(2008) 05 J&K CK 0004

In the Jammu And Kashmir High Court

National Insurance Co. Ltd. APPELLANT

Vs

Ghulam Nabi Zargar and Others RESPONDENT

Date of Decision : 07-05-2008

Acts Referred:
Motor Vehicles Act, 1988 — Section 149

Citation : (2009) ACJ 1934 : AIR 2008 J&K 78 : (2008) 3 JKJ 602

Hon'ble Judges : Mansoor Ahmad Mir, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Mansoor Ahmad Mir, J.—This appeal is directed against the order dated 4-7-2006, passed by Motor Accident Claims Tribunal, Anantang,

in the claim petition titled as Ghulam Nabi Zargar v. Fayaz Ahmad Lone, hereinafter referred to as impugned award.

2. The short controversy involved in this appeal is whether the impugned order came to be rightly passed ?

3. It appears that claim petition came to be filed by respondents 1 and 2 before the Tribunal and was granted vide judgment/award dated 28-11-

2002. Feeling aggrieved, appellant/insurer preferred an appeal and this Court vide judgment dated 10th of June, 2004 decided eight civil

miscellaneous appeals including the appeal preferred by the appellant. It is apt to reproduce para 8 of the said judgment herein.

8. After having proved the breach of condition of policy and the validity of the licence, the appellant is entitled to recover the loss from the owner in

the manner as specified in the judgment (supra); therefore, these claim petitions, are required to be remitted to the Tribunal. The Tribunal would see that where the Appellant has proved the breach of policy conditions or defences available to the Appellant, the Tribunal will take steps for

recovery of the amount by the Appellant for the owner and where these facts have not been proved. The Tribunal will provide opportunity to the

parties to lead evidence and decide accordingly. These appeals are, thus, remitted to the Tribunal.

4. The case/file was remitted back to Motor Accident Claims Tribunal. Anantnag and it framed an additional issue which reads as under:

Where the driver of the offending vehicle was not having valid driving license at the time of accident, if so, whether it violated the terms and

conditions of insurance policy and entitles the insurer to receive the amount from the owners/insured ? OPR 3

5. Insurer/appellant was directed to lead evidence in order to discharge the onus but it failed to lead any evidence and consequently evidence was

closed. The statement of owner/insured was recorded. He deposed that he had engaged Fayaz Ahmad Lone as driver after perusing his driving

licence and had also taken air steps in order to ensure that Fayaz Ahmad Lone was competent to drive the vehicle.

6. After hearing learned Counsel for the parties, Tribunal held that insurer/ appellant has failed to prove that owner insured was aware about the

invalidity of the driving licence and also failed to prove that owner/insured has committed any willful breach. Accordingly it saddled the insurer with

the liability. Feeling aggrieved, the appellant has assailed the said order by the medium of appeal in hand.

7. Learned Counsel for the appellant argued that insurer had already proved that insured had committed breach and has given it a liberty to

recover the amount. The Tribunal has fallen in error and has wrongly interpreted the judgment of this Court.

8. The argument of learned Counsel for the appellant is devoid of force for the following reasons:

9. It appears that Tribunal had framed six issues but no issue was framed viz-a-viz validity of the driving licence. However, while granting the relief.

Tribunal observed that licence was not bearing PSV endorsement, therefore, held that insurer can recover the amount of compensation from

respondent/owner. It is apt to reproduce relevant para of the said judgment herein:

In view of the fact that the licence issued to the respondent (driver) was not endorsed for PSV, the respondent No. 3 Insurance Co. can recover

the amount of compensation from the respondent (driver) owner.

10. While going through the judgment and award Tribunal had nowhere held that owner has committed breach. This Court while deciding a batch

of appeals held in para 8 (supra) that if the insurer has proved the breach of condition of policy and the validity of the licence then insurer is entitled

to recovery. The Tribunal in the award dated 28th of November, 2002 has not held that owner has committed willful breach. After remitting the file

back, the tribunal framed the issue viz-a-viz validity of the licence and passed the impugned order.

11. It was duty of the appellant to prove that owner has committed willful breach and not a mere breach. Willful breach means that if a licence is

not valid or is ineffective or is fake, the duty of the insurer is to prove that owner was aware that licence was fake/invalid/ineffective.

12. Apex Court in case titled as National Insurance Co. Ltd. Vs. Swaran Singh and Others, , held as under:

105. ...

(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. 13. 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 would be on them.

(vi) Even where the insured 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 incident. 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.

14. I have also laid my hands on a recent judgment titled Prernkumari v. Prahlad Dev reported as 2008 AIR SCW 682, wherein their Lordships

have laid down that by proving that driver was having fake licence would not absolve the insurer. It was to be proved that owner was having the

knowledge that driver was holding a fake licence but still permitted him to drive, the vehicle. It is apt to reproduce relevant portion of para 6 of the

said judgment herein:

...It is clear from the above decision when the owner after verification satisfied himself that driver has a valid licence and driving the vehicle in

question competently at the time of the accident there would be no breach of Section 149(2)(a)(ii), in that event, the Insurance Company would

not then be absolved of liability. It is also clear that even in the case that the licence was fake, the Insurance Company would continue to remain

liable unless they prove that the owner was aware or noticed that the licence was fake and still permitted him to drive.

15. In the given circumstances of the case, I do not find any error in the impugned order. Accordingly, the appeal is dismissed.

16. Registry to send down the record along with a copy of this judgment.