
(2012) 07 DEL CK 0118

In the Delhi High Court

Case No : Regular First Appeal Nos.574 of 2004 and 72 of 2006

M/s. Pick up Carriers

APPELLANT

Vs

National Insurance Co. Ltd. and Anr

RESPONDENT

Date of Decision : 05-07-2012

Acts Referred:

Carriers Act, 1865 — Section 10, 8, 9
Civil Procedure Code, 1908 (CPC) — Order 41 Rule 27(1)(b)
Evidence Act, 1872 — Section 57, 85

Citation : (2012) 8 AD 302 : (2012) 191 DLT 295 : (2012) 130 DRJ 487

Hon'ble Judges : V.K. Jain, J

Bench : Single Bench

Advocate : S.K. Bhaduri, for the Appellant; L.K. Tyagi, for the Respondent

Judgement

V.K. JAIN, J.—By this common judgment, I shall dispose of both these appeal, since they involve a common question of law. RFA No.574/2004 is directed against the judgment and decree dated 16.07.2004, whereby a decree for recovery of Rs.4,54,043/- with costs and pendent-lite at future interest @ 12% per annum was passed against the appellant. RFA No.72/2006 is directed against the judgment and decree dated 14.11.2005 whereby a decree of Rs.5,53,323/- with interest @ 12% per annum with effect from 01.04.1997 till the date of filing of the suit, and interest @ 6% per annum from the date of the suit till the date of the decree and future interest @ 6% per annum from the date of decree till the realization was passed against the appellant and in favour of respondent No.1 National Insurance Company Ltd. 2. The facts giving rise to filing of RFA No.574/2004 can be summarized as under:-

Hero Honda Motors Ltd./respondent No.2 in this appeal booked a consignment with the appellant for transporting 53 Hero Honda Motorcycles alongwith 6 packages of spare parts from Dharuhera/Gurgaon to Chhindwara in Madhya Pradesh. When the Motorcycles were being transported in truck No.HR-47-1391, it met with an accident at about 1 A.M. on 18.03.2000, near Village Barman

District Narsinghpur at Sagar-Nagpur Road. The accident occurred on account of Push Road Ends of the truck all of a sudden slipping off and consequently, the steering system becoming free and the vehicle getting imbalanced, going off the right hand side of the road and dashing against the roadside tree. Extensive damages were caused to a number of motorcycles loaded on the truck. A complaint was lodged by respondent No.2 Hero Honda Motors Ltd. with the appellant for payment of Rs.5,15,265/-, vide letter dated 16.09.2000. Prior to that, the consignment which respondent No.2 had booked with the appellant was got inspected through M/s. G.P.S. Miglani Surveyors Pvt. Ltd., and a survey report dated 10.04.2001 was submitted by them to the Insurance Company. Since the consignment booked with the appellant had been insured with respondent No.1 National Insurance Company Ltd., and they failed to settle the claim with respondent No.2, the Insurance Company settled the claim with respondent No.2 for a sum of Rs.4,54,043/-, based upon the survey report submitted by the surveyor. Respondent No.2, in consideration of settlement of its claim subrogated all its rights and remedies in favour of respondent No.1 and executed documents such as Letter of Subrogation and Power of Attorney in its favour. Since the appellant failed to pay the aforesaid amount to respondent No.1, a suit for recovery of the suit amount was filed by it against the appellant before this court. The suit having been decreed, the appellant is before this Court by way of this appeal.

In its written statement, the appellant admitted booking of the consignment with it and also admitted that the motorcycles were being transported by it from Gurgaon/Daruhera to Chhindwara on truck No.HR-47-1391. It was alleged in the written statement that the goods were being carried at owner's risk and the accident occurred due to circumstances beyond the control of the driver, when the Push Road End slipped all of sudden, resulting in steering system became free and the truck got imbalanced, went off the road and dashed against a roadside tree. Thus, the case of the appellant was that since the goods were being transported at the risk of the consigner and there was no negligence on the part of its driver, it was not liable to compensate either the consigner or the Insurance Company.

