

(2011) 05 P&H CK 0058
In the Punjab And Haryana At Chandigarh
Case No : F.A.O. No. 3650 of 2011 (O and M)

Bajaj Allianz General Insurance Company Ltd.	APPELLANT
Vs	
Birmati and Others	RESPONDENT

Date of Decision : 19-05-2011

Acts Referred:

Motor Vehicles Act, 1988 — Section 147, 149(2), 149(4), 149(5)

Citation : (2012) 1 TAC 806

Hon'ble Judges : K. Kannan, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

K. Kannan, J.—The appeal by the Insurance Company is on the ground that the driver did not have a valid driving licence and therefore,

while awarding the compensation, the Tribunal provided for a right of recovery. Learned Counsel is still aggrieved by the decision and cites for

consideration a judgment of the Hon''ble Supreme Court in National Insurance Co. Ltd. Vs. Parvathneni and Another, , where the Hon''ble

Supreme Court had made a reference about the pay and recover principle in a case where the Court found that the Insurance Company was not

liable. In this case, there is hardly a reason to doubt the proposition relating to pay and recover in a situation, which is wholly covered u/s 149(4)

proviso Section 149 (5) of the Motor Vehicles Act. The judgment in Parvathneni''s case (supra) does not doubt the decision of the Hon''ble

Supreme Court in National Insurance Co. Ltd. Vs. Swaran Singh and Others, where the point has been brought out through judgment that

summarises the law in paragraph 110 as follows :

(iii) The breach of policy condition e.g. disqualification of the driver or invalid driving licence of the driver, as contained in sub-section (2)(a)(ii) of

Section 149, has to be proved to have been committed by the insured for avoiding liability by the insurer. Mere absence, fake or invalid driving

licence or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the

insured or the third parties. To avoid its liability towards the insured, the insurer has to prove that the insured was guilty of negligence and failed to

exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by a duly licensed driver or one who was not

disqualified to drive at the relevant time.

(iv) Insurance companies, 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 wherefor would be on them.

(v) The Court cannot lay down any criteria as to how the said burden would be discharged, inasmuch as the same would depend upon the facts

and circumstances of each case;

(vi) Even where the insurer is able to prove breach on the part of the insured concerning the policy condition regarding holding of a valid licence by

the driver or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards the insured unless the

said breach or breaches on the condition of driving licence is/are so fundamental as are found to have contributed to the cause of the accident. The

Tribunals in interpreting the policy conditions would apply "the rule of main purpose" and the concept of "fundamental breach" to allow defences

available to the insurer u/s 149(2) of the Act.

(vii) The question, as to whether the owner has taken reasonable care to find out as to whether the driving licence produced by the driver (a fake

one or otherwise), does not fulfil the requirements of law or not will have to be determined in each case.

(xi) The provisions contained in sub-section (4) with the proviso thereunder and sub-section (5) which are intended to cover specified

contingencies mentioned therein to enable the insurer to recover the amount paid under the contract of insurance on behalf of the insured can be

taken recourse to by the Tribunal and be extended to claims and defences of the insurer against the 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.

2. If there is ever a doubt in the principle, it is only in respect of cases where the Insurance Company was not liable in the first place or there was

no policy of insurance to cover the risk but still the Insurance Company was made liable for satisfying the claim for a third party. In such a situation,

doubting the pay and recover principle will be perfectly justified. However, in such a situation where there was a valid insurance and the person

was making the claim was also entitled to be protected in terms of Section 147 of the Motor Vehicles Act that provides for compulsory insurance

cover, the right of liability of the Insurance Company is statutorily laid down through the provisions in Section 149(4) proviso to Section 149(5)

and this point has also been brought by the judgment of the Hon"ble Supreme Court in New India Assurance Co., Shimla Vs. Kamla and Others

etc. etc., . I have no doubt in my mind about principle which is very well laid down and I will not feel deterred by the doubt which is expressed by

the Hon"ble Supreme Court in Parvathneni"s case (supra). The award passed by the Tribunal is confirmed and the liability cast on the Insurance

Company was perfectly justified. The appeal is dismissed.