

(2001) 07 RAJ CK 0024

In the Rajasthan High Court

Case No : Civil Miscellaneous Appeal No. 876 of 2000

National Insurance Co.

APPELLANT

Vs

Mansa Ram and Others

RESPONDENT

Date of Decision : 13-07-2001

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 27, Order 41 Rule 27(1)

Citation : (2002) 1 RLW 617 : (2002) 2 WLC 161 : (2003) 2 WLN 245

Hon'ble Judges : P.C. Tatia, J

Bench : Single Bench

Advocate : L.D. Khatri, for the Appellant; Rajesh Panwar and P.R. Choudhary, for the Respondent

Final Decision : Dismissed

Judgement

Tatia, J.—Heard learned counsel appellant as well as claimants and the owner of the vehicle. None appeared for the driver of the vehicle.

2. The brief facts relevant for the purpose of decision of this appeal are as under:-

3. That on 19.6.93 at about 7.00 PM driver Ramchandra was driving Jeep No. RST 5184 and Gorkharam, Joraram, Anopram, Indraraj and Fatharam were traveling in the Jeep. At about 8.30 PM near Bawari a truck No. RJ19-G-1221 came and hit the Jeep causing death of Jeep driver Ramchandra on spot and in the same accident Indraraj and Joraram also died. The present claim petition was filed by the father and mother of deceased Ramchandra. At the time of accident deceased Ramchandra was of the age of 25 years only and it is stated that he was having a valid driving licence. Due to this accident the present claim petition was filed by Mansa Ram and Smt. Rukadi Devi who are the father and mother of the deceased Ramchandra and the claim case No. 116/94 was registered before the Accidents Claim Tribunal, Phalodi. In the claim, the claimants claimed Rs. 9,86,000/- only. In the claim petition, the driver, owner and Insurance Company

were impleaded as party. It is submitted by the learned counsel for the appellant that reply was filed by the Insurance Company- appellant before the tribunal and the Insurance Company took a specific plea that the driver of the truck Sitaram was having a licence for driving light motor vehicle and he had no licence to drive heavy vehicles and, admittedly, Sitaram was driving heavy vehicle, i.e. truck, therefore, the Insurance Company is not liable as the owner of the vehicle permitted a person to drive the vehicle without there being any valid licence. According to the reply of the appellant-Insurance Company, the appellant-Company was aware of existence of licence of Sitaram driver. On the plea of Insurance Co. a specific issue No. 3 was framed by the tribunal, which reads as under:-

^^3 vk;k oDr nq?kZVuk V?d ,sls O;fDr }kjk pyk;k tk jgk Fkk ftlds ikl oS/k ,oa izHkkoh M?kbZfoax ykbZlal ugha Fkk ls vizkZFkh chek dEiuh eqvкотk ds fy, ftEesokj ugha gS**

4. A bare perusal of the above issue, according to learned counsel for the appellant, that there is a specific plea of the appellant-Insurance Co. and driver & owner did not appear in the witness box. Therefore, every adverse Inference is required to be drawn against the driver and owner that the driver was not having a valid driving licence and when it is found that driver was not having a valid licence, this itself is a clear breach of condition of the Policy and the Insurance Company is not liable to reimburse any amount awarded against the driver resulting into award against owner.

5. Learned counsel for the appellant relied upon the judgment of the Hon'ble Apex Court delivered in United India Insurance Co., Ltd. v. Shri Gian Chand and Ors. (1). According to learned counsel for the appellant the Hon'ble Apex Court held that once the owner did not appear in the witnesses box to prove his case, an adverse inference had necessarily to be drawn against him.

6. I may quote the relevant portion of the above Judgment of the Hon'ble Apex Court, which reads;

"In fact, once he did not step in the witness box to prove his case, an adverse inference had necessarily to be drawn against him to the effect that the vehicle had been handed over by him for being driven by an unlicensed driver, respondent No.1."

7. In view of me above finding the Hon'ble Apex Court held that Insurance Company is not liable for the award amount.

8. I perused the award passed by the tribunal as well as the issues framed by the tribunal and the reply of the claim filed by the Insurance Company. It is true that there is a specific plea of the Insurance Company in reply that the truck driver Sitaram was having licence only to drive light motor vehicle and Insurance Company got this information from the copy of the licence seized by the Police.