2. The facts giving rise to filing of RFA No.72/2006 can be summarized as under:-

The consignment of motorcycles was booked by respondent No.2 Hero Honda Motors Ltd. with the appellant for transporting those vehicles from Dharuwhera/Gurgaon to Salem and Namakkal (Madras). The motorcycles were being transported in truck No.HNL-9969. When the truck reached near Sholapur, another truck bearing No.AP-0914-7307, coming from the opposite direction in a rash, negligence and careless manner, hit the vehicle of the appellant from the front, as a result of which not only the truck of the appellant but also the motorcycles kept thereon were damaged. In this case also, a claim was lodged by Hero Honda Motors Ltd. with the appellant and the consignment was got inspected by the Insurance Company through its surveyors. Since the claim was

not settled by the appellant, the Insurance Company settled the claim with respondent No.2 and paid a sum of Rs.5,53,323/- to respondent No.2.

In this case also, the appellant admitted booking of consignment with it as also the fact that the goods were being transported by it on truck No.HNL-9969. It was also its case that the accident occurred on account of the negligence of another truck which hit against the truck of the appellant. In this case also, the plea taken

by the appellant was that the goods were being transported at owner's risk and there was no negligence on its part.

3. On pleadings of the parties, the following issues are framed in the suit subject matter of RFA No.574/2004:-

1. Whether there is no privity of contract between the plaintiff No. 1 and the defendant? OPD
2. Whether the suit is liable to be dismissed in view of Section 10 of the Carriers Act? OPD
3. Whether the suit has been signed, verified and instituted by a competent person? OPP
4. Whether the plaintiff has no cause of action to file the present suit? OPD
5. Whether the plaintiff is entitled for the suit amount? OPP
6. Whether the plaintiff is entitled for the interest, if so, then at what rate and to what extent? OPP
7. Relief.

The following issues are framed in the suit subject matter of RFA No.72/2006:-

1. Whether the suit has been properly signed, verified or instituted? OPP
2. Whether the suit is bad for mis-joinder and non-joinder of parties? OPD
3. Whether the plaintiff has served notice u/s 10 Carriers Act? OPP
4. Whether the loss suffered by the plaintiff is due to the negligence of the defendant? OPP
5. Whether the plaintiff is entitled to the suit amount? OPP
6. Whether the plaintiff is entitled to any interest. If yes, at what rate and for what period? OPP
7. Relief.

4. In the suit, subject matter of RFA No.574/2004, only one witness namely Amia Kumar, Deputy Manager of respondent No.1 was examined by the Insurance Company whereas three witnesses were examined by the appellant.

DW 2, Sh. Sanjay Bajaj is one of the Directors of the appellant company. In his affidavit, by way of his evidence he stated that before sending the truck to any destination they used to get it serviced and only when the truck was found fit in all respect, for road worthiness, it was sent for carrying the goods by respondent No.2. DW 3 Mr. Raghunath Singh claims to be co-driver of truck No.HR-47-1391 in which the motorcycles were being transported to Chhindwara. He has stated that on 18.03.2000, he was a co-driver with Ashok Kumar Pandey, on the above referred truck which was loaded with Hero Honda Motorcycles. He has further stated that before leaving for the destination he alongwith Sh. Ashok Kumar Pandey had carefully checked the truck and had found no defect in it. DW 1 Mr. Shakil Khan is a motor mechanic, who had repaired truck No. HR-47-1391 after it had met with an accident.

5. In the suit, subject matter of RFA No.72/2006, the Insurance Company examined only one witness Mr. Ravinder Bowgal, whereas two witnesses were examined by the appellant. Mr. Sanjay Bajaj, Director of the appellant company has been examined as DW1 in this case whereas co-driver of the truck Mr. Mobin Ahmed has been examined as DW2. In his affidavit, by way of evidence, Mr. Mobin Ahmed has stated that he was a co-driver with Sh. Islamuddin on truck No.HNL-9969 on 10.06.1996 when Hero Honda Motorcycles were being transported on that truck. He has further stated that when the truck reached near Tembhurni on Pune Road, truck No.AP 09/U-7307 which was being driven rashly, negligently and carelessly hit the front of truck No. HNL-9969, as a result of which their truck left the road and consequently, the motorcycles loaded in the truck got damaged. According to him, the accident had occurred due to negligence and rash driving on the part of the driver of the other truck.

