
(2019) 08 GAU CK 0095

In the Gauhati High Court

Case No : Motor Accident Appeal No. 34, 84 Of 2018, Interlocutory Application
(Civil) No. 462 Of 2018, 1341 Of 2019

Dhruba Jyoti Choudhury

APPELLANT

Vs

Purabi Talukdar And Ors

RESPONDENT

Date of Decision : 30-08-2019

Acts Referred:

Motor Vehicles Act, 1988 — Section 149(2)(a)(iii)

Citation : (2019) 08 GAU CK 0095

Hon'ble Judges : Nelson Sailo, J

Bench : Single Bench

Advocate : H Buragohain, B K Jain, R D Mozumdar

Final Decision : Disposed Off

Judgement

1. This order will dispose of the two appeals.

2. Heard Mr. S.S. Sharma, the learned senior counsel assisted by Ms. L. Sharma, for the appellant in MAC Appeal No. 34/2018. Also heard Ms. R.D. Mozumdar, the learned counsel for the appellant in MAC Appeal No. 84/2018. Mr. B.K. Jain, the learned counsel appears for the respondent/ claimant in both the appeals and I have also heard him.

3. Both the appeals are against the Judgment dated 22.08.2017 passed by the learned Member, Motor Accident Claims Tribunal-1, Kamrup, Guwahati in MAC Case No. 2021/2015. Facts of the case in brief is that on 18.05.2015 at about 9.45 pm, Sri Kantakarmakar alongwith his friends Sanjay Basak, Sunil Saha, Prabir Saha and Sanjib Saha were coming from Amtola, Howly to their residents by walking on the extreme left side of Howly in Barpeta PWD Road, near the High School field. Suddenly, a vehicle bearing Registration No. AS-01/MB-4401 (EON Car) being driven in a rash and negligent manner, dashed Sh. Kantakarmakar and Sanjay Basak from the back side. As a result, both of them died on a spot. Sh. Kantakarmakar, the deceased was aged about 38 years at the relevant time

and was working in Barnagar College Sorbhog. As a result, the wife of the deceased Smt. Purabi Talukdar, Smt. Anima Karmakar, mother of the deceased and Ms. Krishna Karmakar, daughter of the deceased filed the claim application before the Tribunal. By arraying the owner and driver of the offending vehicle as opposite party Nos. 1 and 2 respectively while arraying the Oriental Insurance Company Limited, the insurer of the offending vehicle as opposite party No. 3. The claimant claimed a sum of Rs. 1.5 crores for the death of Sh. Kantakarmakar in the incident from the opposite party.

4. The opposite party contested the case by filing their written statement. The owner and driver of the offending vehicle in their written statement denied all the averments made by the claimant that the driver of the vehicle drove the vehicle in a rash and negligent manner. They also contended that the vehicle was duly insured with the Oriental Insurance Company Limited and the driver had a valid driving license and therefore, the insurer was liable to indemnify them in the event of any award being passed against them.

5. The Oriental Insurance Company Limited in its written statement denied the factual aspects of the case as narrated by the claimants and insisted some proof of the same. The insurer declined to accept the liability if there was any violation of the terms and conditions of the policy or if the driver did not have effective driving license.

It was also contended that the amount claim was excessive and exaggerated.

6. Claimant Nos. 1 and 2 examined themselves as claimant witness Nos. 1 and 2. They also examined the Principal of Barnagar College Sorbhog as claimant witness No. 3. The Oriental Insurance Company Limited examined Sh. Arup Kumar Bhattacharjee, Insurance investigator as defence witness No. 1. The Tribunal framed four issues and by taking them up all together, decided the claim in favour of the claimants and award them a sum of Rs. 94,28,360/- as compensation alongwith interest @ 7% per annum from the date of filing of the evidence on affidavit i.e. 14.07.2016 till payment. Being aggrieved thus, the appellants are before this Court.

