
(2004) 11 P&H CK 0042

In the Punjab And Haryana At Chandigarh

Case No : First Appeal from Order No. 1121 of 1995

Mrs. Rosy Joshi and Others

APPELLANT

Vs

S. Joginder Singh and Others

RESPONDENT

Date of Decision : 23-11-2004

Acts Referred:

Motor Vehicles Act, 1988 — Section 149(2), 171

Citation : (2005) 2 ACC 347 : (2005) ACJ 1299 : (2005) 139 PLR 465 : (2005) 2 RCR(Civil) 58

Hon'ble Judges : Hemant Gupta, J

Bench : Single Bench

Advocate : Arun Jain and Amit Jain, for the Appellant; A.R. Takkar, for Respondent Nos. 1 and 2 and Suman Jain, for the Respondent

Final Decision : Allowed

Judgement

Hemant Gupta, J.—The claimants are in appeal aggrieved against the award passed by the Motor Accident Claims Tribunal, Chandigarh (hereinafter referred to as the Tribunal), in respect of the claim application filed by the appellants arising out of motor vehicular accident.

2. On 10.7.1993, Surinder Kumar Joshi deceased was travelling on Maruti Van No.CHB-7279 from Chandigarh to Barnala. As per the case set up by the claimants, the vehicle was being driven by Joginder Singh, respondent No. 1 at a high speed on a rainy day. Suddenly, the driver applied brakes on account of which the vehicle slipped and fell into ditches on road side and colluded with a tree. Such accident resulted into injuries to Surinder Kumar Joshi. He succumbed to injuries later on. The claimant alleged that the accident has been caused by rash and negligent driving of maruti van by Joginder Singh. The deceased was 46 years of age at the time of accident and was employed as General Manager (Sales) in Paper Division of Varinder Agro Chemical Ltd. at a monthly salary of Rs. 17,000/-. The legal representatives of deceased Surinder Singh Joshi sought compensation by filing a claim petition before the Tribunal.

3. Joginder Singh, respondent No. 1 admitted that Surinder Kumar Joshi was travelling in the van but he denied that the accident was caused by rash and negligent driving by him. Bharat Singh, the owner of van also filed a written statement on the similar lines. The Insurance Company contested the claim petition inter-alia on the ground that in the claim application filed by Bharat Singh, the driver of the vehicle was Ranbir Singh son of Bharat Singh and that it is nowhere alleged that Joginder Singh son of Bal Krishan was driving the Maruti Van at the time of the accident. It also pleaded that the owner in connivance with the claimants was playing fraud. The driver of the van was not having a valid driving licence and that the claimants have filed the claim application in connivance with respondent No. 1 and 2 to extract easy money from the Insurance Company. It also denied that the deceased was travelling in the aforesaid Maruti Van or that the said van met with an accident or that Surinder Kumar Joshi sustained any injury in the alleged accident. It also stated that the Maruti Van at the time of alleged accident was used as a taxi which was against the terms and conditions of the insurance policy.

4. In support of the respective contentions raised by the parties, the claimants examined Rosy Joshi wife of late Shri Surinder Kumar Joshi as PW1 and she inter alia deposed that the personal car of Surinder Kumar Joshi was out of order on that day and therefore, he borrowed the Maruti Van of Bharat Singh. In cross examination, she denied that no rental or hire of the Maruti Van was to be paid. The claimants also examined Mukesh Ahluwalia as PW4 who produced not only carbon copy of the Post Mortem Report but also a copy of Daily Diary Report as Ex.P7 lodged by Joginder Singh respondent.

5. On the other hand, the respondent Company examined Harinderdeep Singh, Senior Assistant New India Insurance Company, Chandigarh as RW1. Learned Tribunal on the basis of the contents of the Dairy, Diary Report Ex.P7 held that the Maruti Van was being driven as a taxi. Therefore, it was being used for hire or reward and thus the Insurance Company is not liable to pay the compensation. Relevant finding of the Tribu- nal reads as under:

"18. This brings me to determine the liability of the Insurance Company. As noted above, Shri Mukesh Ahluwalia PW4 has himself proved the DDR No. 5 dated 10.7.1993 which Shri Joginder Singh respondent No. 1 lodged at Police Station, Banur. It is clearly stated in his document that Shri Surinder Kumar Joshi had hired the van in which he was proceeding from Chandigarh to Barnala. This is a document relied by the claimants themselves. Therefore, they cannot budge out of it. If that be so, then it is proved to the hilt that Shri Surinder Kumar Joshi was being carried in this van on hire or for reward."