6. The impugned judgment and decree have been assailed by the learned counsel for the appellant on the following ground:-

- (i) Notice u/s 10 of Carriers Act was not given to the appellant.
- (ii) There being no negligence on the part of the appellant, it cannot be held liable for damage to the goods.
- (iii) Respondent No. 1 has failed to prove that the plaint had been signed and verified and the suit instituted by a competent person.
- (iv) The Letter of Subrogation in favour of respondent No. 1 has not been proved in accordance with law, and exhibit number has been put on it, without proving the document.

7. As regards service of notice on the appellant, Section 10 of the Carriers Act provides that no suit shall be instituted against a common carrier for the loss of or injury to goods entrusted to him for carriage unless notice in writing of the loss or injury has been given to him before the institution of the suit and within six months of the time when the loss or injury first came to the knowledge of the plaintiff.

8. In the suit which is subject matter of RFA No.574/2004, the accident took place on 18.03.2000. Admittedly, a notice dated 16.09.2000 was served by respondent No.2, Hero Honda Motors Ltd. upon the appellant. Vide this notice, the appellant was informed that 53 motor cycles transported on truck No. HR-47-1391, which had been booked vide G.R. No.30503 dated 16.03.2000, were extensively damaged during transportation and the value of the damages was about Rs.5,15,265/-. The appellant was requested to lodge the claim and settle it. It was further requested to issue damage certificate for the above damage and send it to respondent No.2 alongwith the copy of FIR.

In the suit which is subject matter of RFA No.72/2006, the accident took place on 14.06.1996. Admittedly, a notice dated 13.08.1996 was served upon the appellant by respondent No.2, Hero Honda Motors Ltd. vide notice dated 13.08.1996. The appellant was informed about the damage of the motorcycles which were being transported on truck No.HNL-9969 vide G.R. Nos.8725-8727 dated 10.06.1996. It was further informed that the value of the damages was approximately Rs.5,87,250.53. The appellant was requested to lodge the claim and settle the same. It was, further, requested to issue a damage certificate alongwith copy of FIR.

9. As observed by this Court, in CS(OS) No.1468/2001 decided on 23.11.2010, 2010 (10) AD DEL. 299, there is no particular form of notice prescribed in the Carriers Act. The purpose of serving notice u/s 10 of Carriers Act is to inform the carrier of the loss or injury to the goods and to give him an opportunity to make amendments for the occurrence of the loss and settle the claim of the consigner of the goods. Since no particular form of the notice has been prescribed in the Act, a notice which gives requisite information and opportunity to the carrier would meet the statutory requirement. In the cases before this Court, in both the notices, the appellant was informed of the accident as well as the damage to the motorcycles. The estimated loss caused to respondent No.2 was also conveyed to the appellant which was asked to settle the claim with respondent No.2. Thus, the appellant got ample opportunity to settle the claim with the consigner. The notices issued to the appellant were, therefore, valid notice envisaged u/s 10 of the Carriers Act. I, therefore, find no merit in the contention that the notices have issued by respondent No.2 were not notices u/s 10 of the Carriers Act. 10. The main contention of the learned counsel for the appellant is that since there was no negligence on the part of the appellant in either of the two cases, no decree against the appellant could have been passed. It is submitted that in the first case, the accident was an Act of God, since the push rod end slipped off all of a sudden resulting in the steering system became free, the vehicle got imbalanced and went off the right hand side of the road and dashed against the roadside tree. It is also submitted by the learned counsel for the appellant that the appellant had taken all necessary precautions since the vehicle was duly checked before it started its journey and had successfully drive for about 1200 Kms before the accident took place. In the second case, according to the learned counsel for the appellant, the accident took place entirely on account of

negligence of the third party, for which no blame can be placed on the appellant or its driver and, therefore, no decree could have been passed against the appellant.

