
(2004) 03 SHI CK 0018
In the High Court Of Himachal Pradesh
Case No : F.A.O. No. 95 of 2002

National Insurance Co. Ltd.

APPELLANT

Vs

Girdhari Lal and Others
 National Insurance Co. Ltd. Vs
Prakash Chandand Others

RESPONDENT

Date of Decision : 15-03-2004

Acts Referred:

Motor Vehicles Act, 1988 — Section 149(2), 163A, 165, 166, 168

Citation : (2004) 1 ShimLC 422

Hon'ble Judges : R.L. Khurana, J

Bench : Single Bench

Advocate : Ravi Bakshi, in F.A.O. Nos. 95, 96, 97 and 98 of 2002 and F.A.O. Nos. 443 and 508 of 2003, for the Appellant; G.D. Verma Romesh Verma, for the Respondent Nos. 1, 2 and 4 in F.A.O. Nos. 95, 96, 97 and 98 of 2002 and F.A.O. Nos. 443 and 508 of 2003; B.M. Chauhan, for Respondents Nos. 1 to 3 in F.A.O. Nos. 443 and 508 of 2003 P.C. Sharma, for the Respondent Nos. 2, 3 and 5 in F.A.O. Nos. 95, 96, 97 and 98 of 2002 and F.A.O. Nos. 443 and 508 of 2003; Ajay Kumar, for the Respondents No. 3 to 6 in F.A.O. Nos. 95, 96, 97 and 98 of 2002 R.S. Jamalata, for the Respondent Nos. 4 and 6 in F.A.O. Nos. 443 and 508 of 2003, for the Respondent

Final Decision : Dismissed

Judgement

R.L. Khurana, J.—The abovenoted six appeals arising out of three separate awards dated 16.10.2001, 12.6.2002 and 3.12.2001 of the learned Motor Accident Claims Tribunal (II), Shimla (for short the Tribunal) are being disposed of by this single judgment since a common question as to the liability of the Appellant Insurance Company is involved therein.

2. Respondent No. 1 Girdhari Lal is the owner of Mini Bus No. HP-10-011 while Respondent Bhupender was the driver of the said bus. One Sunder Singh Nainta, who is a Respondent in some of the appeals is the co-owner of the abovesaid bus along with Respondent No. 1 Girdhari Lal.

3. On 12.6.1995 the abovesaid bus while proceeding from Jangla to Rohru at

about 11.50 a.m. near Smoli Bridge met with an accident as a result it went off the road and fell down in the Pabber river resulting in the death and injuries to a number of passengers travelling therein.

4. FAO No. 95 of 2002 arises out of claim Petition No. 61-S/2 of 1995 wherein the learned Tribunal vide award dated 16.10.2001 awarded compensation amounting to Rs. 3,94,000 along with interest at the rate of 9 per centum per annum from the date of claim Petition till the date of payment of the amount in favour of Respondents No. 3 to 7 in respect of the death of Sunder Singh, father of Respondents 3 to 6 and son of Respondent No. 7, who had died in the abovesaid accident.

5. FAO No. 96 of 2002 arises out of claim Petition No. 16-S/2 of 1995 wherein the learned Tribunal vide award dated 16.10.2001 awarded compensation to the tune of Rs. 3,16,000 along with interest at the rate of 9 per centum per annum from the date of the claim Petition till the date of payment of the amount in favour of Respondent No. 3 in respect of the death of his wife Smt. Begu, who died in the aforesaid accident.

6. FAO No. 97 of 2002 arises out of Claim Petition No. 64-S/2 of 1995 wherein the learned Tribunal vide award dated 16.10.2001 awarded compensation to the extent of Rs. 5,86,000 along with interest at the rate of 9 per centum per annum from the date of the claim Petition till the date of payment of the amount in favour of Respondents No. 3 to 6 in respect of the death Jagdish Lal, husband of Respondent No. 3 and father of Respondents No. 4 to 6, who had died in the abovesaid accident.

7. FAO No. 98 of 2002 arises out of claim Petition No. 86-S/2 of 1995 wherein vide award dated 16.10.2001 the learned Tribunal awarded compensation amounting to Rs. 4,60,000 along with interest at the rate of 9 per centum per annum from the date of the claim Petition till the date of payment of the amount in favour of Respondents No. 4 to 7 in respect of the death of Kalam Singh, husband of Respondent No. 4 and father of Respondents No. 5 to 7, who died in the abovesaid accident.

