M/S. ELITE ENGINEERING AND CONSTRUCTION (HYD.) PRIVATE LIMITED REP. BY ITS MANAGING DIRECTOR

v.

M/S. TEACHTRANS CONSTRUCTION INDIA PRIVATE LIMITED REP. BY ITS MANAGING DIRECTOR

(Civil Appeal No. 2439 of 2018)

FEBRUARY 23, 2018

[A.K. SIKRI AND ASHOK BHUSHAN, JJ.]

Arbitration and Conciliation Act, 1996 – s. 7(5) – Incorporation of arbitration clause in contract by reference – If made out – National Highway Authority of India entered into Concession agreement, whereby it awarded a contract to M/s. T.K. (Concessionaire) for maintenance of the Project Highway on Build Operate and Transfer (BOT) basis – Concessionaire vide EPC agreement awarded that work to M/s. UE (EPC Contractor) – EPC Contractor, in turn, executed a Construction agreement with respondent to execute the works as per terms and conditions entailed in that agreement – Respondent sub-contracted the work to the appellant – Some dispute arose between the appellant and respondent in connection with execution of the said work – Appellant invoked arbitration – Respondent contended that there was no arbitration agreement – Appellant contended that the agreement entered into between the parties (appellant and respondent), by implication, incorporated the arbitration agreement contained in the agreement entered into between the EPC Contractor and the respondent – High Court held that there was only a reference to another document with no intention to incorporate the arbitration clause thereof in a contract between the parties – Propriety of – Held: Proper – In instant case, it was not intended to make the arbitration clause as a part of the contract between the appellant and the respondent – When the incorporation clause refers to certain particular terms and conditions, only those terms and conditions are incorporated and not the arbitration clause.

Dismissing the appeal, the Court

HELD: 1. As per sub-section (5) of section 7 of Arbitration and Conciliation Act, 1996, an arbitration clause contained in an

independent document can also be imported and engrafted in the contract between the parties, by reference to such independent document in the contract, even if there is no specific provision for arbitration. However, such a recourse can be adopted only 'if the reference is such as to make the arbitration clause in such document, a part of the contract.' [Para 16] [593-E-F]

2. The High Court has correctly held that, in the instant case, it was not intended to make the arbitration clause as a part of the contract between the appellant and the respondent. Clause 2 and clause 9.10 are given correct interpretation by the High Court. By these clauses, only those conditions and sub-conditions of the contract, specification etc. which relate to the works and quality are incorporated. Clause 9.10 only talks of 'items' which are not mentioned in the contract and terms and conditions relating to the execution of those items are to be taken from the main contracts. Reference to clause 8.7 is also inconsequential. By this clause only, those terms contained in the main agreement which relate to 'terms of work' are incorporated. Procedure relating to 'termination' is altogether different from resolution of disputes. Dispute may arise even *de hors* the termination of the contract and is an altogether different aspect, not necessarily connected with the termination of work. [Para 18] [596-B-D]

M.R. Engineers and Contractors Private Limited v. Som Datt Builders Ltd. **(2009) 7 SCC 696 : [2009] 10 SCR 373**; *Groupe Chimique Tunisien SA v. Southern Petrochemicals Industries Corpn. Ltd.* **(2006) 5 SCC 275 : [2006] 2 Suppl. SCR 954**; *Larsen & Toubro Limited v. Mohan Lal Harbans Lal Bhayana* **(2015) 2 SCC 461 : [2014] 3 SCR 162**; *Sharma and Associates Contractors Private Limited v. Progressive Constructions Limited* **(2017) 5 SCC 743 – referred to.**

Alimenta S. A. v. National Agricultural Coop. Mktg. Federation of India Ltd. **(1987) 1 SCC 615 : [1987] 1 SCR 957 – relied on.**

Case Law Reference

[2009] 10 SCR 373	**referred to**	**Para 10**
[2006] 2 Suppl. SCR 954	**referred to**	**Para 12**
[2014] 3 SCR 162	**referred to**	**Para 13**
(2017) 5 SCC 743	**referred to**	**Para 13**
[1987] 1 SCR 957	**relied on**	**Para 19**

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 2439 of 2018.

From the Judgment and Order dated 18.09.2015 by the High Court of Judicature at Madras in Original Petition No. 203 of 2014.

Sridhar Potaraju, Prabhat Kumar, Ms. Sindeora VNL, Ms. Ankita Sharma, Udai Khanna, Advs. for the Appellant.

A. K. Ganguli, Sr. Adv., Dr. Amit George, R. Sathish, Mohan Das K. K., Rajesh Kumar, Ms. S. Geetha, Ms. Smitha Rani, Ms. Sonia Vasudev, Advs. for the Respondent.

The Judgment of the Court was delivered by

A. K. SIKRI, J. 1. Leave granted.

2. National Highway Authority of India (NHAI) had entered into agreement dated July 19, 2007 (hereinafter referred to as the 'Concession Agreement') whereby it had awarded a contract to M/s. T.K. Toll Road Pvt. Ltd. (hereinafter referred to as the 'Concessionaire') for undertaking, *inter alia*, the design, engineering, financing, procurement, construction, operation and maintenance of the Project Highway on Build Operate and Transfer (BOT) basis on the National Highway 67 connecting Coimbatore and Nagapattinam. The Concessionaire vide EPC agreement (Engineering, Procurement and Construction Agreement) dated January 31, 2008 awarded the said work on a fixed lump sum turnkey basis to M/s. Utility Energytech and Engineers Private Limited (hereinafter referred to as the 'EPC Contractor'). EPC Contractor, in turn, executed a Construction Agreement dated March 14, 2008 with the respondent herein (M/s. Techtrans Construction India Pvt. Ltd.) to execute the works as per terms and conditions entailed in that agreement. Clause 8 of that agreement permitted the respondent to sub-contract the structural work. Pursuant thereto, the respondent floated a tender for sub-contracting their work in which the appellant also submitted its bid and was ultimately awarded the said work by the respondent vide agreement dated July 29, 2009.