11. In *Patel Roadways Limited vs. Birla Yamaha Ltd.*, AIR 2000 SC 1461, Supreme Court held that the liability of a carrier in India is like that of an insurer and is an absolute liability subject to an Act of God and a special contract which the carrier may choose to enter with a customer. In this regard, the Court referred to the provisions of Section 9 of the Act, which specifically provides that in case of claim of damage or loss to or deterioration of goods entrusted to a carrier, it is not necessary for the plaintiff to establish negligence. It was further held that even assuming that the general principle in cases of tortious liability is that the party who alleges negligence against the other must prove the same, the said principle has no application to the cases under the Carriers Act. Thus, liability of a carrier is absolute and akin to that of an insurer, unless it can be shown that the damage to the goods was attributable to an Act of God or that there was a special contract between the carrier and the insured whereby the carrier is absolved of its liability in case of loss or damage to the goods.

12. It was submitted by the learned counsel for the appellant that the goods were transported at the risk of the consigner, as would be evident from the printed term "at owner's risk" on the Goods Receipt consignment notes which the respondents had filed during trial. This, according to the learned counsel for the appellant, constitutes a special contract to the Supreme Court was referring in *Patel Roadways* (supra). I, however, do not find any merit in this contention. The special contract, to which the Supreme Court was referring in *Patel Roadways* (supra) has to be on express agreement between the consigner and consignee whereby it is consciously agreed by the consignor that the transporter will not be liable to compensate him for any loss of or damage to the goods. Mere a printed term such as the one which appears on the Goods Receipts in these cases does not constitute the special agreement envisaged by the Apex Court. Admittedly, there is no specific agreement between the appellant and respondent No.2, that in no case of damage to the consignment, the transporter would be liable to compensate the consigner. Therefore, the contention raised by learned counsel for the appellant cannot be accepted.

13. The next question which comes up for consideration is as to whether the appellant would be liable or not, in case the accident took place for no fault on the part of the appellant or its employee. In *South Eastern Carriers (P) Ltd. Vs. The Oriental Fire and General Insurance Co. Ltd.* and Another, , the plaintiffs had chartered a truck for carrier of goods. The truck met with an accident. It was claimed by the carrier that there was no negligence or carelessness on the part of the driver and that the accident had occurred only due to unforeseen and inevitable reasons. Noticing that u/s 8 of Carriers Act the liability of a common carrier is absolute except for Act of God and no evidence had been produced by the carrier to show that the accident had occurred due to Act of God, it was held

that the carrier was answerable for the loss of goods even when the loss is not caused by negligence or for want of care on its part. It was held that the only exceptions recognized by the Act are the Act of God and of State's enemies or a special contract that the carrier may choose to enter into with the customer. In *Oriental Insurance Co. Vs. Mukesh and Co. and Another*, the goods entrusted to the carrier were gutted by fire during transport. The cause of fire was attributed to sparks emitted at the time of tightening of consignment by nylon ropes at the octroi post. It was held by a Division Bench of High Court that if the fire broke out due to some unknown cause or due to the negligence of coolies, the transporter as the common carrier u/s 8 of the Carrier Act, was liable to pay for the loss of the damage to the consignee.

14. In my view, if an accident takes place on account of a mechanical failure or on account of the negligence of a third party or on account of the act of a third party, such an act would not constitute an "Act of God" and the carrier would still be liable to make good the loss to the consignor, his liability being absolute and akin to that of the insurer. The Acts of God, to my mind, would be cases such as loss or damage to the goods on account of rains, earthquake or cyclone which are natural calamities. The accident which takes place on account of mechanical failures cannot be termed as Acts of God. A mechanical failure would normally occur if there is some defect in the machine or a component or the component has out-lived its life on account of normally wear and tear. Yet another reason for mechanical failure can be absence of proper upkeep and maintenance of the machine. If a vehicle is regularly maintained and properly checked and the damaged or the worn out parts are replaced well in time, there is no reason for a mechanical failure to take place. As far as the act of a third party is concerned that can never constitute an Act of God. For example, if there is a theft of the consignment being transported by a carrier, it can never be said to be an Act of God, it being a criminal Act on the part of a third person. In taking this view, I am fortified by the above referred decision of Kerala High Court in *South Eastern Carriers (P) Ltd.* (supra) and the decision of Madhya Pradesh High Court in *Oriental Insurance Company* (supra).