6. Learned counsel for the appellants vehemently argued that the contents of the Daily Diary Report though produced by the witness of the claimants is not conclusive to hold that the vehicle was taken on hire by the deceased. The Daily Diary Report was produced only with a view to prove a motor vehicular accident. The onus of proof that the Insurance Company is not liable to pay compensation

is upon the Insurance Company but the Insurance Company has not discharged such onus by summoning either the owner or the driver thereof. On the other hand, one of the claimants has appeared as a witness and categorically denied that any hire charges were payable. Therefore, in view of the direct evidence of the claimants available on record, the contents of the Daily Diary Report could not have been relied upon by the Tribunal to hold that the deceased was travelling in a Van on hire. Reliance is placed upon a Division Bench judgment of Madhya Pradesh High Court in Ramnath Vs. Prasanna Kumar Jain and Others, .

7. It is also argued that the learned counsel for the appellants replying upon National Insurance Co. Ltd. v. Swaran Singh and Ors. (2004) 136 P.L.R. 510 (S.C.) that the Insurance Company is required to establish breach of the conditions of the policy by cogent evidence. If the Insurance Company fails to prove that there has been breach of conditions of policy on the part of the insured, it cannot be absolved of its liability. The Insurance Company must not only establish the available defence raised but must also establish breach on the part of the owner of the vehicle, burden of proof where for would be on the Insurance Company. Reference was also made to New India Assurance Co. Ltd. v. Kamla and Ors. (2001) 127 P.L.R. 830 (S.C.) wherein it was held that the insurer is statutorily liable to pay compensation to third party on account of certificate of insurance issued. But the insurer shall be entitled to recover from the insured the amount paid to the third parties, if there was any breach of policy, conditions on account of the vehicle being driven without a valid driving licence.

8. However, the learned counsel for the respondent Insurance Company argued that since in Ex.P7 itself it is mentioned that the vehicle was being used for hire therefore, the Insurance Company was not obliged to lead any other evidence to prove the fact that the vehicle was being used for hire or reward. If the vehicle was being used for hire then in terms of Clause (2) of Section 149 of the Act, the Insurance Company is not liable to indemnify the insurance as the liability to satisfy the decree or award in terms of Section 149 of the Act is subject to the provisions of Sub-Section (2). It is contended that it is not open to the claimants to read part of the Daily Diary Report and omit the part which is against the appellants. The document has to be read as a whole and once the appellants themselves are relying upon such a document, no further proof was required on the part of the Insurance Company, and thus, the finding recorded by the learned Tribunal are perfectly justified. It is further contended that collusion between the owner, driver and claimants is writ large in as such as the owner and the driver have not challenged the finding recorded by the Tribunal holding them liable to pay compensation. Since the finding recorded by the Tribunal has not been challenged to the effect that there was breach of conditions, this Court is debarred from examining the question of breach of conditions of policy in appeal.

9. The first question which required to be determined is whether the Daily Diary Report by itself is sufficient to prove that the vehicle was being driven for hire. The findings are required to be returned on the basis of entire evidence led by

the parties including the evidence produced by the claimant. The statement of one of the claimants PW1 Rosy Joshi on oath before the Court is clear and categorical that no rental or hire of the Maruti Van was to be paid. Joginder Singh, the author of the Daily Diary Report has not been examined in court. It was open to the Insurance Company to examine such a witness in support of the plea of breach of conditions of policy. The Daily Diary Report is a previous statement made by Joginder Singh. Such statement can be proved to be wrong on the basis of evidence produced by the appellants. In view of the statement on oath made in court, the recitals in Daily Diary Report cannot be said to be proof of the fact that the vehicle was being used for hire or reward. Therefore, in the absence of any other evidence on the part of the respondents to prove that the vehicle was being driven for hire or reward, I am unable to accept the argument raised by the learned counsel for the respondents that there was breach of conditions of policy in terms of sub-section (2) of Section 149 of the Act and thus, the Insurance Company was not liable to make the payment of the compensation.

