
(2014) 08 DEL CK 0228
In the Delhi High Court
Case No : MAC. App. 272/2013

Iffco Tokio General Insurance Co. Ltd. APPELLANT
Vs
Sunita Mishra RESPONDENT

Date of Decision : 05-08-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 12 Rule 8
Motor Vehicles Act, 1988 — Section 140, 149, 149(2), 166, 2
Penal Code, 1860 (IPC) — Section 468, 471

Citation : (2015) ACJ 1900

Hon'ble Judges : Jayant Nath, J

Bench : Single Bench

Advocate : Suman Bagga and Pankaj Gupta, Advocate for the Appellant; Vikas Jain, Advocate for the Respondent

Final Decision : Partly Allowed

Judgement

Jayant Nath, J.—The present appeal is filed by the appellant Insurance Company against the Award dated 13.12.2012. The Tribunal treated the Detailed Accident Report (DAR) as the claim petition under Sections 166 and 140 of the Motor Vehicle Act, 1988. Respondents No. 1 to 5 were the claimants.

2. The brief facts are that the deceased on 19.08.2011 was going on a motorcycle on the main road Fatehpur Beri, Delhi when the motorcycle was hit by a tractor. The deceased was moved to AIIMS but was declared brought dead. He was 39 years of age and working as a security guard at Delhi Public School, Allahabad.

3. The Tribunal recorded that the accident occurred due to the rash and negligent driving of the tractors driver respondent No.6. Total compensation of Rs. 28,63,000/- was awarded. The Tribunal further noted that the vehicle was insured with the appellant company and hence the appellant company was liable to indemnify the claimants. The submission of the appellant that the driver respondent No.6 had a fake license and hence the insurance company was not

liable was not accepted. The Tribunal held that the appellant company cannot absolve itself of its liability and the owner respondent No.7 cannot be held liable.

4. Learned counsel appearing for the appellant submits that the present appeal does not seek to challenge the quantum of compensation awarded but seeks to challenge the findings of the Tribunal that the driver respondent No.6 and the owner respondent No.7 are not liable and seeks recovery rights against the said respondent. Learned counsel for the appellant has made two submissions. She firstly submits that the driver respondent No.6 had a fake driving license and hence it is a clear breach of the conditions of the insurance policy. It is next submitted that even the fake driving license was for motorcycle/LMV (not transport). It is urged that the vehicle in question, namely, the tractor was a water tanker and was engaged in the supply of water. It is further urged that the insurance policy is for a commercial vehicle whereas the driver was having a license which on the face of it did not permit him to drive a commercial vehicle. Based on the two submissions it is urged that the impugned order erroneously has held that the owner of the vehicle respondent No.7 is not liable and has fastened the entire liability on the appellant.

5. I will first deal with the first submission of learned counsel for the appellant that the license of the driver respondent No.6 was fake. As per the appellant this information was received by them on receipt of a copy of the Detailed Action Report (DAR) from the police and that the license is fake is clear from a perusal of the DAR. Hence, it is urged that the appellant has no liability to pay the compensation.

6. Reference may be had to the judgment of the Supreme Court in the case of National Insurance Co. Ltd. Vs. Swaran Singh and Others, where in paragraph 102 the Court held as follows:-

"110 The summary of our findings to the various issues as raised in these petitions are as follows:-

(i) ...

(ii) ...

(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 wherefore it 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 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) ...

(ix) ...

(x)

(xi) ..."

7. Hence, it was for the appellant to prove that the license was forged and the insured respondent No.7 was guilty of negligence and failed to exercise reasonable care in fulfilling the condition of the policy regarding use of the vehicle by engaging a duly licensed driver.

8. In the present case the only evidence that has been led by the appellant is that of Shri Niraj Bhadu, Senior Marketing Executive, R-3W/1 which has been filed by way of affidavit. Relevant portion dealing with the license as stated in paragraphs 3 and 4 of the said affidavit reads as follows:-

3. That the respondent No.3 received notice of DAR summons from this Hon''ble Court in respect of the vehicle No.HR 30 E 7731. The Insurance Company had also received Detailed Accident Information Report in Form 54 and relevant documents including copy of FIR, Charge Sheet and copy of the Driving License, verified by the Investigating Officer. The driver of the alleged offending vehicle bearing Registration No. HR 30 E 7731 was not holding a valid and effective Driving License to drive the said vehicle at the time of alleged accident. The copy of the Driving License as furnished alongwith the DAR/ petition is that of a fake one. This fact has been disclosed by the Investigating Officer in the Detailed

Accident Report and Sections 468/471 IPC have been added against the alleged offending driver for the same. The copy of the verification report verified by the IO is Exhibit R3W1/1.