A 3. Some disputes arose between the appellant and the respondent in connection with the execution of the said work and the appellant vide its letter dated March 25, 2013 raised certain claims against the respondent. The appellant also filed Original Petition under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') on the file of Principal Judge, Karur. This petition was contested B by the respondent who in its reply denied all the allegations raised by the appellant and also submitted that since there was no arbitration agreement between the parties, the petition under Section 9 of the Act was not maintainable. While this was pending, the appellant moved application under Section 11(3) and (5) of the Act for appointment of an arbitrator in C the High Court of Judicature at Madras on January 28, 2014. Notice in this petition was issued by the High Court. In the meantime, on June 30, 2014, the Principal Judge, Karur allowed the petition of the appellant under Section 9 of the Act, but left open the issue of existence of arbitration agreement.

D 4. Insofar as the appellant's petition under Section 11 of the Act is concerned, it was contested by the respondent taking the objection to the maintainability of the petition on the ground of absence of any agreement. The High Court has vide impugned orders dated September 18, 2015 dismissed the said petition of the appellant upholding the contention of the respondent that there is no arbitration agreement E between the parties and, therefore, remedy under the Act for appointment of arbitrator or constitution of Arbitral Tribunal is not available.

5. It may be clarified at this juncture that Agreement dated July 29, 2009 entered into between the appellant and the respondent does not contain any arbitration clause. There is no independent arbitration F agreement between the parties either. However, case set up by the appellant was that this Agreement dated July 29, 2009 entered into between the parties, by implication, incorporates the arbitration agreement that is contained in the Agreement dated March 14, 2008 that was entered into between the EPC Contractor and the respondent.

G 6. Indubitably, clause 45 of the Agreement dated March 14, 2008 between EPC Contractor and the respondent contains procedure for resolution of disputes and sub-clause (3) thereof refers to arbitration procedure. In case of any dispute, as per clause 45.1, first attempt is for 'amicable resolution'. Thereafter, under clause 45.2, process of

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'mediation' is to be resorted to and if that also fails then the 'arbitration procedure' is provided. Clause 45.3 and clause 45.4 read as under:

"**45.3.Arbitration Procedure:**

Subject to the provisions of Article 45.1 and 45.2, any dispute, which is not resolved by amicable resolution between the parties or by a reference to mediation, shall be finally settled by binding arbitration under the Arbitration and Conciliation Act, 1996. The arbitration shall be by a panel of three arbitrators, one to be appointed by each Party and the third to be appointed by the two arbitrators appointed by the Parties. The Party requiring arbitration shall appoint an arbitrator in writing, inform the other party about such appointment and call upon the other party to appoint its arbitrator. If within 15 days of receipt of such intimation the other party fails to appoint its arbitrator, the Party seeking appointment of arbitrator may take further steps in accordance with Arbitration Act.

45.4. Place of Arbitration:

The place of arbitration shall be Mumbai for all Disputes."

7. According to the appellant, this clause gets incorporated in the Agreement dated July 29, 2009 that was entered into between the respondent and the appellant, by virtue of following clauses in the said agreement:

"2.Subcontractor hereby agrees, undertakes to execute the said value of work, and is responsible for the efficient and successful execution of the work and is to be completed as per the contract period specified in the contract document.

a.....

b.....

All the conditions and special conditions of contract, specifications (general and additional clauses relating to the works and quality specified in the relevant agreement between the Construction Contractor and the Employer are binding on the Subcontractor."

Annexure-I specifying the 'Terms and Conditions' Annexed thereto inter alia provides Clause - 9.10 as under:

A "9.10. For items which are not mentioned in this Agreement Clauses, terms and conditions of Agreement between Contractor and EPC Concessionaire will be applicable."

8. It is, thus, argued by the learned counsel for the appellant that as per the aforesaid clause, when the appellant had agreed and undertaken
B to execute the work as per contract specified in the contract document and the said clause also specifically provided that all the special conditions of the contract, specifications etc. relating to the works and qualities specified in the relevant agreement between the construction contractor and the employer are binding on the respondent, the clause relating to arbitration agreement i.e. 45 entered into between EPC Contractor and
C the respondent also became applicable by incorporation. It was submitted that the aforesaid clause read with clause 9.10 of Annexure 1 which categorically mentions that in respect of items which are not mentioned in the Agreement clauses, terms and conditions of the Agreement between the Contractor and EPC Concessionaire will be applicable, would also
D lead to same result.

9. These very arguments were raised before the High Court. The appellant had also referred to certain communications addressed by it to the respondent before invoking legal remedy wherein it has stated that the parties had agreed for settlement of disputes in accordance with
E clause 45.3. The respondent, on the other hand, had drawn attention of the High Court to paragraph 23 of the petition filed by the appellant under Section 9 of the Act wherein it had categorically stated that the appellant would be constrained to initiate legal proceedings against the respondent for recovery of amount by approaching the competent civil court. The High Court, thus, opined that from the communications only,
F it could not be said that parties had agreed for arbitration and, in fact, the appellant in his petition filed under Section 9 of the Act had professed ignorance of the agreement between the respondent and the employer. As it had gone to the extent of making an averment to the effect that 'the petitioner is totally kept in dark about the terms and conditions of
G the agreement till now'. The High Court thereafter construed clauses 2 and 9.10 of the Agreement that was entered into between the appellant and the respondent and came to the conclusion that those clauses never meant to incorporate arbitration agreement into the Agreement dated July 29, 2009 executed between the parties. On this aspect, discussion goes as follows:

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"18. On a careful perusal of the pleadings and documents as also submissions of the learned counsel for the parties, more specifically the reading of the clauses, this court is of the view that part of clause-2 of the agreement dated 29.07.2009 extracted aforesaid refers to only ''works and quality specified in the relevant agreement between the construction contractor and the employer''. All the conditions and the sub-conditions of contract are binding on the sub contractor/petitioner, but the unambiguous reference is only to ''work and quality specified'' without any refence to the arbitration clause. It is not a case of only absence of a reference to arbitration clause, but the reference being specific to the ''work and quality specified.'' An expanded meaning cannot be given to this Clause. It is in this context that Clause-9.10 of Annexure-I specifying the terms and conditions has to be read. Once again, it refers to ''Items'' which are not mentioned in the agreement clauses where conditions of the earlier agreement would be applicable. Thus, this would refers to the items to be used.

