rs. 300/-;

(b) the Company is furnished forthwith with a detailed estimate of the cost; and,

(c) the insured shall give the Company every assistance to see that such repair is necessary and the charge reasonable.

Section 2 : Liability to third parties :--(1) Subject to the condition of Liability, the Company will indemnify the insured against all sums including claimant's cost and expenses, which the insured shall become legally liable to pay in respect of--

(i) death or bodily injury to any person caused by or arising out of the use (including the loading and/or unloading) of the Motor Vehicle

(ii) damage to property caused by the use (including the loading and/or unloading) of the Motor Vehicle

Provided always that:

(a) The Company shall not be liable in respect of death, injury or damage caused or arising beyond the limits of any carriageway or thoroughfare in connection with the bringing for the load to the Motor Vehicle for loading thereon or the taking away of the load from the Motor Vehicle after unloading therefrom.

(b) Except so far as is necessary to meet the requirement of Sections 92-A and 95 of the Motor Vehicles Act, 1939 the Company shall not be liable in respect of death of or bodily injury to any person in the employment of the insured arising out of and in the course of such employment

(c) Except so far as is necessary to meet the requirement of Section 95 of the Motor Vehicles Act, 1939 in relation to liability under the Workmen's Compensation Act, 1923.

(d) The Company shall not be liable in respect of damage to property belonging

to or held in trust by or in the custody or control of the insured or a member of the Insured's household or being conveyed by the Motor Vehicle.

(e) The Company shall not be liable in respect of damage to any bridge and/ or weigh-bridge and/or viaduct and/or to any road and/or anything beneath by vibration or by the weight of the Motor Vehicle and/or land carried by the Motor Vehicle.

(f) The Company shall not be liable in respect of death or bodily injury caused by or arising out of the explosion of the boiler of the Motor Vehicle unless such death or injury is caused by or arises out of the use of the Motor Vehicle in a public place in India within the meaning of Motor Vehicles Act, 1939.

(g) The Company shall not be liable in respect of death or bodily injury caused by or arising out of the explosion of the boiler of the Motor Vehicle unless such death or injury is caused by or arises out of the use of the Motor Vehicle in a public place in India within the meaning of Motor Vehicles Act, 1939.

(2) The Company will pay all costs and expenses incurred with its written consent

(3) In terms of and subject to the limitation of the indemnity which is granted by this Section to the Insured the Company will indemnify any Driver who is driving the Motor Vehicles on the insured's order or with his permission provided that such driver:

(a) is not entitled to indemnify under any other policy;

(b) shall as though he were the insured observe fulfil and be subject to the terms exceptions and conditions of this Policy insofar as they can apply.

(4) The Company may its own option (A) arrange for representation at any inquest or fatal injury in respect of any death which may be the subject of indemnity under this section and undertake the service of proceedings in any Court of Law in respect of any act or alleged offence causing or relating to any event which may be the subject of indemnity under this section.

(5) In the event of the death of any person entitled to indemnify under this Policy the Company will in respect of the liability incurred by such person indemnify his personal representatives in the terms of and subject to the limitations of this policy provided that such personal representatives shall as though they were the insured observe fulfil and be subject to the terms exceptions and conditions of this policy insofar as they can apply.

Application of Limits of Indemnity

In the event of any accident involving indemnity to more than one person any limitation by the terms of the policy and/ or of any endorsement hereon of the amount of any indemnity shall apply to the aggregate amount of indemnity to all persons indemnified and such indemnity shall apply in priority to the insured.

General Exceptions

The Company shall not be liable under this policy in respect of--

(1) any accident, loss, damage and/or liability caused sustained or incurred outside the Geographical Area.

(2) any claim arising out of any contractual liability.

(3) any accident loss damage and/or liability caused sustained or incurred to the Motor Vehicle

(a) being used otherwise than in accordance with the limitation as to use it.

(b) Being driven by any person other than a driver.

(4) any accident loss or damage and/or liability caused sustained or incurred after any variation or termination of the insurance policy.

(5) (a) Any accident loss or damage to any property whatsoever or any loss or expense whatsoever resulting or arising therefrom or any consequential loss.

(b) any liability whatsoever nature

directly or indirectly caused by or contributed to by or arising from ionizing radiations or contamination by radioactivity from any nuclear fuel or from any nuclear waste from the combustion of nuclear fuel. For the purpose of the exception combustion shall include any self sustaining process of nuclear fission.

