
(2014) 05 SHI CK 0112
In the High Court Of Himachal Pradesh
Case No : FAO No. 270 of 2012

Geeta Nand and Others

APPELLANT

Vs

Tulsi Ram and Branch Manager

RESPONDENT

Date of Decision : 08-05-2014

Acts Referred:

Motor Vehicles Act, 1988 — Section 140, 149, 149(2), 149(2)(a)(ii), 163A

Citation : (2014) 05 SHI CK 0112

Hon'ble Judges : Sanjay Karol, J

Bench : Single Bench

Advocate : Vikrant Chandel, Advocate for the Appellant; Leena Guleria, Advocate vice Mr. G.R. Palsara, Advocate for Respondent No. 1 and Mr. Jagdish Thakur, Advocate for Respondent No. 2, Advocate for the Respondent

Final Decision : Allowed

Judgement

Sanjay Karol, J.—In this appeal, filed under the provisions of Section 173 of the Motor Vehicles Act, 1988 (hereinafter referred to as the Act), petitioners, who are the owner and driver of the vehicle, have assailed the award dated 28.2.2012, passed by Motor Accident Claims Tribunal (1), Mandi, Himachal Pradesh, in Claim Petition No. 55 of 2009, titled as Tulsi Ram v. Geeta Nand & others.

2. Operative portion of the impugned award reads as under:

In view of the discussion made above, the claim petition is allowed and the claimant is held entitled for a sum of Rs. 1,73,714/- as compensation alongwith interest at the rate of 7.5% per annum from the date of filing of the petition i.e. on 18-6-2009 the (sic: till) the realization of the whole amount with interest from the respondent Nos. 1 & 2. The respondent Nos. 1 & 2 are liable to pay the amount of compensation alongwith interest jointly and severally. 50% of the amount of compensation, on its deposit, is ordered to be released to the claimant and the remaining 50% amount of compensation is ordered to be invested in

some Nationalized bank at Mandi in the shape of FDR for a period of three years. Any amount, if paid as interim compensation u/s 140 of Motor Vehicles Act shall be adjusted against the amount of compensation awarded today. Memo of costs be prepared accordingly and the file.

3. On the basis of respective pleadings of the parties, Tribunal framed the following issues:

1. Whether on 16-3-2009 at about 5.30 P.M. at Rewalsar the respondent No. 2 was driving Max Pick up No. HP-65-0995 rashly and negligently and caused injuries to the petitioner? OPP

2. If issue No. 1 is proved, to what amount of compensation, the petitioner is entitled to and from whom? OPP

3. Whether the driving of Max Pick up No. HP-65-0995 was not holding a valid and effective driving licence to drive the Max Pick up at the time of accident? OPR

4. Whether the accident had taken place due to rash & negligent driving of Motor Cycle No. HP-24-A-5832 by the petitioner? OPR

5. Relief.

4. After appreciating the evidence so led by the parties, Tribunal held that fault was that of the driver of vehicle bearing registration No. HP-65-0995 and not that of the claimant, who was driving Motorcycle No. HP-24A-5832.

5. Findings returned qua Issues No. 1 and 2, in my considered view, cannot be faulted.

6. No doubt, it is true that in relation to the very same incident, FIR was also registered against the claimant (respondent No. 1 herein), but however in Court, claimant's witnesses have clearly established negligence of driver Kundan Lal (appellant No. 2 herein), who was driving vehicle No. HP-65-0995. The place and the manner, in which accident took place, leads to the only irresistible conclusion that fault/negligence was that of driver Kundan Lal. Testimony of Shri Bhupinder Pal (PW-3) and Shri Devu (PW-4), witnesses to the occurrence of the accident, fully establishes such fact.

7. On the question of compensation, there cannot be any dispute with regard to its justification and rationality. Compensation stands awarded towards expenses incurred and on account of pain and suffering undergone by the claimant on account of injuries sustained by him in the accident.

8. On Issue No. 3, one finds that Tribunal erred in returning findings, holding the Insurer to have successfully proved and established that at the time of occurrence of accident, accused was not holding a valid and effective driving licence.

9. That the vehicle was insured is not in dispute. Insurer took a specific defence that the vehicle was being driven contrary to the provisions of the Act. Now

significantly, neither the owner nor the insurer has stepped into the witness box.

