
(2013) 07 DEL CK 0506
In the Delhi High Court
Case No : Mac. APP. 511 of 2012

Dushad Earth Mover

APPELLANT

Vs

National Insurance Company Ltd. and Others

RESPONDENT

Date of Decision : 31-07-2013

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 12 Rule 8, 151
Motor Vehicles Act, 1988 — Section 14, 149

Citation : (2013) 07 DEL CK 0506

Hon'ble Judges : Suresh Kait, J

Bench : Single Bench

Advocate : Subhash Chandra, for the Appellant; Amit Gaur, Advocate, for the Respondent

Final Decision : Disposed Off

Judgement

Suresh Kait, J.

MAC. APP. 511/2012

1. Vide the present appeal, order dated 18.02.2012 passed by the learned Tribunal is under challenge, whereby while rejecting the plea of the appellant/ owner of the offending vehicle, the learned Tribunal has confirmed the recovery rights in favour of the respondent No. 1/Insurance Company. Briefly stated, initially, the appellant was proceeded ex parte before the learned MACT in claim petition No. 118/06 and by virtue of final award dated 01.11.2006, the learned Tribunal directed the respondent No. 1/Insurance Company to pay the awarded amount to the injured, however, granted recovery rights in favour of the Insurance Company and against the appellant.

2. Being aggrieved, the appellant filed FAO No. 77/2008 against the ex parte award dated 01.11.2006 before this Court.

3. Vide order dated 15.04.2009, while disposing of the FAO noted above, this Court set aside the aforesaid ex parte award dated 01.11.2006 to the extent of

recovery rights given to the respondent No. 1/Insurance Company against the appellant. Accordingly, the appellant was permitted to contest the Claim petition and led evidence afresh, subject to the deposit of 50% of the awarded amount along with interest with the learned Tribunal; and also directed to pay cost of Rs. 20,000/- to the learned counsel for respondent No. 1.

4. Accordingly, the appellant deposited a sum of Rs. 1,90,500/-, i.e., the 50% of the awarded amount with interest on 12.05.2009 before the Tribunal.

5. Thereafter, appellant filed the written statement in MACT Case No. 674/9 (Original No. 118/06) and also led evidence by appearing himself as witness. After completion of evidence and hearing arguments of both the parties, the learned Tribunal vide impugned order dated 18.02.2012 rejected the plea of the appellant but uphold the ex parte order dated 01.11.2006, thus, confirmed the recovery rights against him.

6. In his written statement filed before the learned Tribunal, the appellant has stated that at the time of appointing driver of the offending vehicle, he had taken all due care and precaution and also seen his original driving licence. Thereafter, appellant appointed respondent No. 3/Mr. Sanjeet Saxena, as a driver. (It is noted that the name of the respondent No. 3 has been wrongly mentioned in the memo of parties as "Sanjeev Saxena" instead of "Sanjeet Saxena" as has been mentioned in Ex. R1W1/5a, i.e., his driving license and in the claim petition No. 118/06. Hence, the same is corrected).

7. Moreover, the said driver was earlier working with his own brother, namely, Mr. Mohan Khandelwal and thereafter he was appointed by the appellant. As stated above, the driver of the offending vehicle was having a long experience in driving, as he was working with his own brother.

8. Learned counsel appearing on behalf of the appellant submits that the original driving licence is Ex. R1W1/5a, which was valid from 17.04.1994 to 16.04.2003 and issued in the name of Sanjeet Saxena, the driver of the offending vehicle. The appellant checked the same and thereafter appointed him as driver. On 22.12.2002, i.e., the date of the accident, the said driving licence was valid. He further submits that he is not disputing the fact that the said driving licence has been proved fake, however, he submits that the appellant had taken all due care and precaution while appointing the respondent No. 3 as driver and also tested his skill which is required for a driver.

9. Learned counsel submits that the police had also seized the same driving licence in a criminal case, therefore, the appellant did nothing intentionally or knowingly that the driver was having a fake driving licence.

10. To support his arguments, learned counsel has relied upon a case decided by this Court, titled as New India Assurance Co. Ltd. Vs. Ranbir Singh Shastri and Others, wherein the Coordinate Bench of this Court has observed as under:-

4. The learned Counsel further pointed out that in order to prove the fact that

the Respondent No. 9 (the Respondent No. 5 in the Claim Petition) was not holding a valid driving licence at the time of the accident, the Appellant Company had examined RW1 Jeevan Kumar, a Licencing Clerk from the Office of the Registering and Licencing Authority (Motor Vehicles), Una, H.P., who testified that driving licence (Ex. PB) belonging to Shri Amrik Singh, the driver of the offending vehicle, had not been issued by their Authority. He further testified that as per the record, for the period 01.04.1984 to 31.03.1985, only 292 driving licences had been issued by their Authority, as per the report prepared by Shri S.S. Chaniel (Ex. PW1/A), who was the Registering and Licencing Authority at the relevant time. In cross-examination, the witness admitted that the driving licence had been renewed twice, once in the year 1987 from Una and then in the year 1993 from Abohar, Punjab.