(6) any accident loss damage or liability directly or indirectly caused by or contributed to by or arising from nuclear weapons material.

(7) Any accident loss damage or liability caused sustained or incurred during the period of requisition or commandeering by the Government for any purpose.

The Company shall not be liable in respect of any accident loss damage and/ or liability directly or indirectly proximately or remotely occasioned by contributed to by or traceable to or arising out of or in connection with flood, typhoon, hurricane, volcanic eruption, earthquake or other convulsion of nature, war, invasion of foreign enemies hostilities or war like operations (whether before or after declaration of war) civil war not strike, mutiny rebellion military or usurped power or by any direct or indirect consequences of any of the said occurrences and except u/s II(i) if this policy whilst the insured or any person driving with the general knowledge and consent of the insured is under the influence of intoxicating liquor or drugs and in the event of any claim hereunder the insured shall prove that the accident loss damage and or liability arose independently of and was in noway connected with or occasioned by or contributed to by or traceable to any of the said occurrences or any consequence thereof and in default of such proof the Company shall not be liable to make any payment in respect of such a claim.

Condition

This policy and the Schedule shall be read together and any word or expression to which a specific meaning has been attached in any part of this policy or of the Schedule shall bear the same meaning wherever it may appear.

Condition No. 8: If any difference shall arise as to the quantum to be paid under this policy (liability being otherwise admitted) such difference shall independently of all other questions be referred to the decision of an arbitrator to be appointed in writing by the parties in difference or if they cannot agree upon a single arbitrator to the decision of two disinterested persons as arbitrators of whom one shall be appointed in writing by each of the parties within two calendar months after having been required so to do in writing by the other party in accordance with the provisions of the Arbitration Act 1940 as amended from time to time and for the time being in force. In case either party shall refuse or fail to appoint arbitrator within two calendar months after receipt of notice in writing requiring an appointment, the other party shall be at liberty to appoint sole arbitrator and in case of disagreement between the arbitrators the difference shall be referred to the decision of an umpire who shall have been appointed by them in writing before entering on the reference and who shall sit with the arbitrators and preside at their meetings.

It is clearly agreed and understood that no difference or dispute shall be referable to arbitration as hereinbefore provided, if the company has disputed or not accepted liability under or in respect of this policy.

It is hereby expressly stipulated and declared that it shall be a condition precedent to any right of action or suit upon this policy that the award by such arbitrator, arbitrators or umpire of the amount of the loss or damage shall be first obtained.

"It is also hereby further expressly agreed and declared that if the company shall disclaim liability to the insured for any claim hereunder and such claim shall not within twelve calendar months from the date of such disclaimer have been made the subject-matter of a suit in a Court of law, then the claim shall for all purposes be deemed to have been abandoned and shall not thereafter be recoverable hereunder."

16. While emphasizing the conditions of the policy, the learned Counsel for the appellants contended that none of these conditions stipulates that the Insurance Company would pay such amount as would be covered by the bills only. When the bills are not considered by the Insurance Company as genuine bills, the amount that could be given by the Company to the insured must be on the basis of actual loss or damage that was caused and to the extent of which the assessment could be made. With regard to the quantum of loss or damage that was caused to the plaintiff because of the accident to her vehicle, the evidence on plaintiff's side is very minimal.

17. The learned Counsel for the appellants while reiterating the contention with regard to limitation of filing suit relied on a judgment of the Supreme Court in

National Insurance Company Limited v. Sujir Ganesh Nayak and Company and Anr. 2 (1997) CPJ 1 (SC), wherein their Lordships in Para No. 15 of the judgment held:

Contract Act, 1872 - Section 28 - Void -Agreement - seeks to curtail the period of limitation - would be void.

From the case-law referred to above, the legal position that emerges is that an agreement, which in effect seeks to curtail the period of limitation and prescribes a shorter period than that prescribed by law would be void as offending Section 28 of the Contract Act. That is because such an agreement would seek to restrict the party from enforcing his right in Court after the period prescribed under the agreement expires even though the period prescribed by law for the enforcement of his right has yet not expired. But there could be agreements, which do not seek to curtail the time for enforcement of the right but which provides for the forfeiture or waiver of the right itself if no action is commenced within the period stipulated by the agreement. Such a clause in the agreement would not fall within the mischief of Section 28 of the Contract Act. To put it differently, curtailment of the period of limitation is not permissible in view of Section 28 but extinction of the right itself unless exercised within a specified time is permissible and can be enforced. If the policy of Insurance provides that if a claim is made and rejected and no action is commenced within the time stated in the policy, the benefits flowing from the policy shall stand extinguished and any subsequent action would be time-bared. Such a clause would fall outside the scope of Section 28 of the Contract Act. This, in brief, seems to be the settled legal position. We may now apply it to the facts of this case.