4. That the Respondent No.3 issued a notice under Order 12 Rule 8 of CPC upon the Respondent No.2, Sh.Sunder, the Policy Holder of the vehicle No.HR 30 E 771/ insured for producing the original Insurance Policy in lieu of Cover Note No.72442571 issued by the Respondent No.3 in respect of his vehicle and for producing the Original Driving License of the Respondent No.1, Jagjiwan. A notice under Order 12 Rule 8 of CPC was also sent to the Driver/Respondent No.1 to produce his original Driving Licence. The office copy of notice and the postal receipts are annexed herewith and the same are Exhibit R3W1/2 to R3W1/5 respectively. The true office copy of Insurance Policy is annexed herewith and the same is Exhibit R3W1/6."

9. Hence, essentially the said witness R-3W/1 has repeated the contents of DAR and nothing else. The Document exhibited by R3W1, namely, R3W1/1 which is a photocopy of a letter issued by the Rai Bareli office of the licensing office reads as under:

"It is to inform that license No.J9065 was not issued in the year 2005. The attached photocopy of driving license is not the one issued from this office. Hence, Driving License cannot be attested. There cannot be any comment separately on the attached photocopy of DL."

10. DAR has further various documents attached including a photocopy of what purports to be the driving license of the driver in question respondent No.6. The photocopy of this license which is marked "K" has a note scribbled on it stating that the license has not been issued by the office concerned. Some person has put his signatures under this endorsement on 16.09.2011. The photocopy of the stamp indicates that it has been signed by some office in Rai Bareli. The appellant has not even bothered to get a report from the concerned licensing authority.

11. Apart from a photocopy of the endorsement on mark K and the photocopy Ex.PW3W1/1, there is no other document on record to show that the driving license of respondent No.6 was forged. The original of these documents have not been produced. The concerned authority in Rai Bareli has not been summoned. This document and endorsement is a photocopy.

12. Connected with the above facts is another endorsement on the photocopy of the said driving license which is also hand scribbled and says "for M-cycle + LMV (N.T.)". The second argument of the appellant based on this endorsement is that the vehicle was being used as a commercial vehicle but the driver did not have the license to drive a commercial vehicle. One cannot help noticing that if respondent No.6 the driver had to forge or use a forged driving license, then why would he in this forged license add the sentence "for M-Cycle + LMV (NT)". If he was planning to use a forged license, there was no reason for him to introduce

an endorsement on the license which would make his license invalid if he drove a commercial vehicle. There is no explanation for this. Clearly the appellants have failed to discharge their onus to prove that the driving license was forged.

13. We may now look at the matter from another aspect i.e. even if the license is fake then whether there was a breach of the terms and conditions of the insurance policy and whether the said breach was a deliberate act on the part of the owner and that he failed to exercise reasonable care.

14. The owner respondent No.7 entered the witness box as RW1. On the steps taken by him he has deposed as follows:-

"When I hired Sh.Jag Jeevan as my driver, he stated that he was having a genuine driving licence. I checked the same which appeared to be genuine. I had also checked his driving skill and found him driving the vehicle properly. He also knew the traffic rules and regulations. Copy of the driving license is already Mark X.

....

Xxx by Sh.Brijesh Bagga, Ld. Counsel for insurance company. I had engaged Sh.Jag Jeewan as my driver around the year 2009. It is wrong to suggest that I did not see the driving licence at the time of engaging him. It is further wrong to suggest that I did not take proper precautions and checked his driving skills at the time of hiring him as a driver. I do not remember which authority the DL was made from. It is wrong to suggest that I came to aware about the driving licence after the alleged accident. It is correct that I did not get the licence verified from any authority."

15. The evidence of RW-1/Respondent No.7 clearly shows that he has taken necessary precautions to check the driving skills of the driver and to check the driving license. The Supreme Court in the case of National Insurance Co. Ltd. Vs. Geeta Bhat and Others, held that in case of a driving license of a professional driver is concerned, the owner of the vehicle despite taking reasonable care might not be able to find out as to whether the license was fake. The owner is not expected to verify the genuineness thereof from the transport office. The Court further clarified that the previous judgment of the Supreme Court in the case of National Insurance Company Ltd. vs. Swaran Singh (supra) would continue to apply in case any claims relating to third parties. The Court reiterated that just because the license is fake, that would not absolve the insurer to reimburse the owner of a vehicle in respect of the amount awarded in favour of a third party by the Tribunal. However, it may be noted that in the facts of those cases as none had appeared for the respondents despite service of notice, the court permitted the insurance company to recover the awarded amount from the owner and driver of the vehicle in appropriate proceedings in accordance with law.

