IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:
MR. JUSTICE SYED MANSOOR ALI SHAH
MR. JUSTICE MUNIB AKHTAR

CIVIL APPEAL NO.1280 OF 2019
(On appeal from the judgment dated 25.03.2019 of the Peshawar High Court, Peshawar passed in Civil Revision No.129-P of 2013.)

Universal Insurance Company and another ... Appellants

vs

Karim Gul & another ... Respondents

For the Appellants : Rana Muhammad Arshad Khan, ASC

For Respondent No.1 : Mr. Abdul Sattar Khan, ASC

Date of Hearing : 25.05.2021

JUDGMENT

Munib Akhtar, J.: This appeal involves an interesting point under the Sale of Goods Act, 1930 ("Act"), which arises on the following facts.

2. The appellant is an insurance company, which had insured a motor vehicle, a Suzuki Baleno (2000 model). The car was involved in an incident which resulted in considerable damage to it, such that it became (to use an insurance term in its technical sense) a "total loss" (according to the appellant). The claim of the insured having been settled what remained, i.e., (to again use a technical term) the "salvage" was sold off by the appellant to the respondent No. 1 ("contesting respondent") for a sum of Rs. 130,000/-. The contract between the parties, dated 11.02.2004, stated in its entirety as follows (typographical errors in original):

> "The salvage of vehicle Bearing Reg. No.ACP-755, Eng. No.p600595, chasis No.502047 Suzuki Baleeno M.2000, disposed off to Mr. Haji Karim S/o Mr. Tilla Gul as total loss. This date 11.02.04 in the sum of Rs.1,30,000/- as per verbal instruction of Mr. Sohail Khan officer incharge M/s Universal Ins. LTD Peshawar. We have to deliver all the relevant documents i.e. Duplicate Copy of Registration, 2, Transfer Letter, 3, NOC. The vehicle is delivered to Mr. Karim

> Gul and the responsibility of Company is no more regarding the vehicle. We have received Rs.1,30,000/-."

3. It appears that the contesting respondent expended a substantial sum (being, as per the claim, Rs. 470,000/-) to repair the car and bring it into usable condition. However, when he went to have its registration with the motor vehicle authority transferred to his name he was rebuffed, the authority stating that there was already another vehicle registered with the same number and that the documents produced by him were not genuine. The contesting respondent was therefore unable to use the repaired vehicle. He filed suit in the civil courts at Peshawar claiming damages in the sum of Rs. 10,00,000/- (of which Rs. 600,000/- was the total of the sums expended by him as noted above and the balance was by way of compensation). The appellant contested the suit. Upon trial, the learned court, by judgment dated 30.04.2011, decreed the suit as prayed.

4. The decree was appealed and the learned appellate court, vide judgment dated 17.11.2012, allowed the same and dismissed the suit. The contesting respondent filed a revision in the learned High Court which, by means of the impugned judgment dated 25.03.2019, allowed the same, setting aside the decision of the learned appellate court and restoring the decree of the learned trial court. Hence, this appeal as of right.

5. Learned counsel for the contesting parties took us through the record including the evidence as led by them at the trial. For the appellant, it was submitted that the vehicle had, as agreed between the parties, been sold off as a total loss and it therefore had no liability to the contesting respondent. It was entirely his own matter as to what he did, or could do, with the wreckage, and if he was unable to achieve his desired objective (which was not known to the appellant and with which it had no concern) the consequences fell entirely on him. It was submitted that the learned appellate court, which had essentially allowed the appeal by applying the principle of caveat emptor, had reached the correct result and its decision ought to be restored. Learned counsel for the contesting respondent supported the decision of the learned trial court and the impugned judgment and submitted that, as held therein, the appellant was fully liable to the former. The suit

merited being decreed, and the present appeal ought to be dismissed.

6. We have heard learned counsel as above and considered the record. In our view, the point that requires determination is as follows: what were the "goods", within the meaning of the Act, that were the subject matter of the contract between the parties? Was it, as claimed by the contesting respondent, a motor vehicle in howsoever badly damaged a condition it may have been? Or was it, as contended by the appellant, nothing but (and only) a wreck which was not a motor vehicle in any meaningful sense, and absolutely no regard had to be given to what the contesting respondent intended to, or could, or actually did, do with it? If the former, then there was a case to answer, and the claim ought to succeed. If the latter, then the appellant was released of liability and the suit was liable to be dismissed. The definition of "goods" in s. 2(7) of the Act is of course very widely stated, meaning "every kind of movable property other than actionable claims and money" (and including also a number of things with which we are not here concerned). A functional (or even non-functional) article or thing is within the definition as is a wreckage of any such article or thing.