"Condition No. 19: In no case whatever shall be the company be liable for any loss or damage after the expiration of 12 months from the happening of loss or the damage unless the claim is the subject of pending action or arbitration"

Section 28 of the Contract may be quoted now before going into further discussion:

"Section 28: Every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary Tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent".

18. While relying the judgment stated in National Insurance Company Limited v. Sujir Ganesh Nayak and Company and Anr. (supra), the learned Counsel for the appellants submitted that Condition No. 19 is contrary to Section 28 of the Contract Act. Moreover, Condition No. 19 extinguishes the right of the assured, as the suit was not filed within twelve months from the day when the accident had occurred. He further contended that admittedly the plaintiff had produced fake bills and the salvage is not available and Ex.B.18 shows that the vehicle, which was involved in the accident is sold away and is not available to settle the claim even on cash loss basis for reasonable amount.

19. On the other hand, Mr. Subba Reddy, the learned Senior Counsel representing Mr. K. Venkatesh, the learned Counsel for the respondent-plaintiff submitted that in a given case as per the condition stipulated, the plaintiff should have approached the Civil Court for redressal of her grievance within a period of 12 calendar months, i.e., from 3-10-1990. But the plaintiff with a bona fide intention approached the District Consumer Forum and filed CD No. 503 of 1990, which was ultimately dismissed by the District Consumer Forum observing that the controversy require thorough enquiry in a Civil Court and directed the plaintiff to approach Civil Court. Accordingly, the plaintiff received the order on 22-12-1992 and immediately filed the suit on 15-1-1993. Therefore, as per Section 14 of the Limitation Act, time spent before the District Consumer Forum has to be excluded for calculating twelve calendar months.

20. In support of the contentions, he relied on a judgment of the Supreme Court in Saushish Diamonds Ltd. Vs. National Insurance Co. Ltd., , their Lordships while dealing with Civil Appeal in respect of claim involving interpretation of Insurance Policy, wherein the respondent Insurance Company repudiating the claim and disputing the interpretation given to the policy by the complainant and in such circumstances, their Lordships held:

The appellant has approached the National Consumer Disputes Redressal Commission for recovery of the loss of diamonds entrusted to the Commission Agent. The National Consumer Disputes Redressal Commission, New Delhi in its order dated 28-9-1995 passed the order holding that since the Insurance Company has repudiated the claim, it declined to grant the relief. Thus, this appeal. Shri Harsih Salve, the learned Senior Counsel for the appellant contended that in view of the policy undertaken by the respondent, the Commission could have granted the relief, instead of relegating the appellant to a civil action. We find no force in the contention. We have gone through the stand taken by the respondent in the repudiation. The very interpretation of the policy itself is a subject-matter of the dispute. Under these circumstances, the Commission rightly relegated the parties to a civil action. It is true that limitation has run out against the appellant during the pendency of the proceedings. Therefore, the time taken between the date of the filing of the claim before the Commission and the date of its disposal, namely, 28.9.1995 would be considered by the Civil Court for exclusion u/s 14 of the Limitation Act, 1963. The appeal is accordingly dismissed.

21. He further relied on a judgment of the Supreme Court in P. Sarathy v. State Bank of India 2000 (4) ALD 68 (SC), wherein their Lordships while considering Section 14 of the Limitation Act, 1963 held:

"Court" does not mean Civil Court only -It means any other authority or Tribunal having the trappings of a Court-Deputy Commissioner of Labour constituted as an authority u/s 41(2) of the Tamil Nadu Shops and Establishments Act to hear and decide appeals is a Court within the meaning of Section 14 - The entire period of time during which the appeal before him was pending is liable to be

excluded for computing the period of limitation of filing the suit for declaration that the removal of the plaintiff from service is illegal.

