IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

SC/CHC/APPEAL/39/2014

CHC Case No. 420/11/MR

Francis Milton Kevin Noronha,
Joseph's Corner,
188 B Perry Road, Bandra,
Mumbai 4000050,
India.
and also of:
No. 13, Templer's Road,
Mt. Lavinia.

PLAINTIFF

-VS-

Diesel & Motor Engineering Co. Ltd,
No. 65, Jetawana Road,
Colombo 14.

DEFENDANT

AND NOW BETWEEN

Francis Milton Kevin Noronha,
Joseph's Corner,
188 B Perry Road, Bandra,
Mumbai 4000050,
India.

and also of:

No. 13, Templer's Road,

Mt. Lavinia.

PLAINTIFF-APPELLANT

-VS-

Diesel & Motor Engineering Co. Ltd,

No. 65, Jetawana Road,

Colombo 14.

DEFENDANT-RESPONDENT

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PLAINTIFF-RESPONDENT

Before: Hon. E.A.G.R. Amarasekara, J.

Hon. Kumudini Wickremasinghe, J.

Hon. A.L. Shiran Gooneratne, J.

Counsel: Uditha Egalahewa PC with Miyuru Egalahewa for the Plaintiff-Appellant in

SC.CHC. Appeal No. 39/14 and for the Plaintiff-Respondent in SC. CHC. Appeal No. 39A/14.

Chandaka Jayasundera PC with Rehan Almedia, Naduni Madara, Sayuri Liyanasuriya and Mohomed Yusuf Atheeq for the Defendant-Appellant in SC.CHC. No. 39A/14 and Defendant-Respondent in SC.CHC. Appeal No. 39/14.

Argued on: 04.11.2022

Decided on: 23.05.2025

E.A.G.R. Amarasekara, J.

SC. CHC. Appeal No. 39/14 filed by the Plaintiff-Appellant (hereinafter referred to as "Plaintiff") and SC. CHC. Appeal No. 39A/14, filed by the Defendant-Appellant (hereinafter referred to as "Defendant"), are appeals against the Commercial High Court Judgment in CHC Case No. 420/11/MR, dated 20.12.2013. The Plaintiff and Defendant have agreed that Court can deliver one Judgment for both SC. CHC. Appeal No. 39/14 and 39A/14 and both parties further agreed to limit their submissions to the issue of quantum of damages. **(vide Journal Entry dated 04.11.2022)**.

On or around 05.05.2006, the Plaintiff filed his Plaint in the District Court of Colombo in Case No. 52018/MR, and described the cause of action as follows:

- The Defendant is a duly incorporated company with limited liability having its registered office and/or principal place of business at No. 65, Jetawana Road, Colombo 14.
- At all times material, the Plaintiff was the owner of the motor car bearing registration No. WPGN-0007 (Red Mitsubishi Evolution VII) and the same was entrusted to the Defendant for repairs.
- The car was in the possession and/or control of the Defendant, and therefore, the Defendant had a duty of care towards the Plaintiff's said motor car.
- Whilst the car was in the possession and control of the Defendant, it was placed on a hoist in or about 11.03.2005.

- On that date, an employee of the Defendant acting in the course of her employment reversed another car and caused damage to the Plaintiff's vehicle.
- Thus, the Defendant breached the duty of care owed by the Defendant to the Plaintiff and caused the said damage and the said damage was caused due to the negligence of the Defendant.
- Therefore, the Defendant was liable to pay the Plaintiff the loss and damage suffered by the Plaintiff in respect of the said damage to the vehicle.
- The Plaintiff estimated the said damage at Rs. 25,000,000/- and demanded the same from the Defendant. However, the Defendant failed and/or neglected to pay the Plaintiff the said sum or any part thereof.

As a result, the Plaintiff prayed for damages in a sum of Rs. 25,000,000/- with legal interest until the date of the Plaint and legal interest on the aggregate sum until the payment is made in full.

In responding to the above Plaint, the Defendant filed the answer dated 12.12.2006 denying the liability and, among other things, stated as follows:

- There was a collision within the premises of the Defendant, on or around 10.03.2005.
- The alleged damage said to have been suffered by the Plaintiff was not due to any fault or neglect on the part of the Defendant. The said damage was caused due to a collision with another vehicle and the driver of the other vehicle had not been made a party to the action, and therefore, no cause of action had accrued to the Plaintiff to sue the Defendant.
- The Plaintiff had filed this action in an attempt to unjustly enrich himself inasmuch as the present market value of a brand-new car of the same model as the said car is much less than the purported sum claimed in this action.
- The Plaint did not disclose a cause of action against the Defendant inasmuch as the employee in the Plaint was not acting within the scope of her employment and as such there cannot be any liability on the part of Defendant as pleaded in the Plaint.
- The Plaintiff had not set out the details of the alleged damages claimed, and the said damage caused to the vehicle was repairable.