10. The High Court also drew distinction between the reference to the another document and incorporation of another document in a contract by reference, which has been explained by this Court in ***M.R. Engineers and Contractors Private Limited*** v. ***Som Datt Builders Ltd.***[1] and held that, in the instant case, there was only a reference to another document with no intention to incorporate the arbitration clause thereof in a contract between the parties.

11. Questioning the aforesaid approach of the High Court, learned counsel for the appellant submitted that when the appellant was required to execute the work on the terms and conditions contained in the principal agreement, it was clear intention to incorporate all the terms including clause 45.3. Additionally, he referred to clause 8.7 of the agreement between the parties which stipulates as under:

"8.7 Other terms related to Termination of work will be same as Agreement between EPC, Concessionaire and Construction contractor."

12. His submission was that when the terms related to termination of work contained in the Agreement between EPC, Concessionaire and

[1] (2009) 7 SCC 696

A the respondent were to govern their agreement as well, these would include settlement of disputes on termination of work through arbitration which was the term provided in the contract between the employer and the respondent. Relying upon the judgment in the case of ***Groupe Chimique Tunisien SA*** v. ***Southern Petrochemicals Industries Corpn. Ltd.***[2], he submitted that mere fact that appellant had mentioned about filing suit against the respondent in his petition under Section 9 of the Act would not enure to the benefit of the respondent who said so on account of mistaken understanding of law. Para 9 reads as under:

> "9. It is true that the petitioner had contended before the Jordanian court that there was no arbitration agreement between the parties. But the said contention was not accepted and the suit filed by the petitioner has been dismissed on the ground of want of jurisdiction. Thereafter, on reconsidering the matter and taking legal advice, with reference to the contentions of the respondent, the petitioner has now proceeded on the basis that an arbitration agreement exists between the parties. If, on account of mistake or wrong understanding of law, a party takes a particular stand (that is, there is no arbitration agreement), he is not barred from changing his stand subsequently or estopped from seeking arbitration. [See *U.P. Rajkiya Nirman Nigam Ltd.* v. *Indure (P) Ltd.* [(1996) 2 SCC 667] where the contention based on estoppel was negatived while considering a reserve (*sic* reverse) situation [Ed.: Para 12] .]"

13. Mr. Ganguli, the learned senior counsel appearing for the respondent, on the other hand, submitted that clause 2 of the Agreement entered into between the appellant and the respondent clearly evinced that there was only a qualified incorporation of those terms and conditions of the contract between the employer and the respondent which related to the works and the quality. Insofar as clause 45 is concerned, there was no conscious acceptance thereof between the parties and that was the reason that even the respondent had no knowledge about the said clause and, therefore, he did not mention so even in his petition filed under Section 9 of the Act. He, therefore, submitted that the High Court has rightly relied upon ***M.R. Engineers and Contractors Private Limited*** case in dismissing the petition of the petitioner. He also placed reliance upon the judgments of this Court in ***Larsen & Toubro Limited*** v. ***Mohan***

[2] (2006) 5 SCC 275

Lal Harbans Lal Bhayana[3] and ***Sharma and Associates Contractors Private Limited*** v. ***Progressive Constructions Limited***[4].

14. After considering the respective submissions, we are inclined to agree with the respondent and, therefore, do not find any fault with the impugned judgment of the High Court.

15. In ***M.R. Engineers and Contractors Private Limited*** case, this Court considered the true intent and scope of Section 7 of the Act which deals with 'arbitration agreement'. Relevant portion of Section 7 reads as under:

> "7. Arbitration agreement.—(1) In this Part, 'arbitration agreement' means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.
>
> xxx xxx xxx
>
> (5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract."

16. As per sub-section (5), an arbitration clause contained in an independent document can also be imported and engrafted in the contract between the parties, by reference to such independent document in the contract, even if there is no specific provision for arbitration. However, the Court noted that such a recourse can be adopted only 'if the reference is such as to make the arbitration clause in such document, a part of the contract.' This interpretation to sub-section (5) of Section 7 was elaborated in the following manner:

> "14. The wording of Section 7(5) of the Act makes it clear that a mere reference to a document would not have the effect of making an arbitration clause from that document, a part of the contract. The reference to the document in the contract should be such that shows the intention to incorporate the arbitration clause contained in the document, into the contract. If the legislative intent was to import an arbitration clause from another document, merely

[3] (2015) 2 SCC 461
[4] (2017) 5 SCC 743

A on reference to such document in the contract, sub-section (5) would not contain the significant later part which reads: "and the reference is such as to make that arbitration clause part of the contract", but would have stopped with the first part which reads:

> "7. (5) The reference in a contract to a document containing
B an arbitration clause constitutes an arbitration agreement if the contract is in writing…."

15. Section 7(5) therefore requires a *conscious* acceptance of the arbitration clause from another document, by the parties, as a part of their contract, before such arbitration clause could be read
C as a part of the contract between the parties. But the Act does not contain any indication or guidelines as to the conditions to be fulfilled before a reference to a document in a contract can be construed as a reference incorporating an arbitration clause contained in such document into the contract. In the absence of such statutory guidelines, the normal rules of construction of
D contracts will have to be followed.

16. There is a difference between reference to another document in a contract and incorporation of another document in a contract, by reference. In the first case, the parties intend to adopt only specific portions or part of the referred document for the purposes
E of the contract. In the second case, the parties intend to incorporate the referred document in entirety, into the contract. Therefore when there is a reference to a document in a contract, the court has to consider whether the reference to the document is with the intention of incorporating the contents of that document in entirety
F into the contract, or with the intention of adopting or borrowing specific portions of the said document for application to the contract."

17. After some further discussion on this aspect with reference to the existing case law as well as extracts from *Russell* on arbitration, the
G Court summed up the position as under:

> "24. The scope and intent of Section 7(5) of the Act may therefore be summarised thus:
>
> (*i*) An arbitration clause in another document, would get incorporated into a contract by reference, if the following
H conditions are fulfilled:

(1) the contract should contain a clear reference to the documents containing arbitration clause,

(2) the reference to the other document should clearly indicate an intention to incorporate the arbitration clause into the contract,

(3) the arbitration clause should be appropriate, that is capable of application in respect of disputes under the contract and should not be repugnant to any term of the contract.