15. The learned counsel for the appellant has placed reliance upon the decision of the Rajasthan High Court in *State of Rajasthan Vs. Mehta Transport Company and Others*, A perusal of the above judgment would show that the Court noted that a carrier is responsible for safety of goods except on account of act of God. In the case before the High Court, it was found that the accident had taken place because of bursting of front tyre. It was a new truck. In these circumstances, the Court was of the view that no negligence to the driver can be attributed on account of bursting of tyre and it could not be said that the respondent had not taken proper care in maintaining the tyres of the truck. However, the case before this Court does not involve bursting of tyres. As observed earlier, the push rod end could not have slipped all of a sudden unless there had been some negligence with respect to the maintenance of the vehicle. In any case, it is not the case of the appellant in the written statement that it was on account of latent

defect which was not discoverable on an inspection, that the push rod end slipped all of a sudden resulting in steering system becoming free. Even in the case of bursting of tyres, it may not always be an Act of God. For example, if worn out or damaged tyres and/or tubes are used or excess air is filled in the tyres and consequently the tyres get burst, it would not be an Act of God. Since at any stage, bursting of tyres could have been easily avoided by not using worn out/ damaged tyres/tubes or filling right quantity of air in the tubes or tyres. The learned counsel for the respondent has relied upon the decision of Division Bench of Madras High Court in the case of United India Insurance Company Ltd. Vs. Muthulakshmi, Radhakrishnan and Star Match Factory, . In that case, the goods were being transported in a lorry which overturned and fell. As a result, the bundles of matches loaded in the lorry got fired and were burnt. It was found that the tyre of the lorry got burst as the vehicle was not properly maintained by the carrier. Relying upon the decision of the Supreme Court in Patel Roadways Ltd. v Birla Yamaha Ltd. (supra), it was held that the accident could have been averted by certain amount of foresight of the owner of the common carrier and it is an accident which resulted from the action of the common carrier and the accident could not be said to be an Act of God.

16. Though the appellant would be liable to compensate the respondent even if the accident took place without any fault on its part, I find that the evidence produced by the appellant in the suit subject matter of RFA 574/2004 to prove that there had been no negligence on its part does not inspire confidence. Admittedly, DW3 Sh. Raghunath Singh was not the driver of the vehicle on which motorcycles were being transported, he claims to be co-driver on that vehicle along with the driver Ashok Kumar Pandey. No driving license was available with this witness despite his claim that he was a co-driver. More importantly, no documentary evidence such as duty roster of the drivers was produced by the appellant to prove that this witness was deputed as co-driver on truck bearing No. HR-47-1391, at the time it met with an accident on 18.3.2000.

It would also be pertinent to note here that in the written statement, no plea was taken by the appellant that Sh. Raghunath Singh was co-driver on this truck at the time it met with the accident during which the motorcycles were damaged. In these circumstances, it is difficult to place reliance upon the testimony of this witness.

It is an undisputed proposition of law that the onus lies upon the carrier to prove that it had taken all necessary cars and precautions and despite those cares and precautions, it was not in a position to avert the accident in which the goods were damaged. A mechanical failure of a vehicle can occur on account of defects which may be latent or patent. If the defects were patent, it cannot be said that the carrier had taken all possible cares and precautions in the matter since those defects ought to have been rectified before transportation of the goods was to commence. It is only in the case of latent defects that the carrier can say that since the defects were not visible at the time of inspection, it was not in a

position to rectify those defects and consequently, could not have averted the accident. In *Minu B. Mehta and Another Vs. Balkrishna Ramchandra Nayan and Another*, , the Supreme Court while considering a case of compensation in a case of vehicular accident, held that in order to substantiate a plea that the accident was due to mechanical defect, the owners must raise a plea that defect was latent and not discoverable by use of reasonable care. It was further held that the burden to prove that the accident was due to mechanical defect was on the owners and it was their duty to show that they had taken all reasonable care and despite such care, the defect had remained hidden. In the case before the Supreme Court, though it was stated that all precautions were taken to keep the vehicle in a roadworthy condition, it was not specifically pleaded that the defect i.e. excel brake coming out, was a latent defect and could not have been discovered by use of reasonable care. This was held to be a right ground to reject the defence set up by the appellant.