In consequence, the Defendant sought for a judgment to dismiss the action of the Plaintiff.

Thereafter, the case proceeded to trial and the parties recorded their admissions and raised their issues. Four admissions were recorded by the parties. Issues No. 01 to 06 were raised by the Plaintiff and the Defendant raised Issues No. 07 to 13.

During the trial, Francis Milton Kevin Noronha, the Plaintiff gave evidence and closed his case after that day's proceedings on 05.06.2008, but the Counsel for the Defendant reiterated the objections stating that P11, P12, and P12A were marked subject to proof. It appears that on 03.12.2008, the new Counsel for the Plaintiff had moved for permission to call few more witnesses to prove aforesaid documents. Thereafter, the said Counsel has called one Anoma Abewickrama to prove P11, and mark its original as P11A, and another witness named D.B.de Silva was called on 02.03.2009, without any objection, to mark a new document P13 which is a valuation of the vehicle to indicate the market value of the vehicle as if no accident had occurred. After that Plaintiff has been re-called to give evidence and the Plaintiffs case was finally closed on 06.08.2009 and the Counsel for the Defendant had reiterated the objection for P10, P12 and P12A. However, there was no objection to P10 when it was read in evidence at the first occasion the Plaintiff intended to close his case prior to the Counsel for the Plaintiff moved permission to lead further evidence to prove documents. Thus, the P10, even though the learned High Court Judge has disregarded as not proved, need not be considered as not proved as such objection was not reiterated on 05.06.2008 for the Counsel of the Plaintiff to re-consider whether he should call witnesses to prove it. However, even though the Counsel for the Plaintiff moved permission to call a witness to prove P12, no evidence of the authors of that document was led to prove P12. As such P12 is not acceptable evidence. Even though, one Hewaka Sugath Amarasooriya was called to give evidence before the District Court, on behalf of the Defendant, it appears that his evidence was not completed before the District Court, as the learned District Judge decided to transfer the case to Commercial High Court of Colombo. One Jayantha Fernando, the Head of the Service Department in the Defendant company has given evidence before the Commercial High Court Judge on behalf of the Defendant. It appears that no challenge has been made against this order dated 06.11.2011 to transfer the action to the Commercial High Court. The parties had in fact agreed with the said decision- vide proceedings dated 02.09.2011.

Thereafter, the learned Judge of the Commercial High Court delivered the Judgment dated 20.12.2013 in favour of the Plaintiff but limited the quantum of damages awarded to the Plaintiff,

granting only Rs. 6,100,000/-. Having considered the evidence learned High Court Judge came to the following conclusions:

- That the vehicle was handed over to the Defendant to repair mechanical defects and it was admitted by the Defendant that there was no defect in the chassis or body of the vehicle. When the accident occurred, the vehicle was within the control of the Defendant in the Defendant's workshop and the collusion was caused by an employee of the Defendant who drove the other vehicle. Thus, it is clear that the Defendant Company is liable for the collision and it is not relevant whether the other driver was made a party to the action.
- That the main issue in the action was in relation to the quantum of damages.
- That the Plaintiff had bought the vehicle for Rs. 3,750,000/- and with the subsequent expenses, the Defendant had spent Rs. 4,500,000/- which have not been strongly challenged.
- That, even though the document marked P10 was not properly proved, as per the evidence there was no dispute that the Plaintiff spent to provide goods worth Rs.1,000,000/- to the Defendant for the repairs and therefore, the Plaintiff had spent roughly about Rs.5.5 million for the Vehicle.
- That, other than the above, as a consequence of the accident, the Plaintiff had spent Rs. 575,000/- for his transport. Hence, the total damage caused to the Defendant is Rs. 6,100,000/-, even though he has prayed for 25 million. Thus, the Plaintiff is entitled to that Rs.6,100,000/- and for legal interest till the date of decree and for the legal interest for that total amount till the payment is made in full along with the costs of the case.
- That, it appears that the Defendant had the responsibility of providing a bodyshell as the Defendant itself suggested that on the first occasion, and the Plaintiff was not bound to accept a repaired bodyshell as suggested by the Defendant later on. It is not relevant whether the insurer of the Defendant was ready to pay for that or not. It appears that damage caused to the bodyshell cannot be duly repaired. Hence, it appears that the Defendant intentionally failed to do the due repairs by providing a new bodyshell to restore the harm caused by the negligence on the part of the Defendant.

Being aggrieved by the above Commercial High Court Judgment, the Defendant appealed to this Court by his petition of appeal dated 27.01.2014 and prayed to set aside the Commercial High Court Judgment dated 20.12.2013. Subsequently, the Plaintiff also filed another petition of appeal dated 17.02.2014, seeking a revise of the aforementioned Commercial High Court Judgment while praying for the reliefs originally Plaintiff sought for through his Plaint.