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6. While this Court is conscious of the fact that renewal of a fake licence does not make a licence valid and it has been so held in a number of decisions of the Supreme Court, including the following:

(i) New India Assurance Co., Shimla Vs. Kamla and Others etc. etc.,

(ii) National Insurance Co. Ltd. Vs. Laxmi Narain Dhut,

(iii) National Insurance Co. Vs. Sajjan Kumar Aggarwalla,

(iv) The Oriental Insurance Company Limited Vs. Meena Variyal and Others, the fact that the licence of the driver of the offending vehicle was a fake one is of no avail to the Insurance Company in the instant case, for the reason that it is an equally well settled position of law that the Insurance Company in order to succeed in its defence must conclusively establish on record that the insured had "wilfully" committed breach of the conditions of the insurance policy by permitting his vehicle to be driven by a person not holding a valid and effective driving licence. This is the law laid down by a three-Judge Bench decision of the Supreme Court in the case of National Insurance Co. Ltd. Vs. Swaran Singh and Others, wherein it is observed as under:

(102). The summary of our findings to the various issues as raised in these petitions are as follows:

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(iii) The breach of policy condition, e.g. disqualification of driver or invalid driving licence of the driver, as contained in Sub-section (2)(a)(ii) of Section 149, have 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 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 duly licensed driver or one who was not disqualified to drive at the relevant time.

(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.

6. In *Narcinva V. Kamat and Another Vs. Alfredo Antonio Doe Martins and Others*, the Supreme Court had also pointedly observed:

...The insurance company complains of breach of a term of contract which would permit it to disown its liability under the contract of insurance. If a breach of term of contract permits a party to the contract to not to perform the contract, the burden is squarely on that party which complains of breach to prove that the breach has been committed by the other party to the contract. The test in such a situation would be who would fail if no evidence is led...

11. On the other hand, learned counsel appearing on behalf of the respondent No. 1/Insurance Company submits that the Insurance Company has examined witness Sh. Dinesh Kumar, Senior Assistant of the Company as R1W1, who has proved the insurance policy as Ex. R1W1/1, copy of the notice under Order XII Rule 8 CPC as Ex. R1W1/2, postal receipts as Ex. R1W1/3a, A.D. card as Ex. R1W1/3b, the carbon copy of charge sheet filed by the police against the respondent No. 3 regarding the accident in question as Ex. R1W1/4 and the verification report of the driving licence issued by Licensing Authority, Calcutta was also proved as Ex. R1W1/6.

12. Thus, it is clear from the above noted facts that the driving licence was issued in the name of some other person, namely; Shri Prakash Gupta s/o. of Late Shri Ram Avtar Gupta, and the same was not issued in the name of respondent No. 3/Mr. Sanjeev Saksena, the driver of the offending vehicle.

13. Learned counsel also submits that the driving licence in question was issued for nine years, i.e., valid from 17.04.1994 to 16.04.2003, which itself proves, prima facie, the licence is fake. Whereas as per Section 14 of the Motor Vehicles Act, 1988, in the case of a licence to drive a transport vehicle, the same shall be valid for a period of three years.

14. Upon hearing the learned counsel for the parties and keeping in mind the settled law that the owner of the vehicle has to take all due care at the time of appointing the driver; firstly, he has to see the driving licence and secondly, to test the skill of the driver. If both tests are qualified then it cannot be said that there was any intentional or wilful violation of the terms and conditions of the Insurance policy. Hence, it is obvious that if the owner of the offending vehicle has taken all due care while appointing the driver, then the recovery rights should not be given against the owner of the vehicle.

15. In the present case, respondent No. 3, i.e., the driver of the offending vehicle

was working with Sh. Mohan Khandelwal, brother of the appellant. In the claim petition itself, the second address of the said driver has been mentioned as "c/o Mohan Khandelwal, Hans Construction Company". Moreover, the respondent No. 3/driver had worked for substantial time with Hans Construction Company, wherein his own brother was the sole proprietor. Therefore, the appellant has taken all due care required while appointing a driver.

16. Hence, in view of the above discussion and settled law, I am of the considered opinion that the recovery rights granted by the learned Tribunal in favour of the respondent No. 1/Insurance Company and against the appellant are not proper.

17. Accordingly, I set aside the impugned order dated 18.02.2012 to the extent of recovery rights given against the appellant.

18. Vide order dated 11.05.2012, this court directed that the 50% of the award amount deposited in FAO. No. 77/2009 shall not be released to the appellant. Since the present appeal has been decided in favour of the appellant, therefore, the Id. Tribunal is directed to release the deposited amount with up-to-date interest in favour of the appellant on taking necessary steps.

In view of the above, the instant appeal is disposed of.

CM Nos. 8600/2012 (for stay) & 8602/2012 (U/s. 151 CPC)

With the disposal of the appeal itself, both these applications have become infructuous. The same are disposed of accordingly.