In the case before us though it is alleged that the accident took place when the Push Road Ends slipped off, all of a sudden, resulting in steering becoming free, there is no averment in the written statement that this was a latent defect which could not have been noticed during the inspection of the vehicle. Since there is no pleading that the defect in the vehicle which led to its accident was a latent defect, not discoverable on inspection of the vehicle, no reliance can be placed upon the testimony of Sh. Raghunath Singh to the effect that he along with Ashok Kumar Pandey had carefully checked and had found no defect.

In the suit subject matter of RFA 72/2006, the copy of the resolution in favour of the officers of the Insurance Company is Ex. Pw1/12 and the original power of attorney executed by respondent No.2 Hero Honda Motors Ltd. in favour of National Insurance Company Ltd is Ex. PW1/11. The authenticity of Ex. PW1/12 was not disputed during the cross examination of PW1 Sh. Ravinder Bowgal who had also brought the original resolution with him. The power of attorney Ex. PW1/11 also purports to be executed by the Company Secretary of respondent No.2 in favour of respondent No.1 and also purports to be attested by a Notary Public. Therefore, the view taken by me with respect to the resolution and power of attorney filed in the suit subject matter of RFA 574/2004 would also apply to the documents filed in the suit subject matter of RFA 72/2006.

17. In the suit subject matter of RFA 72/2006, even if the accident involving the truck of the appellant had taken place solely on account of negligence of the driver of truck No. AP09/U 7303, such an act not being an act of the God but being an act attributable to a third party and the liability of the appellant being absolute and akin to that of a life insurer, the appellant is still able to compensate consignor for the damages caused to the consignment which were being transported in its vehicle.

18. As regards institution of the suit and signing and verification of complaints, it has been contended by the learned counsel for the appellant that the original power of attorney in favour of Ms. S. Patnaik who has signed and verified the complaint and

instituted the present suit, having not been produced, the respondent No.1 has failed to prove that the plaint had been signed and verified and the suit has been instituted by a competent person. I, however, find no merit in the contention. Ex. PW1/1 is a copy of the resolution purporting to be passed by the Board of Directors of respondent No.1 at its meeting held on 16.5.1989. Vide this resolution, Deputy Managers, Sr. Divisional Managers as well as Divisional Managers/ Assistant Managers/Administrative Officers/Assistant Development Managers and Assistant Administrative Officers and Assistant Branch Managers at all offices of the company situated anywhere in the country, were appointed to act in the name of the company and to appear and act either personally or through an advocate in all the courts civil, criminal or revenue. They were further authorized to institute, prosecute and defend all actions and proceedings for and against the company and for that purpose to sign and verify vakalatnama, plaint, written statement etc. A certified copy of Ex. PW1/1 was brought by PW1 Sh. Amiya Kumar with him, as is evident from his cross examination dated 19.9.2003. The genuineness and authenticity of Ex. PW1/1 was not disputed during cross examination of PW1. No suggestion was given to him that the copy filed by the Insurance Company in the suit was a forged or fabricated document. Ms. S. Patnaik being Assistant Manager of the Insurance Company, it can hardly be disputed that she was competent to institute the suit as also to sign and verify the pleadings on behalf of the Insurance Company.

