
(2010) 05 SHI CK 0150
In the High Court Of Himachal Pradesh

Modern Automobiles and Another	Vs	APPELLANT
H.P. Vidhan Sabha and Another		RESPONDENT

Date of Decision : 05-05-2010

Acts Referred:

Citation : (2010) 05 SHI CK 0150

Hon'ble Judges : Kuldip Singh, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Kuldip Singh, J.—This judgment shall dispose of RSA No. 229 of 2000 and Cross-Objection No. 43 of 2001 having arisen out of judgment and decree dated 26.6.1999 passed by the learned Additional District Judge, Shimla in Civil Appeal No. 38-S/13 of 1995/94 and Cross-Objection No. 129-S/13 of 1995/94 affirming the judgment, decree dated 10.5.1994 passed by learned Senior Sub Judge, Shimla in Civil Case No. 383/1 of 1991. The appellants 1, 2 and proforma respondent No. 2 in RSA No. 229 of 2000 were defendants No. 1 to 3 respectively in the suit whereas respondent No. 1 was plaintiff. The parties in the judgment are referred as plaintiff and defendants.

2. The brief facts are that plaintiff had filed a suit for recovery of Rs. 1,28,355/- alongwith interest at the rate of 18% per annum from the date of institution of the suit till realization against the defendants. The pleaded case of the plaintiff is that plaintiff had purchased maruti Gypsy HIS-3500 (for short "Gypsy") for Rs. 1,18,000/- from defendant No. 2 authorised dealer of defendant No. 1 in March, 1988. The plaintiff had paid Rs. 1400/- for transportation charges of Gypsy from Gurgaon to Shimla. The Gypsy was delivered to plaintiff at Shimla on 13.6.1988. The defendant No. 2 deals in sale and repairs of maruti vehicles.

3. The Gypsy was sent on 15.2.1990 in the workshop of defendant No. 2 to carry out certain repairs. The defendant No. 3 took out the Gypsy on 15.2.1990 from the workshop for trial and while returning the Gypsy met with an accident due to

rash and negligent driving of defendant No. 3. The four occupants of the Gypsy including defendant No. 3 mechanic of defendant No. 2, got serious injuries and were admitted in the hospital. The Gypsy was totally smashed and damaged. The Gypsy remained unattended for a considerable period in the jungle and was not removed from there despite repeated reminders. The Gypsy was not repaired nor delivered to the plaintiff. The accident took place due to negligence of employees of defendant No. 2 more particularly of defendant No. 3.

4. The Gypsy was removed from the jungle by defendant No. 2 after considerable period and remained parked in the work shop of defendant No. 2 at Taradevi. This caused considerable inconvenience to plaintiff besides complete loss of the vehicle worth Rs. 1, 19,400/-. The police registered the case under Sections 279, 337 and 338 against defendant No. 3 at Police Station, Boileauganj, Shimla

5. The defendants were asked to make the vehicle road-worthy but they failed, therefore, notice dated 13.5.1990 was issued. The plaintiff filed suit and claimed Rs. 1,19,400/- value of the vehicle plus interest at the rate of 18% per annum w.e.f. 15.2.1990 to 17.7.1990 Rs. 8955/-, total amounting to Rs. 1,28,335/- alongwith future interest at the rate of 18% per annum from the date of filing of the suit till realization.