(*ii*) When the parties enter into a contract, making a general reference to another contract, such general reference would not have the effect of incorporating the arbitration clause from the referred document into the contract between the parties. The arbitration clause from another contract can be incorporated into the contract (where such reference is made), only by a specific reference to arbitration clause.

(*iii*) Where a contract between the parties provides that the execution or performance of that contract shall be in terms of another contract (which contains the terms and conditions relating to performance and a provision for settlement of disputes by arbitration), then, the terms of the referred contract in regard to execution/performance alone will apply, and not the arbitration agreement in the referred contract, unless there is special reference to the arbitration clause also.

(*iv*) Where the contract provides that the standard form of terms and conditions of an independent trade or professional institution (as for example the standard terms and conditions of a trade association or architects association) will bind them or apply to the contract, such standard form of terms and conditions including any provision for arbitration in such standard terms and conditions, shall be deemed to be incorporated by reference. Sometimes the contract may also say that the parties are familiar with those terms and conditions or that the parties have read and understood the said terms and conditions.

(*v*) Where the contract between the parties stipulates that the conditions of contract of one of the parties to the contract shall form a part of their contract (as for example the general conditions of contract of the Government where the Government is a party), the arbitration clause forming part

A **of such general conditions of contract will apply to the contract between the parties."**

18. When we apply the aforesaid ratio, we find that the High Court has correctly held that, in the instant case, it was not intended to make the arbitration clause as a part of the contract between the appellant B and the respondent. Clause 2 and clause 9.10 are given correct interpretation by the High Court and discussion in this behalf has already been extracted above. By these clauses, only those conditions and sub-conditions of the contract, specification etc. which relate to the works and quality are incorporated. Clause 9.10 only talks of 'items' which C are not mentioned in the contract and terms and conditions relating to the execution of those items are to be taken from the main contracts. Reference to clause 8.7 is also inconsequential. By this clause only, those terms contained in the main agreement which relate to 'terms of work' are incorporated. Procedure relating to 'termination' is altogether different from resolution of disputes. Dispute may arise even *de hors* D the termination of the contract and is an altogether different aspect, not necessarily connected with the termination of work.

19. In ***Alimenta S.A.*** v. ***National Agricultural Coop. Mktg. Federation of India Ltd.***[5], the question was as to whether the arbitration clause in Fosfa-20 was incorporated in the first contract by way of clause E 11 and in the second contract by virtue of clause 9. The Court held that while the arbitration clause was incorporated in the first contract, the same was not incorporated in the second contract. How the matter has to be looked into, for determining the same, was discussed in the following manner:

F "*13*. … There is a good deal of difference between Clause 9 of this contract and Clause 11 of the first contract. Clause 11 has been couched in general words, but Clause 9 refers to all other terms and conditions for supply. The High Court has taken the view that by Clause 9 the terms and conditions of the first contract G which had bearing on the supply of HPS were incorporated into the second contract, and the *term about arbitration not being incidental to supply of goods, could not be held to have been lifted as well from the first contract into the second one*.

[5] (1987) 1 SCC 615

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14. It is, however, contended on behalf of the appellant that the High Court was wrong in its view that a term about arbitration is not a term of supply of goods. We do not think that the contention is sound. It has been rightly pointed out by the High Court that the *normal incidents of terms and conditions of supply are those which are connected with supply, such as, its mode and process, time factor, inspection and approval, if any, reliability for transit, incidental expenses, etc*. We are unable to accept the contention of the appellant that an arbitration clause is a term of supply. There is no proposition of law that when a contract is entered into for supply of goods, the arbitration clause must form part of such a contract. The parties may choose some other method for the purpose of resolving any dispute that may arise between them. But in such a contract the incidents of supply generally form part of the terms and conditions of the contract. The first contract includes the terms and conditions of supply and as Clause 9 refers to these terms and conditions of supply, it is difficult to hold that the arbitration clause is also referred to and, as such, incorporated into the second contract. *When the incorporation clause refers to certain particular terms and conditions, only those terms and conditions are incorporated and not the arbitration clause. In the present case, Clause 9 specifically refers to the terms and conditions of supply of the first contract and, accordingly, only those terms and conditions are incorporated into the second contract and not the arbitration clause*. The High Court has taken the correct view in respect of the second contract also."

(emphasis supplied)

20. This judgment is noted in ***M.R. Engineers and Contractors Private Limited*** case as well and in the facts of ***M.R. Engineers and Contractors Private Limited***, the Court held that there was no incorporation of arbitration clause. Following discussion throws light to decide the issue in this case as well:

"37. In the present case the wording of the arbitration clause in the main contract between the PW Department and the contractor makes it clear that it cannot be applied to the sub-contract between the contractor and the sub-contractor. The arbitration clause in

A the main contract states that the disputes which are to be referred to the committee of three arbitrators under Clause 67.3 are disputes in regard to which the decision of the Engineer ("Engineer" refers to person appointed by the State of Kerala to act as Engineer for the purpose of the contract between the PW Department and the respondent) has not become final and binding pursuant to Clause
B 67.1 or disputes in regard to which amicable settlement has not been reached between the State of Kerala and the respondent within the period stated in Clause 67.2. Obviously neither Clause 67.1 nor 67.2 will apply as the question of "Engineer" issuing any decision in a dispute between the contractor and the sub-contractor,
C or any negotiations being held with the Engineer in regard to the disputes between the contractor and the sub-contractor does not arise. **The position would have been quite different if the arbitration clause had used the words "all disputes arising between the parties" or "all disputes arising under this**
D **contract". Secondly, the arbitration clause contemplates a committee of three arbitrators, one each to be appointed by the State of Kerala and the respondent and the third (Chairman) to be nominated by the Director General, Road Development, Ministry of Surface Transport, Roads Wing, Government of India. There is no question of such**
E **nomination in the case of a dispute between the contractor and the sub-contractor.**"

21. In view of the aforesaid, the appeal stands dismissed.

Ankit Gyan Appeal dismissed.