19. The suit on behalf of the National Insurance Company and Hero Honda Motors Ltd. was filed way back in the year 2003. PW1 Sh. Amiya Kumar, Deputy Manager of National Insurance Company, has vouchsafed the competence of Ms. S. Patnaik to institute the suit and sign and verify the pleadings on behalf of the company. Not only oral evidence was led, all material documents on behalf of Insurance Company were filed in the suit instituted by Ms. S. Patnaik. Neither she could have filed those documents, nor Mr. Amiya Kumar would have supported the case set up in the plaint unless Ms. S. Patnaik was authorized to sign and verify the pleadings and institute the suit on behalf of the National Insurance Company. Though the suit remained pending for more than a year, the Insurance Company did not dispute the competence of Ms. S. Patnaik to institute the suit on its behalf. Such conduct on the part of the National Insurance Company is also corroborating of the fact that Ms. S. Patnaik was duly authorized by it to sign and verify pleadings and institute the suit on its behalf and that is why not only documentary evidence was produced even an officer of the company confirmed the competence of Ms. S. Patnaik in this regard.

20. In United Bank of India Vs. Naresh Kumar and others, the suit on behalf of the appellant United Bank of India was filed by one Mr L.K. Rohtagi. The suit was dismissed by the Trial Court. However, in the first appeal, the learned Additional District Judge upheld the case of the appellant on merits with respect to loan taken from the appellant bank and execution of the relevant documents by the respondent. It was, however, held by him that the authority of Shri L.K. Rohtagi to file the suit on behalf of the appellant bank had not been proved. The appeal

filed before the High Court having been dismissed, the matter was taken by the appellant bank to Supreme Court. Allowing the appeal, Supreme Court, inter alia, observed and held as under:-

9. In cases like the present where suits are instituted or defended on behalf of a public corporation, public interest should not be permitted to be defeated on a mere technicality. Procedural defects which do not go to the root of the matter should not be permitted to defeat a just cause. There is sufficient power in the Courts, under the CPC, to ensure that injustice is not done to any party who has a just case as far as possible a substantive right should not be allowed to be defeated on account of a procedural irregularity which is curable.

11. The courts below could have held that Sh. L.K. Rohatgi must have been empowered to sign the plaint on behalf of the appellant. In the alternative it would have been legitimate to hold that the manner in which the suit was conducted showed that the appellant bank must have ratified the action of Sh. L.K. Rohatgi in signing the plaint. If, for any reason whatsoever, the courts below were still unable to come to this conclusion, then either of the appellate courts ought to have exercised their jurisdiction under Order 41 Rule 27(1)(b) of the CPC and should have directed a proper power of attorney to be produced or they could have ordered Sh. L.K. Rohatgi or any other competent person to be examined as a witness in order to prove ratification or the authority of Sh. L.K. Rohatgi to sign the plaint. Such a power should be exercised by a court in order to ensure that injustice is not done by rejection of a genuine claim.

13. The suit had been filed in the name of the appellant company; full amount of court fee had been paid by the appellant bank; documentary as well as oral evidence had been led on behalf of the appellant and the trial of the suit before the Sub Judge, Ambala, had continued for about two years, it is difficult, in these circumstances, even to presume that the suit had been filed and tried without the appellant having authorised the institution of the same. The only reasonable conclusion which we can come to is that Sh. L.K. Rohatgi must have been authorised to sign the plaint and, in any case, it must be held that the appellant had ratified the action of Sh. L.K. Rohatgi in signing the plaint and thereafter it continued with the suit

In the case before this Court also, the suit had been filed in the name of respondent No. 1, Court Fee was paid, documentary as well as oral evidence was led on behalf of the insurance company and even the appeal is being contested by it. In these circumstances, it can be safely presumed that these suits had, in fact, been instituted by a competent person on behalf of respondent No. 1 which is public sector company.