6. The defendants No. 1 and 2 had filed joint written statement and have taken preliminary objection of maintainability. It has been pleaded that relationship between the plaintiff and defendants No. 1 & 2 was strictly covered by the terms of the contract executed through job card under which repairs were carried out. It was the option of the plaintiff either to test the vehicle itself or to get it tested through the defendants subject to the condition that "Customers cars are kept, stored and driven at customers own risk and responsibility". The defendants are not liable as the defendant No. 3 was performing his authorized act. The suit has not been filed by competent person. The Gypsy was kept and driven at the risk and responsibility of the plaintiff. The vehicle at the time of testing after repairs fell down on account of rain and the vehicle was damaged. There was no negligence on the part of the driver of the vehicle. The accident was unavoidable and was not on account of negligence of driver of defendants No. 1, 2. The plaintiff is not entitled to damages. The plaintiff should have got the vehicle repaired at the time of accident. The vehicle was lying with defendants No. 1, 2 at the cost and risk of the plaintiff. On merits, it was admitted that the vehicle was purchased for a sum of Rs. 1,18,000/- in the year 1988. The vehicle was used for sufficient long time and its condition cannot be called as good one. It was admitted that Gypsy was sent for repair to defendants No. 1, 2 in the workshop as per job card. The driver was acquitted in criminal case when no negligence was established on his part. The plaintiff is not entitled to any damages. The vehicle was not in good condition.

7. The defendant No. 3 filed separate written statement. He has submitted that the body of the vehicle was damaged. The accident took place during the course of his employment and performance of his duty, he took the vehicle out of the

workshop on the instruction given by defendant No. 2 for service after repairs. The registration of the case was admitted but it was submitted that defendant No. 3 was acquitted by learned Judicial Magistrate 1st Class (4), Shimla on 26.12.1990. The liability to pay the loss and damages was denied by defendant No. 3. The plaintiff filed replications to the written statements of defendants No. 1, 2 and defendant No. 3 and reiterated its case.

8. On the pleadings of the parties, the following issues were framed:

1. Whether the plaintiff is entitled to damages, if so, to what extent and from which of the defendant? OPP.
2. Whether the plaintiff is entitled to interest also, if so, at what rate? OPP.
3. Whether the suit is not maintainable in the present form? OPD.
4. Whether the suit is not filed by a competent person? OPD.
5. Relief.

The issues No. 1, 2 were answered in affirmative and issues No. 3 and 4 in negative and the learned Senior Sub Judge decreed the suit of the plaintiff for a sum of Rs. 79,875/- with proportionate costs and interest at the rate of 10% per annum from the date of the suit till realization. The defendants No. 1, 2 filed Civil Appeal No. 38-S/13 of 1995/94 and plaintiff filed Cross-Objection No. 129-S/13 of 1995/94, both were dismissed by the learned Additional District Judge by common judgment, decree dated 26.6.1999. The defendants No. 1, 2 have come in second appeal in which plaintiff has filed cross-objection also. The appeal has been admitted on the following substantial questions of law:

1. Whether grave miscarriage of justice has been occasioned, as the learned lower appellate court has failed to discuss or return any findings on the ground No. 24 relating to original issue No. 4 which went to the root of the suit and it is maintainable as the very competence of the Secretary, Vidhan Sabha in the matter of filing of the suit was involved in issue which has resulted in grave miscarriage of justice?
2. Whether Ex.PW-1/D which forms basis on which the suit has been decreed and which has been relied upon by the both courts below was not proved in accordance with law and consequently the same could not be allowed in evidence and thus, grave miscarriage of justice has been occasioned to the appellant?
3. Whether grave miscarriage of justice has been occasioned to the appellant in ignoring inasmuch as, that the courts below have ignored the statement of expert Sh. Umesh Sood who was the only expert produced by both the parties and who alone possessed the necessary technical qualification?

The cross-objections were also admitted and ordered to be heard alongwith the appeal.

9. I have heard Mr. R.L. Sood, learned Senior Advocate on behalf of the

appellants and Mr. Ashok Sharma, learned Counsel for respondent No. 1/plaintiff and have also gone through the record. It has been submitted on behalf of the appellants that ground No. 24 which was taken in the grounds of appeal before the learned lower appellate Court regarding competency of the person who filed the suit and covered by issue No. 4 was not considered by the learned lower appellate court which has caused miscarriage of justice. It has been submitted that Ex.PW-1/D relied by both the courts below in decreeing the suit has not been proved in accordance with law and consequently the same could not be read in evidence in decreeing the suit. The Courts below have erred in ignoring the statement of Umesh Sood expert. The learned Counsel for the plaintiff has supported the impugned judgment, decree and in cross-objection has prayed for decree of the suit amount as a whole alongwith interest.