9. When there is a specific plea in defence to claim petition naturally issues are

required to be framed on the plea of the defence and, therefore, as per the language employed in the issue No. 3 it is clear that burden lies upon the appellant-insurance Company to prove the fact, which appellant-Company has pleaded. It is again relevant to mention here that the Insurance company is permitted under law to take defence and, therefore, this defence is in accordance with law taken by the Insurance Company. Therefore, burden naturally lies upon the Insurance Company to prove the fact.

10. A issue if framed placing burden upon the defendant/non- claimant then the initial burden lies upon the defendant/non- claimant to produce evidence in support of the issue and when once this burden is discharged, the onus shifts upon the other party to rebut the evidence of the party who look the defence. It is choice of the party who takes a defence to prove the fact by leading evidence and may choose to withdraw that defence or in case failed to prove by evidence the plea taken by the party, the court may reject that defence. When a specific defence is taken and if there is evidence by the party taking defence then only question arises to rebut the evidence on the issue by the other party. Here in this case, admittedly, no witness was produced by the appellant-Insurance Company before the tribunal Nor there is a single word of mouth on oath before the tribunal. Admittedly as per the pleading of the Insurance Company itself they were aware that there is a licence in favour of driver of the truck Sitaram but according to appellant-Insurance Company this licence was only for driving of light motor vehicle. It is specifically mentioned that this plea is taken after looking into licence of the Sitaram. When the appellant-company had a document available from which they could have obtained the copy or on the basis of the copy which was available with them, could have obtained the certified copy from the competent department or could have summoned witnesses from the contempt department for proving that Sitaram was having licence to drive only light motor vehicle but in their wisdom they did not choose to produce any of the documentary evidence before the tribunal, therefore, with respect to issue No. 3 there is no oral evidence of the Insurance Company as well as there is no documentary evidence produced by the Insurance Company to discharge initial burden to prove the issue as observed above. In case of initial discharge of burden than only question of rebuttal comes and not before that, therefore, in the facts and circumstances of the case adverse inference if is required to be taken then this is to be taken only against the appellant-Insurance Company. It is undisputedly clear that the claimants were not having the access to the licence of the truck driver Sitaram and there was no burden upon them. According to learned counsel for the claimants that they have proved the facts with respect to the accident. The person who was driving the vehicle truck in a rash and negligent manner was the driver Sitaram and, therefore, the claimants are entitled for the claim, whether it is paid by the driver or owner or by the appellant- insurance company and in case the appellant would have produced any evidence on issue No.3 they would have a chance to cross- examine and contest this issue but when none of the witness of the Insurance Company

appeared they had no opportunity to even cross-examine the witness of the Insurance Company.

11. The learned counsel for the owner also submitted that when initial burden was not discharged, the respondent-owner cannot be called upon. It is a proved fact, which has not been proved by the party upon whom there was burden.

12. In light of the facts of this case, as mentioned above, the judgment cited by the learned counsel for the appellant mentioned above delivered in *United India Insurance Co. Ltd. v. Shri Gian Chand and Ors.* (supra), the decision of the Hon''ble Apex Court has no application to the facts of this case. In the above cited case of the Hon''ble Apex Court this was an admitted fact that the driver of the vehicle submitted written statement and in addition to other facts he specifically admitted that he had no licence to drive the vehicle at the relevant time when accident occurred. I may quote the relevant facts of the above cited case, which are as under:-

"However, he stated that he had no licence to drive the vehicle at the relevant time when the accident occurred."

13. When there is an admission of fact then that admission can be relied upon against the person making the admission. When driver admitted that he had no licence at the relevant time when accident occurred then if the owner of the vehicle wanted to contest the plea of absence of licence or even specific plea of handing over vehicle to a person having valid licence who might have been turned handing over vehicle to another person without consent and knowledge of the owner of the vehicle then that fact was required to be proved by the owner only. In the above fact of specific admission of the driver that he had no valid driving licence at the time of accident naturally the final burden lies upon the owner of the vehicle to rebut these facts and when owner failed to rebut these facts by not entering into the witness box then the Hon''ble Apex Court held that adverse inference had necessarily be drawn against the owner of the vehicle. Therefore, this judgment has no application to the facts of this case.