7. Mr. S.S. Sharma, the learned senior counsel by referring to the grounds taken in the memo of appeal submits that the impugned award is unjust, disproportionate and high and therefore, the same is required to be reduced. He submits that the insurer did not bring on record any material or evidence that the insured appellant gave employment to the driver despite knowing that his driving License No. 2182/MKG/PROF/11 was fake and that the appellant violated the condition of the policy. The learned senior counsel submits that the Tribunal overlooked the stand of the appellant in the written statement that he had in fact employed an experienced driver having valid and subsisting driving license, which was kept in the box of the car alongwith one expired driving license. Despite the protest of the driver, the police seized the expired license instead of the other license which was valid at the time of the accident. This aspect of the

matter having been ignored by the Tribunal, the learned senior counsel submits that the Tribunal is not justified in passing the impugned award directing the insurer to pay first and then to recover the same from the owner of the vehicle i.e. the appellant.

8. Mr. S.S. Sharma, the learned senior counsel by referring to the case of National Insurance Company Limited Vs. Suaren Singh and Others reported in 2004 3 SCC 297 submits that the insurer has to prove that the owner of the vehicle was guilty of willful breach of condition of the insurance policy or the contract of the insurance. It is for the insurer to prove that the insured did not take adequate care and caution to verify the genuineness or otherwise of the license held by the driver. In the present case, the insured appellant appointed his driver after seeing the driving license produced by him which appeared to be genuine and therefore, he did not commit any breach of the policy condition or was he negligent in any manner in knowingly appointing a driver with a fake license. He submits that the insured appellant is not required to personally visit the office of the District Transport Officer or Regional Transport Officer to enquire about the genuineness of the driving license of his driver.

9. Mr. S.S. Sharma, the learned senior counsel has further placed reliance on the Apex Court decision in United India Insurance Company Limited Vs. Lehu and Others reported in 2003 (3) SCC 338. Referring to the decision, the learned senior counsel submits that where prior to hiring the driver, the owner satisfies himself that the driver has a driving license and can drive the vehicle competently, there will be no breach of Section 149 (2) (a) (iii) of the Motor Vehicle Act. He submits that in order to avoid liability under the said Section, the insurer must show that there was a breach of the policy condition on the part of the insured and it is not just sufficient to show that the person driving at the time of the accident was without any license. In the present case, the learned senior counsel submits that there is no proof or even any iota of evidence that the appellant knew that the driving license of his driver which was valid up to 18.10.2017 was a fake driving license and that he hired the driver even after knowing that his driving license was a fake one. He therefore submits that the doctrine of pay and recovery invoked by the Tribunal being misconceived and perverted, the impugned Judgment and Award may be interfered with by this Court in so far as recovery has been directed from the owner of the vehicle i.e. the appellant. The learned senior counsel in support of his submission has also relied upon the following decisions:-

(i) Ram Chandra Singh Vs. Rajaram & Ors., reported in (2018) 8 SCC 799.

(ii) Pepsu Road Transport Corporation Vs. National Insurance Company, reported in (2013) 10 SCC 217.

(iii) Narchinva V. Kamat & Ors. Vs. Alfredo Antonio Doe Martins & Ors., reported in 1985 (2) TAC 396.

10. Mr. S.S. Sarma, the learned senior counsel further submits that in the

accident that happened on 18.05.2015, one Shri. Sanjay Basak also succumbed to his injuries and his legal heirs filed a claim application before the Motor Accident Claims Tribunal, Barpeta against the appellant Insurance Company in MAC App. No. 84/2018 and the claim was decided in favour of the claimants. The amount awarded as compensation by the Tribunal has been paid by the Insurance Company. Therefore, there is no reason as to why the Insurance Company should not pay the awarded compensation to the claimants in the present case as well.