10. The plaint has been signed and verified by Laxman Singh, Secretary of the plaintiff. He appeared as PW-4 and has stated that in the year 1987 he was Secretary of Himachal Pradesh Vidhan Sabha. The defendants No. 1 and 2 in preliminary objection No. 4 of the written statement have taken the plea that the suit has been filed by a person who is not competent to file the suit. In para 1 of reply on merits, the authority of Secretary to file the suit has been denied. In replication to the written statement of defendants No. 1, 2 in answer to para 4 of the written statement, it has been pleaded that Secretary is Principal Officer of the plaintiff and, therefore, he filed the suit and similar plea has been taken in answer to para No. 1 of the written statement on merits. In cross-examination, PW-4 Laxman Singh Kashyap has stated that as Secretary he is competent to file the suit. The cross-examination of PW-4 was not carried further to elicit from him how he is not competent to file the suit. He has not been cross-examined whether any authorization for filing the suit was separately given to him or not. The defendant No. 3 is Varinder Kumar Katoch. The written statement of defendant No. 3 has been signed by Lokinder Katoch. It appears Varinder Kumar Katoch defendant No. 3 and Lokinder Katoch are two names of one person or atleast these names are used by defendant No. 3 inter-changeably.

11. DW-1 Lokinder Katoch in his statement has stated nothing regarding the competency of the Secretary of plaintiff to file the suit. DW-2 Satpal Kesar has stated that Secretary of the Vidhan Sabha is not competent to file the suit as he has not produced any proof. The onus of issue No. 4 was on defendants. They have taken the stand that since Secretary has not given any proof of his competency to file the suit, therefore, he is not competent to file the suit. The competency to file the suit and proof of competence to file the suit under an authority of plaintiff are different. The defendants have led no evidence that in fact Secretary, Vidhan Sabha was not authorized to file the suit. PW-4 has asserted his stand by stating that he is competent to file the suit. In evidence it is not the case of the defendants that PW-4 had no authority to file the suit on behalf of the plaintiff. The defendants have not shown any prejudice for filing the suit by plaintiff through PW-4.

12. In any case the stand of PW-4 that he is competent to file the suit has been reiterated by the plaintiff when cross-objections in the first appeal were filed by counsel for the appellant on the basis of power of attorney filed in the trial Court. In other words, the plaintiff by filing cross-objections in the lower appellate Court on the basis of power of attorney of the trial court ratified the filing of the suit through PW-4. In second appeal, the cross-objections have been filed by the plaintiff through Secretary. This further indicates that the plaintiff has ratified the action of the Secretary which was taken in the trial court, lower appellate Court.

13. In *United Bank of India Vs. Naresh Kumar and others*, the Supreme Court has held that a person may be expressly authorized to sign the pleadings on behalf of the company for example by the Board of Directors passing a resolution to that effect or by a power of attorney being executed in favour of any individual. In absence thereof, and incases where pleadings have been signed by one of its officers a corporation can ratify the said action of its officer in signing the pleadings. Such ratification can be express or implied. The court can, on the basis of the evidence on the record and after taking all the circumstances of the case, specially with regard to the conduct of the trial court come to the conclusion that corporation had ratified the act of the signing of the pleadings by its officer.

14. The principle of ratification as held by the Supreme court in *United Bank of India (supra)* can be easily applied in the present case inasmuch as right from the trial court, till the second appeal, the Secretary of the plaintiff is pursuing the matter on behalf of the plaintiff and therefore, it can be safely inferred that plaintiff has ratified the act of its Secretary of filing the suit and pursuing the same in first appeal and second appeal. The substantial question of law No. 1 is decided against the appellants.