SHIVAWWA AND ANR. A

v.

THE BRANCH MANAGER, NATIONAL INDIA INSURANCE CO. LTD. AND ANR.

(Civil Appeal No. 2247 of 2018) B

MARCH 28, 2018

[DIPAK MISRA, CJI AND A.M. KHANWILKAR, J.]

Motor Vehicles Act, 1988 – s.166 – Person died after falling off from the tractor-trailer owned by respondent No.2 – Claim petition filed by appellant No.1, father of the deceased before Tribunal seeking compensation from respondent No.1-insurance company, respondent No.2 and the driver (employee of respondent no.2) – Tribunal passed award against the respondents, jointly and severally, to compensate the family members of the deceased with a sum of Rs.3,20,000/- with interest @ 6% p.a. – High Court in appeal held that respondent No.1 insurance company could not be saddled with any liability as the deceased had not travelled along with his goods in the tractor-trailer and therefore, it could not be made liable to pay any compensation – Held: Tribunal analysed the evidence in its entirety and also took into account the charge-sheet filed in respect of the accident in question for accepting the factum that deceased had travelled in the tractor along with his goods to Holealur where he had gone to unload the foodgrains of Maize loaded on the tractor belonging to respondent No.2 and while returning therefrom met with the accident – High Court by a sweeping observation proceeded to reverse the finding of fact recorded by the Tribunal – Conclusion reached by the Tribunal is a possible view, which could not have been disturbed by the High Court in a casual manner – Finding of the Tribunal that the deceased had travelled along with his goods, affirmed and restored – Insurance policy brought on record was a valid policy in respect of the offending tractor and thus, insurer would be obliged to satisfy the compensation amount awarded to the claimants– Award passed by Tribunal restored. C D E F G

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A **Allowing the appeal, the Court**

HELD: 1.1 The Tribunal had analysed the evidence of PW-2 (eye-witness) and PW-1 (mother of the deceased) in its entirety and also took into account other evidence in the shape of charge-sheet filed by the Investigating Officer, in respect of the accident B **in question for accepting the factum that deceased had travelled in the tractor along with his goods to Holealur where he had gone to unload the foodgrains of Maize loaded on the tractor belonging to respondent No.2, which was driven by employee of respondent No.2 and while returning from Holealur, met with the accident. When cross-examined, PW-2 stated that on the date of accident** C **they had taken maize crop in the said tractor. Notably, the fact that the deceased had loaded his agricultural produce on the tractor and also accompanied the tractor for unloading the same to Holealur and while returning met with an accident, has gone unchallenged. [Para 7] [604-B-C, H; 605-A]**

D **1.2 The High Court by a sweeping observation proceeded to reverse the finding of fact recorded by the Tribunal. The conclusion reached by the Tribunal is a possible view, which could not have been disturbed by the High Court in the appeal filed by the insurer, much less in such a casual manner, as has been done** E **by the High Court. [Para 9] [608-C-E]**

1.3 The High Court based its conclusion that the insurer cannot be saddled with the liability to satisfy the award, on the finding that the deceased was not travelling along with his goods at the time of accident. No more and no less. However, as the F **said finding recorded by the High Court cannot be sustained, the finding of the Tribunal on the factum that the deceased had travelled along with his goods is affirmed and restored. It would necessarily follow that the insurer was not absolved of its liability to pay the compensation amount awarded to the claimants. The Tribunal had found, as of fact, that the insurance policy brought** G **on record was a valid policy in respect of the offending tractor. Assuming that the insurance company was not liable to pay compensation amount awarded to the claimants as the offending tractor was duly insured, the insurer would be still liable to pay the compensation amount in the first instance with liberty to**

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recover the same from the owner of the vehicle owner (respondent No.2). However, in the facts of the present case, consequent to affirmation and restoration of the finding of fact recorded by the Tribunal regarding the factum that deceased had travelled along with his goods at the time of accident, the insurer would be obliged to satisfy the compensation amount awarded to the claimants. [Paras 10, 11 and 12] [608-F-H; 609-A-B; 610-G]

National Insurance Co. v. Swarn Singh and Ors. **(2004) 3 SCC 297 – relied on.**

Case Law Reference

(2004) 3 SCC 297	**relied on**	**Para 11**

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 2247 of 2018.

From the Judgment and Order dated 09.07.2015 of the High Court of Karnataka, Dharwad Bench in M. F. A. No. 4401 of 2008(MV).

Sharanagouda Patil, Ms. Supreeta Sharanagouda, Advs. for the Appellants.

Ms. Meenakshi Midha, Kapil Midha, Bhavya Lakhwara, Chander Shekhar Ashri, Advs. for the Respondents.

The Judgment of the Court was delivered by

A. M. KHANWILKAR, J. 1. This appeal emanates from the judgment of the High Court of Karnataka dated 9th July, 2015 in M.F.A. No.4401/2008 (MV) which had allowed the appeal filed by respondent No.1 (Insurance Company) and set aside the award of the Motor Accident Claims Tribunal (for short "the Tribunal") granting compensation to the appellants.

2. A claim petition was filed in reference to the death of one Chanabasayya Sidramayya Hiremath, son of appellant No.1 and brother of appellant No.2 herein. On 23rd January, 2001, the deceased was returning, after unloading food-grains, on tractor-trailer bearing No. KA-29/T-1651/T-1652 belonging to respondent No.2, and being driven by an employee of respondent No.2, one Mallikarjuna Beemappa Ganiger. At around 1.00 AM, it is alleged that owing to the rash and negligent driving of the said Mallikarjuna Beemappa Ganiger, the deceased fell off the

A tractor-trailer and suffered fatal injuries. A claim petition under Section 166 of the Motor Vehicles Act, 1988 was subsequently filed before the Tribunal, Bagalkot, by the legal representatives of the deceased seeking compensation of Rs. 8 lakh from respondent No.1 - insurance company, respondent No.2 - owner and the driver, Mallikarjuna Beemappa Ganiger. After considering the facts and evidence on record, the Tribunal rejected the respondents' contention that the deceased had himself been negligent by standing on a tractor hook which connected the tractor and the trailer and concluded that the accident had occurred due to the negligence of the driver of the motor vehicle. The Tribunal, thus, passed an award against the respondents, jointly and severally, to compensate the family members of the deceased with a sum of Rs.3,20,000/- (Rupees three lakh twenty thousand only) with interest at the rate of 6% per annum, from 3.7.2001 to 29.4.2003 and from 11.7.2007 till date of realisation of the award amount.