22. Mr. Subba Reddy, the learned Senior Counsel representing Mr. K. Venkatesh, learned Counsel for the respondent-plaintiff submitted that as per the condition stipulated in the policy the suit has to be filed within twelve calendar months i.e., from 3-1-1990 but in view of the plaintiff with bona fide intention for redressal of his grievance approaching District Consumer Forum and filed CD No. 503 of 1990 and it was ultimately dismissed by the District Consumer Forum observing that the controversy require thorough enquiry in a Civil Court and directed the plaintiff to approach Civil Court. Therefore, as held by the Supreme Court in the judgment National Insurance Company Limited v. Sujir Ganesh Nayak and Company and Anr. (supra), the time spent before the District Consumer Forum has to be excluded for computing the limitation as contemplated under the impugned clause of the policy. If the time is expired, the suit is filed within time and there is no illegality committed by the Trial Court in entertaining the suit.

23. On the contrary, Mr. Subba Reddy, the learned Senior Counsel representing Mr. K. Venkatesh, Counsel appearing for the respondent-plaintiff had taken me through the findings recorded by both the Courts below in general and the findings which had been recorded by the Appellate Court in particular and had contended that in view of both oral and documentary evidence available on record the stand taken by the appellants cannot be believed inasmuch as on appreciation of both oral and documentary evidence on facts, the relief had been negated to the appellants and hence the said concurrent findings need not be disturbed in the second appeal.

24. Considering the rival contentions, it is an admitted fact that two Surveyors appointed by the Insurance Company inspected the damaged vehicle and submitted their reports. Ex.B12 is the report dated 20-2-1990 filed by the defendants. In Ex.B.12 at Page No. 3, Mr. Pukhraj Jain, who conducted spot survey as per the instructions of Insurance Company on 17-2-1990, took photographs in different angles, thereafter the said Surveyor visited the Police Station but the documents were not available. The first Surveyor, Mr. Pukhraj Jain had furnished the details of the damage. He had specifically mentioned with regard to the part of the vehicle that was damaged in the accident. The factum of accident is not under dispute. The factum of damage is also not under dispute in view of the first inspection conducted by Mr. Pukhraj Jain on 17-2-1990. Ex.B12 goes to show the extent of damage that was caused to the vehicle. In Column No. 13 of Ex.B12, it is mentioned that ten photographs were enclosed and the details of loss or damage is mentioned in a separate sheet. The first defendant in his written statement has not given the quantum of damages that were assessed by the first Surveyor. In Ex.B12 also there is no specific mention made as to the monetary value of loss that was caused to the vehicle. Further there was another Surveyor, Mr. A.A. Khan, who was appointed by the Insurance Company for inspecting the insured vehicle to assess the value of loss that was caused to the

vehicle. In Ex.B14 dated 30-4-1990, the second Surveyor, Mr. A.A. Khan mentioned that it was subject to re-inspection and it is not stated by any one as to when such re-inspection was proposed or if the plaintiff was asked to keep the vehicle till such re-inspection. Mr. A.A. Khan the Surveyor had again verified the parts of the vehicle and gave descriptive particulars of the damage that was caused to the parts of the vehicle. In Ex.B14, the second Surveyor submitted that final survey to the insured vehicle was conducted while it was kept at M/s. Surya Mechanical Works, Rajahmundry and photographs were taken before and after dismantling damage and they were enclosed with the report. But the defendants have not filed the photographs taken by the first Surveyor on item wise inspection of the damaged parts and assessed the labour charges and other aspects including depreciation and salvage value. The second Surveyor, Mr. A.A. Khan submitted approximate loss at Rs. 81,627-67 paise and deducted the salvage value at Rs. 3,000/- to arrive at that figure. The defendants contended that Mr. P. Ananda Rao and Shivkumar approached the plaintiff on 21-9-1990 and asked the mechanic who attended the repairs to produce the salvage and that the said owner of M/s. Surya Mechanical Works could not produce the salvage. Prior to this, on 3-8-1990 the defendants addressed a letter to the plaintiff stating that the bills produced by the plaintiff were found to be fake. Subsequently on 3-10-1990 the second defendant addressed Ex.A3 stating that its Regional Office had turned down the request for reconsideration of the claim since the plaintiff had to produce salvage at the time of inspection and proper evidence for the loss. The Trial Court while discussing the above held that twice the Insurance Company subjected the vehicle to inspection. But at the time of second inspection the plaintiff was not asked to keep salvage merely because in Ex.B14 it was stated that the report was subject to re-inspection and now it cannot be said that the report is false and that it requires reassessment or modification. Further the Surveyor had not taken any letter from the plaintiff to the effect that such advise was received from the Surveyor or any undertaking to keep the vehicle where it was for re-inspection. Irrespective of the amount that could be mentioned in the bills, the amount mentioned by the Surveyor in Ex.B14 must have referred to the cost of the parts that are required for replacement. The defendants failed to produce the market price of the items as on the date of inspection and approximate value of labour charges that were required for getting repairs and replacement. Therefore, the Trial Court has rightly observed that failure on the part of the defendants to submit the minimum price that could be paid for the damaged parts and failure to furnish the minimum labour charges that were required for causing repairs to carry out replacement of parts would certainly drive the Court to accept the final report of the second Surveyor as reasonable and approximate value of the real loss caused to the plaintiff. This Court is of the opinion that the above aspect may not enure to the benefit of the defendants. Moreover, the catena of decisions relied by Mr. Briz Mohan Singh may not be relevant or germane to the present litigation. As rightly contended by Mr. Subba Reddy, the learned Senior Counsel representing Mr. K. Venkatesh, the learned Counsel for the respondent-plaintiff that there is