16. Hence, even if the driving license was fake, the appellants have failed to

prove that respondent No.7 was guilty of negligence and failed to exercise reasonable care in the matter to fulfill the conditions regarding use of the vehicle by a duly licensed driver.

17. Hence, there is no merit in the first submission of learned counsel for the appellant.

18. I now come to the second submission of the appellant i.e. that the tractor was being used as a commercial vehicle and that the driver was not authorized to drive a commercial vehicle.

19. A perusal of the reply filed by the appellant before the Tribunal would show such a plea has not been made before the Tribunal. The reply only states "The fake driving license consisted categories Motorcycle + LMV (NT) only" without any further elaboration. There was no attempt to spell out the facts as to why the driver due to this endorsement on the license was disqualified to drive the vehicle i.e. that he was driving a tractor trolley for commercial purpose. The said plea has now been taken for the first time in the present appeal. Hence, it would not be normally possible for this court to permit the appellant to raise such contentions for the first time.

20. In any case, as same necessary facts were on record, I have considered the submissions of the appellant and respondent on merits. What the appellant contends is that even if the driving license is taken to be correct, it only authorizes the driver to drive a "M-cycle+LMV" (NT). It is submitted that in the present case the driver was driving a tractor with a water tanker attached which was being used to supply water and hence was being used for commercial purpose. Hence, it was urged that this was contrary to the terms of the driving license.

21. Perusal of the driving license shows that what is ticked is light motor vehicle and motorcycle. These two categories are printed. The phrase for "M+cycle" and LMV (NT) is written by hand with no initials of the person who has inserted this clause. This clause itself raises doubts as explained above, as to why it has been endorsed across the license and who did this endorsement. Hence, the origin of this endorsement or the author of this endorsement remains unknown.

22. Section 2(44) of The Motor Vehicles Act, 1988 defines a tractor as follows:-

"2(44) "tractor" means a motor vehicle which is not itself constructed to carry any load (other than equipment used for the purpose of propulsion); but excludes a road-roller;"

23. A light motor vehicle is defined to include a tractor and the relevant provision, namely, Section 2(21) reads as follows:-

(21) "light motor vehicle" means a transport vehicle or omnibus the gross vehicle weight of either of which or a motor car or tractor or road-roller the unladen weight of any of which, does not exceed 7,500 kilograms;"

24. Similarly, section 2(47) defines a transport vehicle as follows:-

"transport vehicle" means a public service vehicle, a goods carriage, an educational institution bus or a private service vehicle;"

25. Section 2(14) defines a "goods" carriage as follows:-

"goods carriage" means any motor vehicle constructed or adapted for use solely for the carriage of goods, or any motor vehicle not so constructed or adapted when used for the carriage of goods;

26. The Supreme Court in the case of Natwar Parikh and Co. Ltd. Vs. State of Karnataka and Others, in para 24 held as follows:-

24. ... Therefore, we have to read the words "motor vehicle" in the broadest possible sense keeping in mind that the Act has been enacted in order to keep control over motor vehicles, transport vehicles etc. A combined reading of the aforesaid definitions u/s 2, reproduced hereinabove, shows that the definition of "motor vehicle" includes any mechanically propelled vehicle apt for use upon roads irrespective of the source of power and it includes a trailer. Therefore, even though a trailer is drawn by a motor vehicle, it by itself being a motor vehicle, the tractor- trailer would constitute a "goods carriage" u/s 2(14) and consequently, a "transport vehicle" u/s 2(47). The test to be applied in such a case is whether the vehicle is proposed to be used for transporting goods from one place to another. When a vehicle is so altered or prepared that it becomes apt for use for transporting goods, it can be stated that it is adapted for the carriage of goods. Applying the above test, we are of the view that the tractor-trailer in the present case falls u/s 2(14) as a "goods carriage" and consequently, it falls under the definition of "transport vehicle" u/s 2(47) of the MV Act, 1988." Therefore, the words "motor vehicle" have been defined in the comprehensive sense by the legislature."

27. This was a case pertaining to a tax levied under the Karnataka Motor Vehicle Taxation Act. The appellant in that case had used the vehicle for transporting over-dimensional cargo and was using a drawing vehicle which the appellant call a "tractor" to push/pull the loaded trailer. Hence, the vehicle being used therein though described as tractor trailer, was a different kind of vehicle.

28. The Punjab & Haryana High Court while interpreting the above judgment in the case of Bajaj Allianz General Insurance Co. Ltd. vs. Tarun Kaura & Ors. (FAO 2887/2008 decided on 02.03.2010) held as follows:-

"The judgment of the Hon"ble Supreme Court cannot be read to mean, that the person holding a driving license to drive a tractor cannot drive, it with the trolley attached to it. Trolley is an agricultural equipment, therefore, the driver holding a driving license to drive tractor can always drive tractor along with the trolley."