As parties agreed to limit their submissions to the quantum of damages, this judgment will consider only whether the damages should be enhanced, reduced or whether the damages should not have been granted.

As per the Judgment of the learned High Court Judge, it appears that the learned High Court Judges calculation of damages is based on two factors, namely;

1. The expenses borne by the Plaintiff on the vehicle (Rs. 5.5 million), which included the money spent for buying (3.75 million), other expenses born after buying which appears to be around Rs. 750,000/- and Rs. 10 million spent for spare parts provided by the Plaintiff to the Defendant to do the repairs.
2. The expenses borne by the Plaintiff for his travelling (Rs. 575,000/-)- vide pages 398 and 399 of the brief.

On that basis the learned Judge had come to the conclusion that the total damage is around Rs. 61 million. It must also be kept in mind that basically the Court has to decide the rights of the parties as at the date of the Plaint. However, in my view, there is an error in calculation of damage to the vehicle in terms of the total expenses borne by the Plaintiff on the vehicle. Calculation of damages in that way may be correct if there is a finding that the vehicle was condemned fully or that it cannot be handed over to the Plaintiff after full restoration due to a fault of the Defendant at the date of the Plaint. As per the evidence at page 139 of the brief, it appears that the damaged vehicle is still at the Defendant's workshop. It must be noted that the damaged vehicle is the property of the Plaintiff, if he left it at the place of the Defendant, owing to the fact there was no settlement after the accident, any deterioration that may occur due to that cannot be accrued to the Defendant, as, subject to claiming damages for any harm caused, it is the responsibility of Plaintiff to take care of his property if it was not going to be repaired by the Defendant according to his terms. The Plaintiff cannot be allowed to take up a position that until the Defendant agrees to his terms, the

damaged vehicle should remain at the workshop of the Defendant and the Defendant should be responsible for any deterioration till the dispute is resolved.

It must be noted that the money spent by the Plaintiff to provide spare parts as per P10 is Rs. 1,146,288/-. Since the learned High Court Judge disregarded P10 as a document that had not been proved, he has considered the amount spent for such spare parts as Rs. 10 million- vide page 398. However, these spare parts, as per the evidence, were either to repair or upgrade the engine. When the accident occurred, the vehicle was on the hoist but without the engine, and it was the day to hand over the vehicle after fixing the repaired engine- vide pages 74 and 117 of the Plaintiff's evidence. Thus, the money spent for spare parts for the repair or upgrade of the engine could not have been affected by the accident unless the court has to consider the vehicle as fully condemned after the accident.

The learned High Court Judge has also considered the Rs.3.7 million spent for buying the car as part of the calculated damages. This was bought in 2004 when the odometer reading was 1100Kms, and when it was handed over to the Defendant for repairs, the odometer reading was 28000 Kms and there was an issue of low oil pressure. These factors indicate that there should have been natural wear and tear after buying the vehicle, which may depreciate the value. It is also revealed in evidence that the tyres were replaced after buying the vehicle, which cost Rs.500,000/-. This is the part of the expenses considered by the learned High Court Judge as expenses after buying the vehicle, but when odometer reads 28000 Kms, the value of these tyres cannot be the same. Thus, in my view, calculating damages as per the expenses made by the Plaintiff cannot be the correct method of calculating the damage caused to the vehicle by the accident. Now I endeavor to see how it could have been calculated by the learned High Court Judge.

Damages are offered to restore the harm caused by the fault of the Defendant. If the vehicle was fully condemned after the accident, naturally, it should be the market value of the vehicle that should have been considered. However, there does not appear to be any evidence that the vehicle was condemned or that its condition became unrepairable for one to use it for safe travel. In fact, both the parties at the beginning agreed to repair it as per the proposal made by the Defendant in accordance with Tax Estimate marked as P1, which included the replacement of the bodyshell with a new bodyshell, indicating both parties agreed that it could be restored. It appears that as the Insurer of the Defendant did not agree to cover the replacement of bodyshell, the Defendant resiled