10. u/s 149(2) of the Act, the Insurance Company has an opportunity to defend the action on the ground that there has been a breach of specified conditions of the policy. One of the conditions, the breach of which is required to be proved by the Insurance Company, is the use of a vehicle for hire or reward where the vehicle on the date of contract of insurance is not covered to ply for hire or reward. It is, thus, apparent that the Insurance Company can avoid its liability only if it is proved that on the date the vehicle was insured it did not have any permit to ply for hire or reward. The relevant clause of sub-section (2) of Section 149 of the Act reads as under:

"149(2) No sum shall be payable by an insurer under sub-section (1) in respect of any judgment or award unless, before the commencement of the proceedings in which the judgment or award is given the insurer had notice through the Court or, as the case may be, the Claims Tribunal of the bringing of the proceedings, or in respect of such judgment or award so long as execution is stayed thereon pending an appeal; and an insurer to whom notice of the bringing of any such proceedings is so given shall be entitled to be made a party thereto and to defend the action on any of the following grounds, namely:-

(a) that there has been a breach of specified condition of the policy, being one of the following conditions, namely:-

(i) a condition excluding the use of the vehicle

(a) for hire or reward, where the vehicle is on the date of the contract of insurance a vehicle not covered by a permit to ply for hire or reward, or

(b)(c)(d)....."

11. In Swaran Singh's case (supra), the breach of policy conditions was in respect of disqualification of a driver or invalid driving licence falling within sub-

clause (ii) of Section 149(2)(a) of the Act whereas in the present case, the breach is alleged user of the vehicle for hire or reward falling under Clause (1) of Section 149(2)(a) of the Act. In respect of violation of sub-clause (ii), the Courts recorded summary of findings to the following effect:

"(iii) the breach of policy conditions, 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 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 insured unless the said breach or breaches of the conditions 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."

12. The clause (ii) and clause (i) of Section 149(2)(a) deals with breach of different kinds. It is apparent that Insurance Company was to establish the available defence raised in the proceedings but also establish breach on the part of the owner of the vehicle. Still further, as per clause (vi) of the summary of findings, the breach of the conditions are to be so fundamental as are found to have contributed to the accident. In the present case, even if it is assumed that the deceased was passenger for hire, such fact has not been contributed to the cause of accident and therefore, such breach is not sufficient so as to avoid the liability of the Insurance Company.

13. Reference may be made to another supreme Court judgment reported as Durga Steel Vs. Rajesh Kumar and another, wherein it was held that the passenger in a goods vehicles may be owner of the goods if carried in a goods

vehicle the Insurance Company is not liable. The provisions of Section 95 of the Motor Vehicles Act, 1939 dealt with in the said case are para materia to the provisions of Section 149 to the extent relevant in the present case. It was held that it would not be proper to consider a goods vehicle as a passenger vehicle on the basis of single use or use on some stray occasions as vehicle for carrying passenger for hire or reward. It was held that the correct test to determine whether a passenger was carried for hire or reward would be whether there has been a systematic carrying of passengers. Only if vehicle is so used then that vehicle can be stated to be a vehicle in which the passengers were carried for hire or reward. It was held to the following effect:

"For the purposes of Section 95, ordinarily a vehicle could have been regarded as a vehicle in which passengers are carried if the vehicle was of the class. Keeping in mind the classification of vehicles, by the Act, the requirement of registration with particulars including the class to which it belonged, requirement of obtaining a permit for using the vehicle of different purposes and compulsory coverage of insurance risk, it would not be proper to consider a goods vehicle as a passenger vehicle on the basis of a single use or use on some stray occasions of that vehicle for carrying passengers for hire or reward. For the purpose of construing a provision like proviso (ii) to Section 95(1)(b), the correct test to determine whether a passenger was carried for hire or reward, would be whether there has been a systematic carrying of passengers. Only if the vehicle is so used then that vehicle can be said to be a vehicle in which passengers are carried for hire or reward."

14. It is not even the case of the Insurance Company that the vehicle required a permit to ply for hire or reward on the date of contract of insurance. There is no proof that the vehicle was being used for hire on the date of accident or there was systematic activity of carrying passengers in such vehicle. Therefore, the Insurance Company cannot absolve its liability to indemnify the insured.

15. No other point was urged.

16. In view of the findings recorded above, I am unable to uphold the findings absolving the Insurance Company from the liability to indemnify the insured. Consequently, while allowing appeal of the claimants; the said part of the award is set aside and the respondents are held jointly and, severally liable to pay compensation to the claimants alongwith interest at the rate of per cent per annum from the date of filing of claim application till realisation.

17. No order as to costs.