3. Aggrieved, respondent No.1 insurance company assailed the Tribunal's award before the High Court of Karnataka, contending that the deceased had not travelled along with his goods in the tractor-trailer and therefore, it could not be made liable to pay any compensation. The High Court found merit in the contention raised by respondent No.1, that the deceased was not travelling along with his goods at the time of the accident and thus held that respondent No.1 insurance company could not be saddled with any liability in that regard.

4. The appellants have challenged the impugned judgment including on the ground that the High Court failed to appreciate the evidence on record and the fact that the deceased was the sole earning member of the family without whom, the family had no other source of income. The appellants also submit that the quantum of compensation awarded by the Tribunal was meager and unjustifiable and therefore, also seek enhancement of the Tribunal's award.

5. We have heard Mr. Sharanagouda Patil, learned counsel for the appellants and Ms. Meenakshi Midha, learned counsel for the respondents. Be it noted, the driver of the offending vehicle has not been arrayed as a party either before the High Court or before this Court and the claim of the appellants is only against respondent No.1 - Insurance Company and the respondent No.2 – owner of the vehicle.

6. The High Court has held that the insurer (respondent No.1) cannot be saddled with the liability to satisfy the award and on that finding, allowed the appeal preferred by respondent No.1. The reason which weighed with the High Court for arriving at that conclusion, as can be discerned from the impugned judgment, is based on the selective reading of evidence of PW-2 (eye-witness) who had stated that the deceased was standing on the hook connecting the tractor and trailer and the deceased fell down due to rash driving of the tractor, which ran over his head and chest. The High Court has also selectively adverted to the evidence of PW-1, mother of the deceased and opined that even her evidence was to the same effect. Additionally, she has stated that the deceased was studying in B.A. and running a Pan-Beedi shop. After so noting, the High Court jumped to a conclusion that a combined reading of the evidence of these witnesses leads to an inference that the victim was not travelling with his goods at the time of accident which occurred at about 01.00 Hours in the night. On recording this opinion, the High Court absolved the insurer. The analysis by the High Court is in the following words:

> "6. Per contra, learned counsel for the respondents strongly relies on the evidence of P.W.2 and contends that P.W.2 is an eyewitness and deposed before the Court that while returning from Holealur, the driver of the tractor was driving the vehicle in a rash and negligent manner and caused the accident in which the deceased died on the spot. Ex. P-1 is the complaint given by the father of the deceased. It is stated therein that on 22.01.2001 his son had gone to Holealur in the tractor belonging to respondent No.1 and while returning at about 01:00 hours in the night intervening 22nd and 23rd January, 2001 has son sustained fatal injuries in the accident. It is also clearly stated therein that the deceased was standing in the hook which connects tractor to the trailer and the victim fell down due to rash driving and the tractor ran over his head and the chest. The evidence of P.W.1, mother is also to the same effect. She has also stated in her evidence that the deceased was studying in B.A. and running a Pan Beedi shop.
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> 7. A combined reading of all witnesses leads to an inference that the victim was not travelling with his goods at the time of accident. The accident has occurred at about 00:01 hours in the night. In the circumstances, the insurer cannot be saddled with the liability

A to satisfy the award. The appeal merits consideration and accordingly allowed."

7. On the other hand, a perusal of the judgment of the Tribunal reveals that the Tribunal had analysed the evidence of PW-2 and PW-1 in its entirety and also took into account other evidence in the shape of B charge-sheet filed by the Investigating Officer, in respect of Crime No.12/ 2001 registered in respect of the accident in question for accepting the factum that deceased had travelled in the tractor along with his goods to Holealur where he had gone to unload the foodgrains of Maize loaded on the tractor belonging to respondent No.2, which was driven by Mallikarjuna Beemappa Ganiger and while returning from Holealur, met C with the accident. In her examination-in-chief, PW-1 deposed as follows:

> "On the fatal day of accident i.e., on 23.01.2001 in the evening at about 5:00 p.m., my son deceased Chanabasayya gone to Hole-Alur for unloading the foodgrains in Commission Agent shop for sale of the same in a TT Unit bearing No.KA, 29/T-1651 T-1652 D belongs to Basanagouda Hireniganagoudar, after unloading the foodgrains belongs to us while returning to the village by my son in the said TT unit the driver of the said T.T. unit was driving the vehicle in rash and Regulations and caused the accident near Heballi village at anappana halls (stream) due to this negligent E driving of the driver, my son fell down from the T.T. unit and the said vehicle passed on the head of my and due to gracious injuries to head my son was succumbed on the spot, and P.M. was conducted at Govt. Hospital Badami."

PW-2 in his examination-in-chief stated as follows:

F "On 23.11.2001 Lt. chanabasayya and myself together went to Rone in the tractor of Basanagouda Hireninganagouder by loading the maize in the said tractor and while returning back near our city near Ganapan village the driver of the tractor drove a tractor in very rash and negligent manner and in a high speed G endangering the human life and injured Lt. Chanabasayya and he died on the spot. I have witnessed the said accident. Like me others were also in the tractor."

When cross-examined, PW-2 stated that on the date of accident they had taken maize crop in the said tractor. Notably, the fact that the H deceased had loaded his agricultural produce on the tractor and also

accompanied the tractor for unloading the same to Holealur and while returning met with an accident, has gone unchallenged.