from going ahead with that proposal. Disagreement of the Insurer is a matter between the Defendant and the Insurer and should not be a matter to be concerned in deciding the obligations between the Defendant and the Plaintiff. By offering to repair in accordance with P1, the Defendant appear to have shown that the replacement of bodyshell was necessary to restore the vehicle to previous position. It is true that the estimate contained in P1 was done by the Defendant, but it has not been challenged properly to show that the total amount mentioned in said P1 is not the value of repairs needed for restoration. No other estimate, taken from any other institution for the cost of restoration, has been tendered in evidence. Of course, a valuation by De Silva Motor Engineers has been marked as P13, but, as per the evidence of the witness who came to testify for that valuation, it shows the value of the vehicle based on the current price prior to the accident, in other words, the market price of the vehicle at the given time. As per the said report, the value is Rs.6,780,000/-. This could have been considered as the damage or compensation for the vehicle if the vehicle was fully condemned as one that cannot be safely used again even after repairs. If the said witness, who came to testify to the correctness of P13, valued the vehicle as it was after the accident, or estimated the value of the repairs needed to restore it, the difference between the market value and the value as it was or the value of the repairs that were needed to restore, could have been considered as the damages to the vehicle. There was no material to say that the vehicle was in such a condition after the accident that made it difficult to restore it to the condition that it had before the accident. It appears that the Defendant attempted to pacify the harm caused by the accident by providing another vehicle in replacement of the vehicle met with the accident. Two vehicles have been offered at different times in that regard; Benz and another Mitsubishi Evolution VIII. If the vehicle was to be replaced, then it had to be similar to the market value of the vehicle that met with the accident. There is no sufficient material to say that these attempts to replace it with another vehicle is reasonable as there is no evidence with regard to their valuation to show their value was similar to the market value of the vehicle of the Plaintiff. In fact, it appears that their values were less than the estimate of De Silva Motor Engineers.

In fact, it must be noted that even in the letter of demand, other than the incidental expenses, the main claim was for a replacement vehicle or Rs.6,780,000/- or necessary repairs to be done with complete replacement of the body shell.

The expenses incurred in India has not been proved by the Plaintiff. On the other hand, they may not be direct damages and depend on many factors such as whether the Plaintiff could be able to get the vehicle exported to India etc. Stress and trauma cannot be valued in monetary terms and not available in an Aquilian action. In relation to the air ticket expenses, no ticket has been marked and no dates have been revealed to consider whether those expenses were before the date of the Plaint or not.

Hence, only evidence acceptable to indicate the cost to restore the vehicle is contained in P1 which gives the total amount as Rs. 4,214,523.52, which has to be considered as the damaged caused to the vehicle. I do not see any error by the learned High Court Judge in adding the Rs.575,000/-, which appears to be consequential expenses for transport as a result of the accident. Thus, the total damage or compensation has to be considered as Rs.4,789,523.52/- as at the date of accident and the Plaintiff is also entitled to legal interest on that till the date of the Plaint. The Plaintiff is entitled to claim legal interest on the aggregate amount from the date of the Plaint till the full amount is recovered. The Plaintiff is the owner of the vehicle which was damaged and thus is entitled to the return of the said damaged vehicle with the repaired engine. If the Defendant is unable to return the damaged vehicle with the repaired engine, the Plaintiff is entitled to the market value of the vehicle as damages, which is Rs.6,780,000/- as per P13 as at the date of accident, and to the legal interest on that till the date of the Plaint and also to legal interest on the aggregate amount from the date of Plaint till the full sum is recovered. However, if the condition of the vehicle has deteriorated due to leaving it with the Defendant owing to the fact there was no settlement to the liking of the Plaintiff, that cannot be a reason to enhance the aforesaid damages. Thus, the claim in the Plaint for a sum of Rs.25,000,000/- is clearly exorbitant and cannot be justified.

The Defendant in his written submissions referring to '**McGregor on Damages'**, **21st Edition**, **Sweet and Maxwell**, has referred to the principles of 'Mitigation of Damages'. However, the calculation of damages by this Court as explained above cannot be avoided by any reasonable action or step that may have taken by the Plaintiff. In the above calculation, I do not see any reasonably avoidable loss. What has been decided as damages is what is necessary for the purpose of making good the loss occurred to the Defendant due to the Defendant's breach of duty. However, as explained above, errors in the calculations of damages by the learned High Court Judge has to

be rectified in accordance with this Judgment. Hence the Judgment of the learned High Court Judge dated 20.12.2013 should stand amended in accordance with this Judgment.

Appeal filed by the Plaintiff to revise the Judgment of the learned High Court Judge and grant the relief prayed in the Plaint, that is to pay Rs.25,000,000/- as damages is partly refused as the claim for Rs.25,000,000/- is refused but the Judgment of the High Court Judge is considered and readjusted as to the compensation or damages to be paid by the Defendant as explained above.

Appeal filed by the Defendant to set aside the Judgment and grant relief as prayed in his answer, that is to dismiss the Plaint is also refused, but the Judgment of the learned High Court Judge as to the payment of damages is amended as aforesaid.

No Costs.

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Judge of the Supreme Court

Hon. Kumudini Wickremasinghe, J.

I agree.

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Judge of the Supreme Court

Hon. A.L. Shiran Gooneratne, J.

I agree.

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Judge of the Supreme Court