no dispute with regard to the computation of limitation for filing of suit and the suit is filed within twelve calendar months from the date of limitation of the claim but when the plaintiff approached the District Consumer Forum with a bona fide intention for redressal of his grievance, time was spent and the time that was spent before the District Forum has to be excluded by applying the ratio laid down by the Supreme Court in the judgments National Insurance Company Limited v. Sujir Ganesh Nayak and Company and Anr. and Saushish Diamonds Limited v. National Insurance Company Limited (supra), wherein Section 14 of the Limitation Act postulates civil action having run out time taken in the proceedings before the District Forum and directed to be considered by the Civil Court for exclusion of Section 14 of the Limitation Act, 1963. Therefore, I see no reason to interfere with the judgment and decree of the Trial Court as well as first Appellate Court.

25. I have once again gone through the oral and documentary evidence for the purpose of satisfying myself about the legality of the findings, which had been recorded by both the Courts below. Both the Courts, in fact, had appreciated the evidence of the plaintiff who had examined PW1 D.V. Anandam and marked Ex.A1 Copy of Insurance Policy, Ex.A2 Copy of letter dated 3-8-1990 addressed by the second defendant to the plaintiff, Ex.A3 a letter dated 3-10-1990 addressed by the second defendant to the plaintiff and that apart the evidence adduced on behalf of the defendants i.e., DW1 Asst. Divisional Manager of the defendant company, DW2 licensed Surveyor, DW3 Senior Branch Manager of the defendant Company and DW4 Private Professional Surveyor were examined and marked Ex.B1 to B10 are the bills and vouchers submitted by the plaintiff, Ex.B11 duplicate commercial vehicle comprehensive policy, Ex.B12 report dated 22-2-1990 of the Surveyor, Pukhraj, Ex.B13 copy of estimation given by Surya Mechanical Works to the Branch Manager for the second defendant, Ex.B14 report dated 30-4-1990 submitted by Mr. A.A. Khan, an Insurance Surveyor, Ex.B15 report dated 13-7-1990 submitted by Mr. V. Munshi Prasad, Surveyor, Eluru, Ex.B16 letter dated 24-10-1990 sent by the Surveyor, Mr. Shivkumar to the Regional Office of the Defendant Company, Ex.B17 letter of the plaintiff sent to the defendant and Ex.B18 letter dated 21-9-1990 from the husband of the plaintiff to the first defendant in detail and had disbelieved the stand taken by the appellant-defendants. Apart from the findings, which had been recorded by the Trial Court, the Appellate Court also had recorded clear findings relating to the liability of the defendants-company. Further a finding was also recorded that the vehicle of the plaintiff, which is involved in the accident, is used for the commercial purpose and so the plaintiff might have incurred loss due to the said accident. On the other hand, the defendant company runs its business on the public amount and the said business was not in a commercial nature but it is for the welfare of the public. These are the findings, which had been recorded on appreciation of both oral and documentary evidence by the first Appellate Court. In view of the fact that the Counsel for the appellants-defendants was unable to point out to any question of law muchless substantial questions of law to be

argued at length, I am not inclined to interfere with the concurrent findings, which had been recorded by both the Courts below.

26. In the light of the foregoing discussion, there are no merits in the second appeal and the second appeal fails and is accordingly dismissed with costs throughout.