15. The substantial questions of law No. 2 and 3 are interconnected therefore, both of them are taken up for disposal collectively. Ex.PW-1/D is the most crucial document on the basis of which the suit of the plaintiff has been decreed. The learned Counsel for the defendants No. 1 and 2 has submitted that the courts below have erred in relying Ex.PW-1/D in decreeing the suit. Ex.PW-1/D cannot be read in evidence to burden the defendants with the liability as held by two courts below. There is no other material on record to support the plea of plaintiff. Once Ex.PW-1/D is ignored then there is nothing on record to what amount the plaintiff is entitled to.

16. PW-1 Shamsheer Bangtu, Works Manager, H.R.T.C. Divisional Workshop has stated that he is posted as Manager since 1990. He received letter dated 21.9.1992 copy Ex.PW-1/A from Vidhan Sabha. The vehicle was inspected on the spot on 28.2.1992, he has brought the original report a copy of which is Ex.PW-1/D which bears his signatures. The total damage to the vehicle was Rs. 91,067.25 on account of repair and thereafter the vehicle could come in original shape. In cross-examination conducted by defendants No. 1 and 2 he has stated that he had not seen the vehicle. He had not visited the spot. The plaintiff filed an

application dated 2.4.1993 for additional evidence which was rejected on 12.5.1993 by the trial Court. The order dated 12.5.1993 was assailed in C.R. No. 97 of 1993 which was allowed on 8.7.1993. The relevant part of the order dated 8.7.1993 is as follows :

In view of what has been stated by PW-1 that he did not visit the spot and had no personal knowledge of the vehicle, I find that the trial court has acted with material irregularity in not permitting the petitioner to examine the Head Mechanic, since according to the plaintiff, it has come to its notice now that it was Head Mechanic Neel Mani, who had conducted the inspection of the vehicle. The question as to whether the Head Mechanic had or had not submitted his report on the basis of the inspection will be a question, which will have to be decided after the Head Mechanic is examined in court and opportunity is allowed to the defendants to cross-examine him. This question cannot be decided without examining Head Mechanic. Consequently, I find it to be a fit case for interference. Resultantly, the revision is allowed. The impugned order is set aside and the application of the plaintiff-petitioner is allowed.

17. Thus, in view of order dated 8.7.1993, the statement of PW-1 Shamsheer Bangtu regarding report Ex.PW-1/D is of no value to the plaintiff. The statement of PW-5 Neelmani, Service Station Incharge, HRTC, Workshop was recorded on 2.12.1993 after the order dated 8.7.1993. He has stated that he remained posted as Service Station Incharge, Taradevi Workshop, on 22.2.1992 he inspected the Gypsy bearing No.HIS-3500 of the plaintiff. He prepared the report of estimate of expenses. Ex.PW-1/D is the copy of report the original of which he has brought in the Court. Ex.PW-1/D was prepared by him on the spot. Rs.11,192.25 handling charges shown in Ex.PW-1/D are the expenses of bringing the parts from the market. In case the vehicle is to be brought in proper condition, then vehicle requires expenses mentioned in report Ex.PW-1/D. In cross-examination, he has stated that he has passed 7th class. He has stated that he had not given the notice of inspection to anybody. He had done the inspection all alone, one helper namely Lokinder Katoch was with him, Devinder Kumar, Mechanic was also with him. The report which he prepared on the spot was prepared by Devinder Kumar. He had not prepared from his own hand written report. The report was submitted to Superintendent which was prepared through Devinder. He typed the report but he was not with the Superintendent when the report was typed. After typing, the report was handed over to the concerned authority, volunteered both the reports were sent. Devinder Kumar is still an employee of HRTC. He has also stated that he dictated to Devinder Kumar, Mechanic in HRTC Workshop later on. In the cross-examination, it was put to this witness that he did not inspect the vehicle. In other words, the report Ex.PW-1/D is wrong.