11. Ms. R.D. Mozumdar, learned counsel for the appellant Insurance Company by referring to the grounds taken in the memo of appeal submits that the Tribunal committed error in law as well as on facts in not considering the fact that the appellant Insurance Company proved that the driving license No. 1406/NB/2007 of the driver who drove the offending vehicle expired on 20.04.2014 and that the other driving license i.e., No. 2182/MKG/Prof/11 was also a non-existent one. She submits that the accident took place on 18.05.2015 and on that day the driver did not have any license. Therefore, the owner of the offending vehicle knowingly allowed the vehicle to be driven by a person whose driving license had expired. She therefore submits that there is no question for the appellant insurance company to pay the compensation and then recover it from the owner of the vehicle as directed by the Tribunal in the impugned Judgment and Award.

12. Ms. R.D. Mozumdar, the learned counsel further submits that besides the above ground, the Tribunal calculated the actual income of the deceased to be Rs. 9,30,336/- and therefore, deduction towards income tax should have been Rs. 25,000/- plus 20% of the total income exceeding Rs. 5 lakhs. Calculated as such, the tax will be more than Rs. 1,12,000/- per year. However, the Tribunal deducted only a sum of Rs. 17,771/- towards tax per year. She therefore submits that even on this count, the impugned judgment and award is liable to be interfered with.

13. Ms. R.D. Mozumdar, learned counsel further submits that the amount of compensation given under the two conventional heads i.e., funeral expenses and loss of consortium are on the higher side considering the law laid down by the Apex Court in National Insurance Co. Ltd. Vs. Pranay Sethi & Ors., reported in (2017) 16 SCC 680. The learned counsel further submits that even if the appellant insurance company is to pay first and recover it from the owner, the owner of the vehicle after being given notice, should be asked to furnish security for the entire amount which the insurer will pay to the claimants. In support of her submission, Ms. R.D. Mozumdar relies upon the following decisions:-

(i) Oriental Insurance Co. Ltd. Vs. Shri. Nanjappan & Ors., reported in (2004) 13SCC 224.

(ii) Kala Devi & Ors. Vs. Bhagwan Das Chauhan & Ors., reported in (2015) 2SCC 771.

(iii) Judgment & Order dated 08.08.2018 of the Apex Court in Civil Appeal No.

8144/2018 (Shamana & Anr. Vs. the Divisional Manager, Oriental Insurance Co. Ltd. & Ors.).

(iv) Judgment & Order dated 20.05.2019 of this Court in MAC Appeal No. 66/2014 (National Insurance Co. Ltd. Vs. Sikandar Ali & 2 Ors.).

14. Mr. B.K. Jain, the learned counsel for the respondent claimant submits that the Insurance Company examined Sh. Arup Kumar Bhattacharjee their investigator as defence witness No. 1. In his examination-in-chief, the said witness deposed that he was authorized by the Insurance Company to make the investigation and on making his investigation, he found the driving license No. 1406/NB/2007 to have expired on 20.04.2014. Further, the driving license No. 2182/MKG/Prof/11 was a fake license. However, the said witness in his evidence has nowhere disclosed the source of his information and therefore, the deposition of the said witness has no evidentiary value. He submits that the burden is upon the insurer to prove that the driving license of the offending vehicle either is a fake driving license or an expired license by examining the authority who had issued the license on oath. In the instant case, the insurer neither produced the District Transport Officer nor any authorized Officer of the Transport Department to prove that the driving license held by the driver concerned had expired and that one of them was a fake driving license. Such burden having not been discharged, the Insurance Company is only liable to indemnify the insured.

15. Mr. B.K. Jain further submits that it is also not sufficient on the part of the insurer to prove that the driving license held by the driver concerned was an expired license or a fake license or for that matter, there was no license held by the driver at the time of the accident. He submits that the insurer must establish the fact that despite the owner of the vehicle knowing fully well that the driver did not have a valid driving license or did not have any license, hired him as his driver. The insurer having failed to establish the same, it will be only liable to indemnify the insured. Therefore, the impugned judgment and award requires no interference. Mr. B.K. Jain in support of his submission relies upon the following decisions:-

(i) Rani & Ors. Vs. National Insurance Co. Ltd. & Ors., reported in (2018) 8 SCC 492.

(ii) Shamana & Anr. Vs. Divisional Manager, Oriental Insurance Co. Ltd. & Ors. (Supra).