29. The Supreme Court in the case of Oriental Insurance Co. Ltd. Vs. Brij Mohan and Others, held that a tractor fitted with a trailer may or may not be a goods

carriage. A tractor was meant to be used for agricultural purposes. A trailer attached to the tractor is necessarily required to be used for agricultural purposes, unless registered otherwise. It further mentioned that carriage of vegetables for being agricultural produce would lead to an inference that the tractor was being used for agricultural purposes. The Court further noted that where the tractor and trailer were being used to transport vegetable to the market for purpose of sale, then it could not be termed to be agricultural purpose. Relevant portion of the judgment reads as follows:-

16. A tractor fitted with a trailer may or may not answer the definition of goods carriage contained in Section 2(14) of the Motor Vehicles Act. The tractor was meant to be used for agricultural purposes. The trailer attached to the tractor, thus necessarily is required to be used for agricultural purposes, unless registered otherwise. It may be, as has been contended by Mrs.K.Sharda Devi, that carriage of vegetables being agricultural produce would lead to an inference that the tractor was being used for agricultural purposes but the same by itself would not be construed to mean that the tractor and trailer can be used for carriage of goods by another person for his business activities. The deceased was a businessman. He used to deal in vegetables. After he purchased the vegetables, he was to transport the same to the market for the purpose of sale thereof and not for any agricultural purpose. The tractor and trailer, therefore, were not being used for agricultural purposes...."

30. This Court in the case of New India Insurance Company Ltd. vs. Sanjay Singh in MAC.APP.561/2012 decided on 8.5.2014 has held that a tractor is a LMV and that no separate endorsement is required on the driving license for driving a tractor and a person having a driving license for driving LMV can drive a tractor.

31. The argument of the appellant is that necessary endorsement on the said driving license for driving a transport vehicle was not there and that respondent No.6 was actually driving a transport vehicle i.e. transporting water. In view of the judgment of the Supreme Court in the case of National Insurance Company Ltd. vs. Swaran Singh (supra). It was for the appellant to prove that there was a deliberate breach by the driver/owner of the offending vehicle of the terms and conditions of the insurance policy. There is no evidence led by the appellant to show that the tractor and trailer were being used for a purpose other than agricultural purpose. R-3W1 Shri Niraj Bhadu, the Senior Marketing Executive of the appellant who gave evidence has said nothing about the tractor being used for commercial purpose or as a goods carriage. The reply filed before the Tribunal by the appellant is also silent on this aspect.

32. However, one cannot help noticing the DAR filed by the police on record. Alongwith the DAR some photocopy of photographs of the vehicles involved in the accident have been placed on record. The photocopy of the photograph shows the photo of a tractor with Reg. No. HR 30F 7731. The next photograph clearly shows a tractor attached to a water tanker and the tanker has painted on it "Ashok Tanwar Water Supplier" with the phone number possibly 997181883

and landline --. The Vehicle Mechanical Inspection report also notes the make of the tractor as Mahendra 265 D11 Reg. No. HR-30E 7731 and notes that the tractor is with the water tanker and states fresh damages on the front bumper.

33. Based on these facts, prima facie it appears that the offending vehicle was a tractor which was with a water tanker as a trailer. The trailer was not being used for agricultural purposes. Accordingly, prima facie it has to be held that the tractor was being used as a transport vehicle and the driver required an endorsement on his license to drive a transport vehicle.

34. But keeping in mind the fact that the appellant has neither properly pleaded these contentions about the tractor being a goods vehicle nor has he led any cogent evidence to the said effect, in my view it would be appropriate that the appellant pays the awarded amount to the claimants/respondents no. 1-5. However, interest of justice would be served by giving liberty to the appellant to initiate separate appropriate proceedings in accordance with law, to seek to recover the awarded amount from the owner and driver of the offending vehicle. In case any such proceedings are initiated by the appellant, they will be adjudicated on its own merits.

35. Appeal is accordingly partly allowed as above.

36. The interim orders passed in favour of the appellant are vacated. As per order dated 22.03.2013, the appellant was directed to deposit the entire award amount with interest before the Registrar General of this High Court. The Registrar General was to release 50% of the award amount to the claimants as per the terms and conditions of the Award and the balance was to be kept in fixed deposit. In view of the above order, the balance amount also lying in fixed deposit along with accumulated interest be released to the claimants/respondents No.1 to 5 as per the terms and conditions fixed by the Tribunal in the Award.

37. In case the appellant has complied with the directions in the Award, the statutory amount deposited at the time of filing of the appeal may be released.