18. The learned Counsel for the appellant/defendants 1, 2 has submitted that Ex.PW-1/D has not been proved on record and, therefore, Courts below have erred in relying Ex.PW-1/D for decreeing the suit of the plaintiff. He has relied

United Commercial Bank v. Durga Dass and Anr. 1995 (1) Shim.L.C. 497 on the point that if documents have not been legally proved, then such documents are to be ignored. He has also submitted that mere marking of the documents does not dispense with its proof and for this submission, learned Counsel for defendants 1, 2 has relied on Sait Tarajee Khimchand and Others Vs. Yelamarti Satyam alias Satteyya and Others, The learned Counsel for defendants 1, 2 has submitted that if Ex.PW-1/D is ignored, then there is no material on record to come to the conclusion that how much alleged damage was caused to the Gypsy. The accident took place on 15.2.1990. The Gypsy was allegedly inspected on 22.2.1992 as per PW-5 Neelmani. The report Ex.PW-1/D was prepared on 28.2.1992. There is nothing on record that the condition of Gypsy noticed in report Ex.PW-1/D dated 28.2.1992 was the same immediately after the accident on 15.2.1990. It is the case of the plaintiff that Gypsy remained unattended in the Jungle for long time. Therefore, it was incumbent upon the plaintiff to prove what was the condition of the Gypsy on 15.2.1990 immediately after the accident.

19. The report Ex.PW-1/D has not been proved either by PW-1 or PW-5. In fact PW-5 has taken different and contradictory stands with regard to report Ex.PW-1/D. The report Ex.PW-1/D is not signed by PW-5. It has also come on record in the statement of PW-5 himself that he dictated some report to Devinder Kumar, Mechanic, thereafter, report was typed by the Superintendent and both reports were sent to concerned Officer. The report dictated by PW-5 to Devinder Kumar, Mechanic has not been produced nor Devinder Kumar, Mechanic has been examined. PW-5 has not named the Superintendent who typed the report which was dictated to Devinder Kumar. He has not stated that report dictated to Devinder Kumar was compared with the report typed by the Superintendent and typed report was correct as per his dictation given to Devinder Kumar. PW-5 has stated that he was not present when the Superintendent typed the report. Thus, taken from any angle, the report Ex.PW-1/D has not been proved in accordance with law. This report has been wrongly relied by the two Courts below in decreeing the suit of the plaintiff. The learned Counsel for defendants No. 1, 2 has submitted that the statement of DW-1 Umesh Sood, expert examined by defendants 1, 2 has been wrongly ignored by the two courts below. DW-1 inspected the Gypsy on 18.1.1993. he has not prepared any report. He has stated that it was not a case of total loss and the vehicle was repairable. The loss is assessed on the basis of depreciation which is different for different parts. The statement of DW-1 Umesh Sood is of no help to the either side.

20. It has been pleaded in the plaint that Gypsy was purchased for Rs. 1, 18,000/- in March, 1988. The accident took place on 15.2.1990, even if it is assumed that as far as plaintiff is concerned, it is a case of total loss. In that case, plaintiff is not entitled to more than the depreciated value of the Gypsy on 15.2.1990. But the plaintiff has placed nothing on record what was the depreciated value of the Gypsy on 15.2.1990. Thus, taken from any angle, it is not possible to assess the value of the Gypsy on 15.2.1990 and, therefore,

plaintiff is not entitled to amount as claimed in the suit. The two Courts below have erred in relying Ex.PW-1/D which has not been proved in accordance with law, in decreeing the suit. The substantial question of law No. 3 is decided against the appellants but substantial question of law No. 2 is decided in favour of the appellants. The impugned judgment, decree are not sustainable and are liable to be set-aside and for the same reasons, the cross-objections are liable to be dismissed.

21. No other point was urged.

22. The result of the above discussion, the appeal is allowed and cross-objections are dismissed, judgment, decree dated 26.6.1999 passed by the learned Additional District Judge, Shimla in Civil Appeal No. 38-S/13 of 1995/94 are set-aside and the suit of the respondent No. 1/plaintiff is dismissed with no order as to costs.