16. I have heard the submissions made by the learned counsels for the rival parties and I have perused the materials available on record including the records requisitioned from the Tribunal.

17. It is the case of the appellant owner of the vehicle involved in the accident that the insurer failed to prove that the insured did not take adequate care to verify the license held by the driver concerned. Further, the insurer has not been able to establish that despite due knowledge that the driving license of the driver

had expired or was a fake one, the owner of the vehicle still hired him to drive the vehicle. On the other hand, it is the case of the appellant insurer that on the date of the accident i.e., 18.05.2015, the driver of the offending vehicle did not have a valid driving license and the other driving license claimed to be valid up to 18.10.2017 was a fake driving license. The owner of the vehicle having violated the terms and conditions of the insurance policy, the insurer is not liable to indemnify the insured. Besides this, the amount deducted by the Tribunal towards the income tax of the deceased is on the lower side and that the conventional amount awarded by the Tribunal is contrary to the law laid down by the Apex Court.

18. From the materials available on record, there is no dispute that an accident took place on 18.05.2015, involving a vehicle under Registration No. AS-01/MB-4401 belonging to the appellant, owner. The vehicle was insured with the appellant insurer and was valid w.e.f., 03.07.2014 to 02.07.2015. As per the police report under From 54, the vehicle was driven by Shri. Asan Ali (respondent No. 5), who was having a driving license bearing No. 1406/NB/2007 issued by the District Transport Officer, Nalbari and the date of expiry is 20.04.2014. However, it is the contention of the claimants is that the appellant owner after 3 or 4 days of the accident visited them and handed over the relevant papers of the accident vehicle including the driving license of the driver to them. The driving license given to them was under Registration No. 2182/MKG/PROF/11, valid up to 18.10.2017. With the said documents, they approach the Tribunal claiming compensation for the death of the deceased. The appellant owner and the respondent No. 5 jointly filed their written statement before the Tribunal contending inter-alia that the respondent No. 5 at the time of the accident was having a subsisting driving license and which was valid up to 18.10.2017. Further, the accident vehicle being validly insured with the Insurance Company, the insurer was liable to pay compensation to the claimants and even if the owner was found to be liable, the insurer would be liable to indemnify the insured in view of the subsisting insurance policy.

19. The appellant Insurance Company as already mentioned hereinabove examined Sh. Arup Kumar Bhattacharjee, their appointed investigator. In his examination-in-chief, he deposed that he verified the driving license seized by the police after the accident and found the same to have expired on 20.04.2014. Insofar as the other driving license said to be valid up to 18.10.2017, the same was a fake driving license. This was stated by him in his cross examination. However, the fact remains that this witness nowhere has disclosed the source of his finding that the driving license that was seized by the police expired on 20.04.2014 and that the other driving license was a fake one. The Apex Court in Swaran Singh (Supra) held that the breach of policy condition has to be proved to have been committed by the insured for avoiding liability by the insurer. Mere absence, fake or invalid driving license 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. Further, even where the insurer is able to prove breach on the part of the insured concerning the policy condition regarding holding of a valid license by the driver during the relevant period, the insurer could not be allowed to avoid its liability towards the insured unless the said breach or breaches on the condition of driving license is/are so fundamental as are found to have contributed to the cause of the accident. The decision of the Apex Court in Swaran Singh (Supra) was also referred to by the same Court in Shamana (Supra) where it was reiterated that the onus is always upon the Insurance Company to prove that the driver had no valid driving license and that there was breach of policy conditions.

20. The Apex Court in Pepsu Road Transport Corporation (Supra) held that the insurer's defence that the driver had a fake driving license at the time of the accident in breach of conditions of policy was by itself not sufficient to avoid its liability. The onus is still on the insurer to prove that the owner of the vehicle driven by the driver failed to take reasonable care in employing a qualified and competent driver having valid driving license.

