

(2012) 02 DEL CK 0564
In the Delhi High Court
Case No : Mac. App. No. 348 of 2011

Musawar Ali

APPELLANT

Vs

United India Insurance Co. Ltd and Others

RESPONDENT

Date of Decision : 16-02-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 12 Rule 8
Motor Vehicles Act, 1988 — Section 149(2)

Citation : (2012) 02 DEL CK 0564

Hon'ble Judges : G.P. Mittal, J

Bench : Single Bench

Advocate : Anil Kumar Gupta, for the Appellant;

Final Decision : Dismissed

Judgement

G.P. Mittal, J.

CM APPL No.7797/2011(Delay)

There is a delay of 194 days in filing the Appeal.

Respondent No.1, who is the only contesting party had preferred not to file any reply to the application. None is present to oppose the application.

For the reasons stated in the application, the same is allowed. Delay of 194 days in filing the Appeal is condoned.

The application stands disposed of.

CM APPL No.7798/2011(Stay)

1. The order dated 08.08.2011 has not been complied with. The stay granted vide that order stands vacated.

The application stands disposed of.

MAC APP No.348/2011

1. The Appellant Musawar Ali who is owner of vehicle No. DL 1LJ 8931 which caused the accident resulting into fatal injuries on Najmun Khatoon impugns the judgment dated 19.05.2010 whereby while awarding a compensation of Rs. 2,37,000/-, the Claims Tribunal granted recovery rights to the United India Insurance Co. Ltd.(the insurer), the insurer of the offending vehicle against the Appellant. Para 24 of the impugned judgment is extracted hereunder:

24. LIABILITY TO SATISFY THE CLAIM.

Respondent No.2, Insurance Company has examined R2W2 Sh. Rajender Prasad Saraswati from RTO Office, Agra, who has stated that as per their record, the driving license bearing No.O-9528/AG/85 was not issued from their authority and hence the same was fake. No evidence was lead to controvert the claim of the Insurance company. Therefore, since the driving license was not effective, I am inclined to grant recovery rights to the Insurance Company. Respondent No.1 being owner and respondent No.2 being insurer of the offending vehicle are jointly and severally liable to make payment of compensation to the petitioner. Respondent no.2 may initiate appropriate proceedings for recovery of the award amount from respondent No.1.

2. There is no dispute about the proposition of law as held in United India Insurance Company Ltd. Vs. Lehu and Others, and National Insurance Co. Ltd. Vs. Swaran Singh and Others, that the insurer must prove that there was willful breach on the part of the insured to avoid liability. In United India Insurance Company Ltd.(supra) v. Lehu & Ors (supra), in para 20 it was held as under:

20. When an owner is hiring a driver he will therefore have to check whether the driver was a driving license. If the driver produces a driving license which on the face of it looks genuine, the owner is not expected to find out whether the license has in fact been issued by a competent authority or not. The owner should then take the test of the driver. If he finds that the driver is competent to drive the vehicle, he will hire the driver. We find it rather strange that Insurance Companies expect owners to make enquiries with RTOs, which are spread all over the country, whether the driving license shown to them is valid or not. Thus where the owner has satisfied himself that the driver has a license and is driving competently there would be no breach of Section 149(2)(a)(ii). The Insurance Company would not then be above of liability. If it ultimately turns out that the license was fake, the Insurance Company would continue to remain liable unless they prove that the owner/insured was aware or had notice that the license was fake and still permitted that person to drive. More importantly, even in such a case the Insurance Company would remain liable to the innocent third party, but it may be able to recover from the insured. This is the law which has been laid down in Skandia Insurance Co. Ltd. Vs. Kokilaben Chandravadan and Others, ; Sohan Lal Passi Vs. P. Sesh Reddy and others, ; and New India Assurance Co., Shimla Vs. Kamla and Others etc. etc., . We are in full agreement with the views expressed therein and see no reason to take a different view.

3. Similarly in *National Insurance Company Ltd. v. Swaran Singh & Ors*, (supra), in para 51 it was held as under:

51. It is trite that where the insurers, relying upon the provisions of violation of law by the assured, take an exception to pay the assured or a third party, they must prove a willful violation of the law by the assured. In some cases violation of criminal law, particularly, violation of the provisions of the Motor Vehicles Act may result in absolving the insurers but, the same may not necessarily hold good in the case of a third party. In any event, the exception applies only to acts done intentionally or "so recklessly as to denote that the assured did not care what the consequences of his act might be.