10. Apex Court in National Insurance Co. Ltd. Vs. Swaran Singh and Others, , has laid down the following principles:

(i) Chapter XI of the Motor Vehicles Act, 1988 providing compulsory insurance of vehicles against third party risks is a social welfare legislation to extend relief by compensation to victims of accidents caused by use of motor vehicles. The provisions of compulsory insurance coverage of all vehicles are with this paramount object and the provisions of the Act have to be so interpreted as to effectuate the said object.

(ii) Insurer is entitled to raise a defence in a claim petition filed u/s 163A or Section 166 of the Motor Vehicles Act, 1988 inter alia in terms of Section 149(2) (a)(ii) of the said Act.

(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.

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

(viii) If a vehicle at the time of accident was driven by a person having a learner's licence, the insurance companies would be liable to satisfy the decree.

(ix) The claims tribunal constituted u/s 165 read with Section 168 is empowered to adjudicate all claims in respect of the accidents involving death or of bodily injury or damage to property of third party arising in use of motor vehicle. The said power of the tribunal is not restricted to decide the claims inter se between claimant or claimants on one side and insured, insurer and driver on the other. In the course of adjudicating the claim for compensation and to decide the availability of defence or defences to the insurer, the Tribunal has necessarily the power and jurisdiction to decide disputes inter se between insurer and the insured. The decision rendered on the claims and disputes inter se between the insurer and insured in the course of adjudication of claim for compensation by the claimants and the award made thereon is enforceable and executable in the same manner as provided in Section 174 of the Act for enforcement and execution of the award in favour of the claimants.

(x) Where on adjudication of the claim under the Act the tribunal arrives at a conclusion that the insurer has satisfactorily proved its defence in accordance with the provisions of section 149(2) read with sub-section (7), as interpreted by this Court above, the Tribunal can direct that the insurer is liable to be reimbursed by the insured for the compensation and other amounts which it has been compelled to pay to the third party under the award of the tribunal. Such determination of claim by the Tribunal will be enforceable and the money found due to the insurer from the insured will be recoverable on a certificate issued by the tribunal to the Collector in the same manner u/s 174 of the Act as arrears of land revenue. The certificate will be issued for the recovery as arrears of land revenue only if, as required by subsection (3) of Section 168 of the Act the insured fails to deposit the amount awarded in favour of the insurer within thirty days from the date of announcement of the award by the tribunal.

(xi) The provisions contained in sub-section (4) with proviso thereunder and sub-section (5) which are intended to cover specified contingencies mentioned therein to enable the insurer to recover amount paid under the contract of insurance on behalf of the insured can be taken recourse of by the Tribunal and be extended to claims and defences of insurer against 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.

These principles stand noticed and reiterated by the apex Court in Pepsu Road Transport Corporation Vs. National Insurance Company, .

11. In the instant case, one finds that driver Kundan Lal (PW-1), did not state anything with regard to his licence. In fact this witness was not cross-examined by the insurer. However, learned counsel appearing for the owner and the driver,

tendered in evidence driving licence, which was exhibited as RA. The original was seen and returned.

12. Despite the fact that the document authorized the driver to drive a transport vehicle, as a paid employee, Tribunal discarded the same, for the reason that owner had placed another document, which was not exhibited but marked as R-3, evidencing the fact that driving licence (Ex. RA) was issued in violation of statutory provisions (Section 3 of the Act).

13. No doubt, both these documents are irreconcilable, but however the fact of the matter is that keeping in view the ratio of law laid down by the apex Court in Para-10(iii) of Swaran Singh (supra), onus was upon the insurer to have established breach of the policy. Document (marked R-3) is not proved and exhibited in accordance with law. When document (Ex. RA) was tendered in evidence, no objection was even raised by the insurer. Also, insurer did not avail any opportunity of cross-examining the driver or leading any additional evidence to discharge the statutory burden.

14. As such, findings qua Issue No. 3 cannot be said to be legal and need to be set aside. Ordered accordingly.

15. In view of the aforesaid discussion, it is held that insurer failed to discharge the statutory burden. Issue No. 3 is decided accordingly. It cannot be said that there is any breach of the Insurance Policy, hence liability to pay the amount of compensation so awarded by the Tribunal, shall solely rest upon the Insurance Company and not the appellants as directed by the Tribunal. Impugned award is modified accordingly.

Present appeal is allowed in the aforesaid terms and disposed of, so also the pending application(s), if any.