14. I may refer another earlier judgment of the Hon''ble Apex Court delivered in *Narcinva v. Mamat and Anr. v. Alfredo Antonio Doe Martins and Ors.* (2). This earlier judgment was not even brought to the notice of the Hon''ble Apex Court as is clear from the judgment of *Gian Chand's* case (supra), (in this earlier judgment, the Hon''ble Apex Court narrated the facts of the case. Relevant portion of which is as under:-

"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 a 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. The language and the format in which issue Nos. 7 and 8 have been cast by the Tribunal clearly casts

the burden of proof on the insurance company. Not an iota of evidence has been led by the insurance company to show that the second appellant did not have a valid driving licence to drive the vehicle."

15. A bare perusal of the above facts, it is clear that the burden of issue was upon the insurance company and the insurance company failed to produce evidence and it was held that it is to be seen who was at fault if no evidence is recorded, naturally the insurance company. Therefore, in the present case also the facts are identical as issue was framed placing burden upon the insurance company and there is no other evidence in support of the case of the insurance company.

16. In the above judgment reported in *Narcinva V. Kamat and Another Vs. Alfredo Antonio Doe Martins and Others*, not only this but there was., cross-examination of the appellant of that case and it was specifically asked whether he would produce his driving licence and (he) driver failed to produce the same, therefore, a request was made to draw adverse inference against the driver to hold that he was not having any valid driving licence. Despite that cross-examination the Hon"ble Apex Court held that insurance company failed to prove the breach of condition due to the absence of valid driving licence with the driver.

17. In view of the above facts the decision given by the learned tribunal on issue No,3 is just and proper and there is no illegality in deciding issue No.3 against the appellant-company. No other point was pressed by the learned counsel for the appellant. Hence the appeal of the appellant is dismissed.

18. Learned counsel for the appellant submitted that he has filed an application under Order 41 rule 27 CPC seeking permission to produce the copy of the licence of the driver Sitaram. Order 41 rule 27 CPC clearly prohibits production of the evidence oral or documentary and starts with as under:-

"Order 41 Rule 27 CPC (1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate court, But if...."

19. It clearly shows that there is a prohibition against production of the additional evidence oral or documentary but there are circumstances in which the evidence can be permitted to produce. Clause (a) of Sub-rule (1) of rule 27 of order 41 provides that in case when evidence was refused by the trial court and which ought to have been admitted then appellate court can grant permission to produce evidence. The Clause (aa) of Sub-rule (1) of rule 27 of order 41 provides that in case of any additional evidence which was not in the knowledge of the party after exercising due diligence or it was not with the knowledge of the party or even after exercise and due diligence party could not produce then the appellate court may permit.

20. Here in this case, as is clear from even the reply filed by the appellant-insurance company that they were fully aware of the documentary evidence and

they have mentioned in the reply itself but did not choose to produce alongwith the reply or before framing issues or even at the time of their own evidence. No efforts were made to produce any evidence on the issue. Therefore, above clauses do not apply to the application of the appellant. There is another sub-clause (b) of sub-rule (1) of rule 27 of order 41 CPC which recognizes the power of the appellate court and in case appellate court requires the documents to be produced to enable to pronounce the judgment or for any other substantial cause the appellate court may require the document from the party. Here in this case, when the document, which could not have been produced by the appellant as back as in the year 1993 when the reply was filed. There is no just reason to permit the appellant to produce documentary evidence after about four years of the filing of the reply and after four years of the even application under Order 41 Rule 27 CPC, which may result into re-trial of the entire matter and, particularly, I am not inclined to grant any permission under Order 41 Rule 27 CPC because of the fact that even mere fact of absence of valid licence with the driver at relevant point of time will lead to another question of fact whether the driver was driving the vehicle with specific knowledge and consent of the owner to drive the vehicle without their being any valid licence and this plea is not even of the appellant-company. Since the appellant-company did not choose to place on record documentary evidence at proper time and looking to the provision of order 41 rule 27 CPC there is no ground for permitting application under Order 41 Rule 27 CPC. Hence the application is dismissed.

21. In view of the reasoning given above the appeal of the appellant is dismissed without there being any order as to the costs against the appellant.