7. Consideration of the question before us must begin by an examination of the contract between the parties, which has already been reproduced above. A contract has to be interpreted objectively and not as per the subjective views of the parties. Its terms, to put it shortly, are to bear that meaning as they would have for, or convey to, "a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract" (per *The Interpretation of Contracts* by Kim Lewison (5th ed., 2007, pg. 1). The contract here is of just one paragraph. In our view, the key words to be examined are "total loss". The question is how this term is to be interpreted and applied. Are the words to be understood in the technical sense that they bear in insurance business, or given an ordinary meaning, in the context of that what was being sold? There is nothing to suggest that the contesting respondent was involved in the insurance business or had any familiarity or knowledge of how these words are used there. Learned counsel for the appellant argued that the words were to be understood in an ordinary sense, i.e., that the loss undergone was

total. If applied in this sense it would be plausible to conclude that what was sold was mere wreckage, i.e., something that had ceased to be a car in any meaningful sense. This could be regarded as a non-technical use of the words. However, if the words are to be understood in a technical sense a different conclusion could emerge. The reason is that in the insurance business the thing insured can be declared to be a "total loss" in two different senses. One is of it being an "actual total loss". Here, the sense is that the insured property has been destroyed or damaged to such an extent that it can be neither recovered nor repaired for further use; it has been (to use a somewhat everyday expression) "totaled". In this sense the insured property is reduced to just wreckage and nothing more. The other is "constructive total loss". This is the situation where the repair cost of the damaged insured property exceeds its market value if the repairs were undertaken. In insurance law these terms are primarily used in marine insurance: see the Marine Insurance Act, 2018, ss. 58 and 61 (which correspond closely to ss. 57 and 60 of the (UK) Marine Insurance Act, 1906). However, the concepts have long been used in relation to non-marine policies as well: see *MacGillivray on Insurance Law*, 14th ed. (2018), para 21-024. Therefore, though the 2018 Act postdates the contract with which we are concerned, the terms as defined therein shed valuable light on the issue before us and can be used analogously for present purposes. The relevant sections are as follows (to the extent material; emphasis supplied):

> "**58. Actual total loss**.—(1) Where the subject-matter insured is destroyed or so damaged *as to cease to be a thing of the kind insured* or where the assured is irretrievably deprived thereof, there is an actual total loss."
>
> "**61. Total Constructive total loss defined**.--(1) ... there is a constructive total loss where the subject-matter insured is reasonably abandoned on account of its actual total loss appearing to be unavoidable or because *it could not be preserved from the actual total loss without an expenditure which would exceed its value when the expenditure had been incurred*."

It will be seen that in an "actual total loss" situation, the thing insured (here, the car) is so damaged that it ceases to be a thing of the kind insured. In other words, the car would cease to be as such, and become mere wreckage. However, in "constructive total loss" the insured property does retain its description as such;

it is simply that it is not worthwhile to pay for the repairs or have them undertaken. In this sense, as regards the present appeal, the car would be regarded as continuing to remain as such no matter how much damage it may have suffered. The question to be resolved therefore becomes, in what sense were the words “total loss” used in the contract: as “actual” or “constructive” total loss?

8. It can be safely concluded that the contract (notwithstanding its typographical errors) was the creation of the appellant. It is the entity in the insurance business and can be taken to know the sense in which the term “total loss” is used in the industry. Keeping the relevant background facts in mind (as emerging from the evidence led at the trial) in our view a reasonable person considering the contract objectively would conclude that the term was used in the contract in a technical sense. The appellant’s case is that that sense was of “actual” total loss, i.e., the thing sold was mere wreckage. In our view, there is a certain ambiguity as to in which of the two technical senses the words were used. Now, a well known principle of interpretation of contracts is the *contra proferentem* rule: “when there is a doubt about the meaning of a contract, the words will be construed against the person who put them forward” (Lewison, *op. cit.*, pg. 360). It has been held judicially, in the (UK) Court of Appeal that the rule is “a principle not only of law but of justice” (*Association of British Travel Agents Ltd. v. British Airways Plc* [2000] 2 All ER (Comm) 24, [2000] 2 Lloyd’s LR 209), and in the Supreme Court of Canada that “whoever holds the pen creates the ambiguity and must live with the consequences” (*Co-operators Life Insurance Co v Gibbons* [2009] 3 SCR 605, 2009 SCC 59). This rule applies here, and the ambiguity must be resolved against the appellant. The words “total loss” used in the contract ought not to be construed in the sense of “actual total loss”, which would reduce that what was sold to mere wreckage. They should be taken to have the other technical meaning, i.e., “constructive total loss”. In other words, the car in question retained its character as such, and did not cease to be a thing of the kind that had been insured.

9. It follows that the questions that were posed at the beginning of the judgment and which, in our view, are dispositive of the appeal must be answered against the appellant and in favor of the contesting respondent. What was sold was not mere wreckage,

which was no longer a car in any meaningful sense. Rather, it was a car, howsoever badly damaged it may have been and notwithstanding that the cost of the repairs (which was, on the evidence, many times more than the price) may have exceeded the market value of the vehicle when repaired. If, as we hold, what was sold was a car then the contesting respondent had an enforceable expectation that he would be able to use it as such in a lawful manner, i.e., to have it registered in his own name. He was unable to do so and thus clearly suffered loss. The burden of that loss must fall on the appellant. Accordingly, in our view, though for reasons rather different from those which prevailed with the learned trial court and the learned High Court, those courts rightly concluded that the suit was to be decreed.

10. This appeal fails and is hereby dismissed.

Judge

Judge

Announced in Court on 24.8.2021 at Islamabad

Judge

Approved for reporting