8. In light of the entire evidence, the Tribunal found thus:

"7. …..This fact has been denied by respondent no.3 and as such the burden of proving of issue No.1 is on the petitioner and in order to prove issue No.1 second petitioner is examined as PW-1 who has filed her affidavit evidence and PW-1 deposed in her evidence regarding the accident caused to her son deceased Chanabasayya on 23.1.2001 involved with tractor and trailer belongs to respondent no.1 driven by respondent no.2 on the date of accident. Through counsel for respondent no.3 cross examined PW-1, but PW-1 has not given admissions in order to discard her evidence. Even PW-1 has denied the suggestion that deceased was standing on a hook portion in the tractor trailer which connects the tractor Engine and trailer portion of the vehicle and travelling on that day, but PW-1 has denied this suggestion. In order to prove the accident an independent witness PW-2 is examined by the petitioner wherein this witness has also filed affidavit evidence and stated regarding the accident caused to deceased Chanabasayya on 23.1.2001 involved with tractor and trailer unit belongs to respondent no.1. This witness is also cross-examined by counsel for respondent no.3, but nothing is elicited to discard the evidence of PW-2. The petitioners have relied upon police documents, which are marked through PW-1 as per Exp-1 to Ex.P-5. ExP-1 is the true copy of FIR registered before Badami P.S in Crime No.12/2001 as per the complaint filed by first petitioner i.e, father of the deceased u/sec.279 and 304 (A) of IPC. The Copy of complaint is also annexed to the FIR wherein petitioner no.1 has filed this complaint before the Badami P.S. on 23.1.2001 against the driver of T.T. Unit. ExP-2 is the charge sheet filed by the I.O. against respondent no.2, driver of the T.T. unit before JMFC Badami wherein a criminal case bearing C.C.No.314 of 2001 was registered against driver of T.T. unit for the offence punishable u/Secs. 279 and 304 (A) of IPC. Ex.P3 is the spot mahazar and contents of Ex.P-3 clearly proves the spot and accident and also it corroborated with spot of accident as relief by the petitioners in their claim petitioner. ExP-4 is the IMV report filed by the Motor Vehicle Inspector after examination of T.T. unit involved in the

A accident and this document proves that accident in question did not cause due to any mechanical defect in the vehicle. ExP-5 is the post mortem examination report of the deceased Chanabasayya conducted by M.O. Community Health Center at Badami and as per P.M. report the death had occurred due to head injuries and also damage to the vital organs of brain of the deceased."

B

The Tribunal also considered the plea taken by the insurer (respondent No.1) which was sought to be established through evidence of its officer working as an administrative officer, in the following words:

"8. Respondent No.3 has examined its officer who is working as
C Administrative officer in the office of respondent no.3 and this witness has filed affidavit evidence accepted u/0 18 rule 4 of CPC wherein RW-1 stated that, deceased Chanabasayya died as he was standing on a hook portion of Tractor Trailer and died due to his negligence on the date of accident. But in support of this contention RW-1 has not produced any rebuttal documents to that
D of Ex.P-1 to Ex.P-5. However, RW-1 in his cross examination clearly admitted that in the complaint marked at Ex.P-1 it is not recited with deceased obtained T.T. unit from respondent no.1 on hire basis and RW-1 has denied the suggestion made to him during cross examination that he is deposing false evidence regarding
E deceased was standing on a tractor hook which connects the engine and trailer portion. After considering the evidence of RW-1 though respondent no.3 in its petition filed to the claim petition and also RW-1 in his oral evidence stated that the accident had occurred due to the gross negligence of deceased himself, but to support this contention there is no cogent and oral evidence nor
F documentary evidence placed on record by the respondent no.3. On the contrary, there is evidence of PW-1 and 2 and also Ex.P-1 to Ex.P-5 which are the documents obtained from C.C. file wherein as per the complaint filed by the petitioner No.1, a crime was registered against the accused i.e., driver of T.T. unit and
G I.O. after due investigation has filed charge sheet against respondent no.2 who was driver of the T.T. unit on the date of accident and hence there documents are not denied by the respondent no.3. on the contrary, Ex.P-1 to Ex.P-5 clearly establish that the accident in question was occurred due to actionable negligence of driver of T.T. unit wherein respondent No.2 was

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driving the said tractor and trailer on 23.1.2001 and caused accident at 1.00 a.m. near Ganappan Halla just 1.00 k.m. away from Hebballi village on Cholchagudda-Govankoppa PWD road and the gross negligence of driver caused the death of Chanabasayya who succumbed to injuries and died on the spot as he was travelling in the said T.T. unit on that day and hence the negligence is clearly attributed on the part of driver of T.T. unit and death of Chanabasayya was the proximate cause of road traffic accident which comes under the preview of Sec. 166 of M.V. Act and this positive evidence lead by the petitioners is proved by the documentary evidence, but the contention of respondent no.3 has to be rejected and also there is no cogent evidence to hold that the death of Chanabasayya was due to his own negligence. Hence, after appreciation of evidence of PW-1 and 2 and RW-1 and by perusal of Ex.P-1 to Ex.P-51 I hold that, the petitioners have prove issue No.1 as against respondent no.1 to 3. Accordingly, issued no.1 is answered in affirmative."

And again in paragraph 11, on the issue of entitlement of compensation it noted thus:-

"…The petitioners claimed compensation from respondent No.1 to 3 jointly and severally wherein respondent No.1 is owner of offending vehicle respondent No.2 driver of vehicle and respondent No.3 is the insurer, but RW-1 representing insurance company has given evidence denying its liability contending that, there is breach of policy conditions particularly there is violation of condition clause "A" of Ex.R-1 wherein deceased had hired the vehicle of respondent No.1 in order to load maize corns to dump at hole Alur in Commission Agent shop. In the evidence of RW-1 insurance cover note is produced and it is marked at Exhp-1. The contention of respondent No.3 is rejected by this Tribunal regarding the defence taken that death of Chanabasayya was due to his gross negligence. On perusal of Ex. R1 it is valid policy obtained from respondent No.1 over his T.T. unit wherein policy period commences from 12.2.2000 to 11.2.2001. In view of admission of RW-1 in cross examination wherein RW-1 admitted in his cross reads as follows:-

"…..On the contrary, the deceased had went to dump maize corns belongs to them in the vehicle owned by respondent No.1.

A Hence, the contention of respondent No.3 that vehicle and its use was for hire and reward is not proved by any cogent evidence on record. On the contrary, the offending vehicle T.T. unit was used for carrying foodgrains to each the sale point i.e., Commission Agent shop at Hole-Alur which an agricultural produce of petitioners family carried called Tractor- Trailer. Therefore this B decision relied by the petitioners is aptly applicable wherein the use of vehicle is for agricultural purpose and not for any other commercial purpose. Once it is held use of vehicle by the deceased for agricultural purpose then question of violating any policy conditions by respondent No.1 will not arise….."