21. It was next contended by the learned counsel for the appellant that the Letter of Subrogation Ex. PW2/2 and the power of attorney Ex. PW2/1, purporting to be executed by respondent No.2 in favour of respondent No.1 having not been duly proved by summoning the executant of the documents, no

decree could have been passed in favour of respondent No.1 there being no privity of contract between the appellant and respondent No.1. Again I find no merit in the contention. The Power of Attorney Ex. PW2/2 is an original document and purports to be attested by a Notary Public. The power of attorney purports to be executed by the Company Secretary of respondent No.2 Hero Honda Motors Ltd in favour of respondent No.1 National Insurance Company Ltd. There is a statutory presumption u/s 85 of Evidence Act that the Power of Attorney was executed by the person by whom it purports to have been executed and the person who executed the power of attorney was fully competent in this regard. In Jugraj Singh and Another Vs. Jaswant Singh and Others, the Power of Attorney attested by a Public Notary was disputed on the ground that it did not show on its face that the Notary had satisfied himself about the identity of the executant. Supreme Court held that there was a presumption of regularity of official acts and that the Notary must have satisfied himself in the discharge of his duties that the person who was executing it was the proper person. In Rajesh Wadhwa vs. Sushma Govil, AIR 1989, Del 144, it was contended before this Court that till it is proved that the person who signed the said power of attorney was duly appointed attorney, the court cannot draw a presumption u/s 57 and 85 of the Evidence Act. Repelling the contention, it was held by this Court that the very purpose of drawing presumption under Sections 57 and 85 of the Evidence Act would be nullified if proof is to be had from the foreign country whether a particular person who had attested the document as a Notary Public of that country is in fact a duly appointed Notary or not. When a seal of the Notary is put on the document, Section 57 of the Evidence Act comes into play and a presumption can be raised regarding the genuineness of the seal of the said Notary, meaning thereby that the said document is presumed to have been attested by a competent Notary of that country. In Punjab National Bank Vs. Khazan Singh and Others, the Power of Attorney in favour of a bank, which had been duly attested, was rejected by the learned District Judge on the ground that the presumption u/s 85 of Evidence Act was available to a particular class of Power of Attorneys described in the section, which was confined to its execution and authenticity alone. The High Court, however, rejected the view taken by the learned District Judge holding that absence of proof of resolution authorizing the executant to execute the Power of Attorney could not be sustained and a presumption in favour of the attorney would arise u/s 85 Act.

Hence, in this case also, the Court can presume not only that the Power of Attorney Ex. PW2/1 was executed by the Company Secretary of respondent No.2 in favour of respondent No.1, it can be further presumed that the person who executed the power of attorney, was duly authorized by respondent No.2 company to execute that document in favour of respondent No.1. Therefore, it was not necessary for the respondents to examine the executant of this document.

Since a power of attorney was executed by respondent No.2 in favour of respondent No.1, the suit on behalf of respondent No.2 could have been

instituted by respondent No.1. Since both the respondents had joined as co-plaintiffs even if the Letter of Subrogation is to be excluded from consideration, the decree could certainly be passed in favour of respondent No.2 Hero Honda Motors Ltd. which itself seeks a decree in favour of respondent No. 1. I, therefore, find no merit in the contention raised by the learned counsel for the appellant in this regard.

22. For the reasons stated hereinabove, I find no merits in the appeals, as far as payment of the principal sum of Rs. 4,54,043/- in the suit subject matter of RFA No.574/2004 and Rs.5,53,323/- in the suit subject matter of RFA No.72/2006 are concerned. However, I find that in the suit subject matter of RFA No.72/2006, the learned Trial Judge has awarded interest from 1.4.1997, the date on which the claim was paid by the Insurance Company to M/s Hero Honda Motors Ltd as well as interest @ 6% per annum from the date of the decree till realization. Admittedly, there was no agreement between the parties for payment of the interest. Therefore, no interest for the pre-suit period could have been awarded to the respondent. Moreover, no court fee on the amount of interest for pre-suit period was paid by the respondents. Hence, the judgment and decree dated 14.11.2005 is modified to the extent that the respondent no.1 will be entitled to recover Rs.5,53,323/- with costs along with pendent lite and future interest @ 6% per annum. For the reasons stated hereinabove, RFA No.574/2004 is hereby dismissed, whereas the judgment and decree dated 14.11.2005, which is subject matter of RFA No. 72/2006 is modified to the extent indicated above. There shall be no order as to costs.

Decree sheet be drawn accordingly. Trial court record be sent back forthwith.