21. From the above decisions of the Apex Court, it may be seen that the Insurance Company in order to avoid its liability has to prove that the driver of the vehicle involved in the accident did not have a valid driving license and that the owner of the vehicle despite knowing the fact that the driver did not possess a valid driving license still chose to have him as his driver. Only then will the insurer be able to avoid its liability. Further, even in such case, the doctrine of pay and recovery will still be applicable.

22. The Apex Court in the case of Pappu & Ors. Vs. Vinod Kumar Lamba & Anr., reported in (2018) 3 SCC 208 held that the Insurance Company is entitled to take a defence that the offending vehicle was driven by an unauthorized person or that the person driving the vehicle did not have a valid driving license. The onus would shift on the Insurance Company only after the owner of the offending vehicle pleads and proves the basic facts within his knowledge that the driver of the offending vehicle was authorized by him to drive the vehicle and was having a valid driving license at the relevant time. Further, from the facts involved in that case, it can be seen that the owner of the vehicle did not disclose the name of the driver and his other details unlike the facts involved in the present case. In the present case, both the owner and the driver of the offending vehicle were made parties to the claim application and they jointly filed their written statement denying fault on their part while stating that the vehicle was duly insured with the insurer and the driver have a valid driving license at the time of the accident. Therefore, in my considered view the said decision cannot be applied to the present case and the insurer will have to indemnify the insured.

23. With regard to the loss of dependency calculated by the Tribunal, it may be

seen that the deceased being a Government employee, the income tax to be paid by him was deducted at source and the last pay of the deceased for the month of April 2015 was Rs. 53,374/-. Out of the said amount, an amount of Rs. 208/- was deducted towards professional tax and as per Form 16, an amount of Rs. 17,711/- was deducted towards his income tax. It may be noticed that the Tribunal however erroneously accepted Rs. 17,771/- instead of Rs. 17,711/- as the income tax paid by the deceased. The amount as accounted by the Tribunal shall however be retained as it will hardly make any material difference. Consequently, after deducting the income tax as well as the professional tax paid by the deceased, the Tribunal by adding 50% towards future prospect to his income calculated the loss of dependency to be Rs. 93,03,360/-. To this amount a sum of Rs. 25,000/-, Rs. 50,000/- and Rs. 50,000/- was added towards the conventional heads, funeral expenses, loss of care and guidance for minor children and loss of consortium respectively. Consequently, the total amount of compensation was arrived at Rs. 94,28,360/-. With respect to the amount of compensation payable under the conventional head, a Constitution Bench of the Apex Court in National Insurance Co. Ltd. Vs. Pranay Sethi & Ors., reported in (2017) 16 SCC 680 fixed a sum of Rs. 15,000/- each towards loss of estate and funeral expenses and a sum of Rs. 40,000/- towards loss of consortium. The same will have to be followed in the present case as well.

24. Accordingly, upon considering the case in its entirety the amount of compensation towards loss of dependency as quantified by the Tribunal at Rs. 93,03,360/- shall be maintained. In addition to this, an amount of Rs. 70,000/- shall be added towards the conventional heads as stipulated by the Apex Court in Pranay Sethi & Ors. (Supra). Thus, the total amount of compensation that would be entitled to the respondent claimants will be Rs. 93,73,360/-. The awarded amount shall carry interest @ 7% per annum from the date of filing of the evidence on affidavit i.e., 14.07.2016 till payment. The appellant Insurance Company shall deposit the entire amount before the Tribunal, within a period of 2 (two) months from the date of receipt of a certified copy of this order. Out of the deposited amount, a sum of Rs. 20 lakhs shall be kept in a fixed deposit in the name of the wife of the deceased for 3 years and a sum of Rs. 20 lakhs shall be kept in a fixed deposit in a Nationalized Bank in the name of the daughter of the deceased till she attain majority and a sum of Rs. 20 lakhs shall be paid to the mother of the deceased. The remaining balance shall be disbursed to the wife of the deceased.

25. With the above observations and directions, the appeals stand disposed of. Send back the lower records.

26. The insurance company may withdraw the statutory deposit.