C

9. As mentioned earlier, the High Court by a sweeping observation proceeded to reverse the finding of fact recorded by the Tribunal. Whereas, the Tribunal had duly considered the evidence of PW-1, PW-2 and the material accompanying the charge-sheet filed in respect of Crime No.12/2001 as also the plea taken by the insurer and the evidence D of RW-1. In our opinion, the conclusion reached by the Tribunal is a possible view, which could not have been disturbed by the High Court in the appeal filed by the insurer, much less in such a casual manner, as has been done by the High Court.

10. Notably, the High Court has not even adverted to the other E findings recorded by the Tribunal as regards the manner in which accident occurred and, in particular, about the rash and negligent act of the driver of the tractor which had caused the accident resulting into the death of Chanabasayya on the spot due to grievous injuries suffered by him. The High Court has also not adverted to the finding recorded by the Tribunal in respect of Issue Nos.2 and No.3 regarding the proof of age, F occupation and income of the deceased and the quantum of just and reasonable compensation. The High Court based its conclusion that the insurer cannot be saddled with the liability to satisfy the award, on the finding that the deceased was not travelling along with his goods at the time of accident. No more and no less. However, as the said finding G recorded by the High Court cannot be sustained, the finding of the Tribunal on the factum that the deceased had travelled along with his goods will have to be affirmed and restored. It would necessarily follow that the insurer was not absolved of its liability to pay the compensation amount awarded to the claimants. We say so because the Tribunal has found, as of fact, that the insurance policy brought on record was a valid policy in

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respect of the offending tractor for the period commencing from 12.02.2000 to 11.02.2001. A

11. Assuming for the sake of argument that the insurance company was not liable to pay compensation amount awarded to the claimants as the offending tractor was duly insured, the insurer would be still liable to pay the compensation amount in the first instance with liberty to recover the same from the owner of the vehicle owner (respondent No.2), in light of the exposition in the case of ***National Insurance Co. Vs. Swarn Singh and Ors.***[1] In paragraph 110 of the said decision, a three-Judge Bench of this Court observed thus: B

> "110. The summary of our findings to the various issues as raised in these petitions are as follows: C
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> (i) Chapter XI of the Motor Vehicles Act, 1988 providing compulsory insurance of vehicles against third party risks is a social welfare legislation to extend relief by compensation to victims of accidents caused by use of motor vehicles. The provisions of compulsory insurance coverage of all vehicles are with this paramount object and the provisions of the Act have to be so interpreted as to effectuate the said object. D
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> (ii) Insurer is entitled to raise a defence in a claim petition filed under Section 163A or Section 166 of the Motor Vehicles Act, 1988 inter alia in terms of Section 149(2)(a)(ii) of the said Act. E
>
> (iii) xxx
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> (iv) The insurance companies are, however, with a view to avoid their liability must not only establish the available defence(s) raised in the said proceedings but must also establish 'breach' on the part of the owner of the vehicle; the burden of proof where for would be on them. F
>
> (v) xxx
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> (vi) xxx G
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> (vii) xxx
>
> (viii) xxx
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> (ix) xxx

[1] (2004) 3 SCC 297 H

A (x) **Where on adjudication of the claim under the Act the tribunal arrives at a conclusion that the insurer has satisfactorily proved its defence in accordance with the provisions of Section 149(2) read with Sub-section (7), as interpreted by this Court above, the Tribunal can direct that the insurer is liable to be reimbursed by the insured for the compensation and other amounts which it has been compelled to pay to the third party under the award of the tribunal Such determination of claim by the Tribunal will be enforceable and the money found due to the insurer from the insured will be recoverable on a certificate issued by the tribunal to the Collector in the same manner under Section 174 of the Act as arrears of land revenue. The certificate will be issued for the recovery as arrears of land revenue only if, as required by Sub-section (3) of Section 168 of the Act the insured fails to deposit the amount awarded in favour of the insurer within thirty days from the date of announcement of the award by the tribunal.**

(xi) **The provisions contained in Sub-section (4) with proviso thereunder and Sub-section (5) which are intended to cover specified contingencies mentioned therein to enable the insurer to recover amount paid under the contract of insurance on behalf of the insured can be taken recourse of by the Tribunal and be extended to claims and defences of insurer against insured by, relegating them to the remedy before, regular court in cases where on given facts and circumstances adjudication of their claims inter se might delay the adjudication of the claims of the victims."**

(emphasis supplied)

12. However, in the facts of the present case, we have no hesitation in taking a view that consequent to affirmation and restoration of the finding of fact recorded by the Tribunal regarding the factum of deceased had travelled along with his goods at the time of accident, the insurer would be obliged to satisfy the compensation amount awarded to the claimants.

13. Reverting to the argument of the appellants that the Tribunal committed manifest error in computing the compensation amount, we

find that the appellants (claimants) did not file an appeal for enhancement of compensation amount against that part of the award passed by the Tribunal nor chose to file any cross-objection in the First Appeal filed by the insurer before the High Court. Moreover, from the judgment of the High Court there is no indication that any attempt was made on behalf of the appellants to ask for enhanced compensation amount on the grounds as would have been available to the appellants in that behalf. Significantly, in the present appeal also, the appellants have not asked for any "relief" against that part of the award passed by the Tribunal, regarding the quantum of compensation. The relief claimed in this appeal is only to set aside the decision of the High Court passed in the First Appeal preferred by the insurer. In this backdrop, it will not be appropriate for this Court to consider the argument regarding the quantum of compensation at the instance of the appellants (claimants).

14. As a result, the appeal would succeed only to the extent of setting aside the impugned judgment of the High Court passed in the First Appeal filed by the insurer (respondent No.1) as prayed and consequently, by restoring the Award dated 21st January, 2008 passed by the Motor Accident Claims Tribunal, Badalkot. We order accordingly.

15. The appeal is allowed in the above terms with costs.

Divya Pandey Appeal allowed.