4. Turning to the facts of this case, the Appellant(First Respondent before the Tribunal) appeared and filed a written statement stating that the driver possessed a valid and effective driving license at the time of the accident. The Appellant preferred not to pursue his defense and was ordered to be proceeded ex parte by an order dated 16.12.2009. The Insurance Company (insurer) examined R2W2 Rajender Prasad Saraswat, Senior Clerk from RTO Office, Agra who issued the license alleged to be held by the driver. He testified that the license bearing No.O-9528/AG/85 was not issued from their authority. In cross-examination of this witness on behalf of the Appellant, he deposed that he had brought the full record of the license issued with alphabet "O". R3W1 Rajesh Maurya, an Assistant with United India Insurance Company Ltd. deposed that the owner was issued a notice Ex.R3W1/C to produce the driving license of the driver with acknowledgement Ex.R3W1/B, but the notice was returned back undelivered. Although, the Appellant initially contested the Petition, but later on preferred to be proceeded ex parte and failed to pursue his defense. It is not the Appellant's case that he took the test of the driver's driving skill or that he bonafidely believed the license to be genuine. Once the Insurance Company proved the license to be fake, the onus shifted on the owner (the Appellant) to show that he exercised due diligence in entrusting the vehicle to the driver. I would refer to the observation of this Court in *New India Assurance Co. Ltd. v. Sanjay Kumar*, ILR (2007) 2 Del 733, where it was held as under:

20. In the context of a fake driving license, the factual arena becomes a little complex. With the advancement of science and technology and computer aids it has become very easy to replicate licenses. Indeed, it has become extremely difficult to distinguish the fake from the real. Cases have been reported where a license, origin whereof is fake, has been renewed by the Licensing Authority. Kamla's case(Supra) was dealing with a license, origin whereof was dubious but was subsequently renewed by the Licensing Authority. If the Licensing Authority could not detect, when presented for renewal, that the license was fake license, how can a lay person detect same?

21. Knowledge is a state of mind. It is personal to the person possessed of the knowledge. Till he steps into the witness box, it would be impossible for any person to establish what his knowledge was.

22. Thus, where the insurance company alleges that the term of the policy of not entrusting the vehicle to a person other than one possessing a valid driving license has been violated, initial onus is on the insurance company to prove that the license concerned was a fake license or was not a valid license. This onus is capable of being easily discharged by summoning the record of the Licensing Authority and in relation thereto proving whether at all the license was issued by the authority concerned with reference to the license produced by the driver. Once this is established, the onus shifts on to the assured i.e. the owner of the vehicle who must then step into the witness box and prove the circumstances under which he acted; circumstances being of proof that he acted bona fide and exercised due diligence and care. It would be enough for the owner to establish that he saw the driving license of the driver when vehicle was entrusted to him and that the same appeared to be a genuine license. It would be enough for the owner, to discharge the onus which has shifted on to his shoulders, to establish that he tested the driving skill of the driver and satisfied himself that the driver was fit to drive the vehicle. Law does not require the owner to personally go and verify the genuineness of the license produced by the driver.

23. Where the assured chooses to run away from the battle i.e. fails to defend the allegation of having breached the terms of the insurance policy by opting not to defend the proceedings, a presumption could be drawn that he has done so because of the fact that he has no case to defend. It is trite that a party in possession of best evidence, if he withholds the same, an adverse inference can be drawn against him that had the evidence been produced, the same would have been against said person. As knowledge is personal to the person possessed of the knowledge, his absence at the trial would entitle the insurance company to a presumption against the owner.

24. That apart, what more can the insurance company do other than to serve a notice under order 12 Rule 8 of the CPC calling upon the owner as well as the driver to produce a valid driving license. If during trial such a notice is served and proved to be served, non response by the owner and the driver would fortify the case of the insurance company.

5. In view of the above discussion, it is clear that in the absence of any specific plea by the Appellant as to the steps taken by him to show that he exercised due diligence, it cannot be said that he acted diligently in entrusting the vehicle to the driver. In view of the facts and circumstances of the case, it was established that there was willful breach on the part of the insured. No fault can be found with the impugned order granting recovery rights to the First Respondent.

6. The Appeal is devoid of any merit; it is accordingly dismissed.

7. No costs.