8. FAO No. 443 of 2003 arises out of Claim Petition No. 109-S/2 of 1995 wherein vide award dated 12.6.2002 the learned Tribunal awarded a sum of Rs. 1,12,000 as compensation along with interest at the rate of 9 per centum per annum from the date of the claim Petition till the date of payment of the amount in favour of Respondent Kedar Singh for the grievous injuries sustained by him in the aforesaid accident.

9. F.A.O. No. 508 of 2003 arises out of claim Petition No. 89-S/2 of 1995 wherein the learned Tribunal vide award dated 3.12.2001 had awarded compensation to the tune of Rs. 1,95,000 along with interest at the rate of 9 per centum per annum from the date of the claim Petition till the date of payment of the amount in favour of Respondents No. 1 to 3 in respect of the death of their mother Smt. Hazarmati who had died as a result of the grievous injuries sustained by her in

the above said accident.

10. In all the above cases, the learned Tribunal held the Appellant liable to indemnify the owners/insured as to the payment of compensation amount. The Appellant-Insurance Company was thus called upon to pay the amount. Liberty was, however, given to it to recover the amount from the owners of the offending vehicle.

11. It may be noted that the Appellant-Insurance Company while resisting the claim Petition and denying its liability had pleaded in para 5 of preliminary objections raised in its reply as under:

That the driver of the vehicle did not have a valid driving licence and the liability, if any, is therefore, of the owner of the vehicle or its driver. The replying Respondent, however, reserves its right to ascertain the factual position in case the particulars about the driving licence are supplied by the co-Respondent to prove its defence.

12. The defence raised by the Appellant Insurance Company in all the cases is *pari material* the same.

13. There is no denying that the learned Tribunal has held that the driver of the offending bus, at the relevant time, was not holding a valid driving licence. Such findings have not been assailed either by the owner or the driver of the offending vehicle or the claimants/Respondents and as such the same have become final.

14. It was contended on behalf of the Appellant Insurance Company that once the learned Tribunal had found that the driver of the offending vehicle was not holding a valid driving licence, it has gravely erred in holding the Appellant-Insurance Company liable to pay the amount under the award to the claimants/Respondents.

15. It is significant to note that it is not the case of the Appellant-Insurance Company that there has been a breach of the terms and conditions of the insurance policy and that such breach was not on the part of the insured inasmuch as the insured knowingly had allowed a person, not holding a valid driving licence, to drive the vehicle.

16. Section 149(2) of the Motor Vehicles Act, 1988, provides:

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 a 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) for organised racing and speed testing, or

(c) for a purpose not allowed by the permit under which the vehicle is used, where the vehicle is a transport vehicle, or

(d) without side - car being attached where the vehicle is a motor cycle; or

(ii) a condition excluding driving by a named person or persons or by any person who is not duly licensed, or by any person who has been disqualified for holding or obtaining a driving licence during the period of disqualification; or

(iii) a condition excluding liability for injury caused or contributed to by conditions of war, civil war, riot or civil commotion; or

(b) that the policy is void on the ground that it was obtained by the non-disclosure of a material fact or by a representation of fact which was false in some material particular.

17. Dealing with the scope and ambit of the above provision, the Hon^{ble} Supreme Court in *United India Insurance Company Ltd. Vs. Lehu and Others*, has held:

Now let us consider Section 149(2). Reliance has been placed on Section 149(2)(a)(ii). As seen, in order to avoid liability under this provision it must be shown that there is a 'breach'. As held in *Skandia Insurance Co. Ltd. Vs. Kokilaben Chandravadan and Others*, and *Sohan Lal Passi Vs. P. Sesh Reddy and others*, cases the breach must be on the part of the insured. We are in full agreement with that. To hold otherwise would lead to absurd results. Just to take an example, suppose a vehicle is stolen. Whilst it is being driven by the thief there is an accident. The thief is caught and it is ascertained that he had no licence. Can the insurance company disown liability? The answer has to be an emphatic 'No'. To hold otherwise would be to negate the very purpose of compulsory insurance. The injured or relatives of the person killed in the accident may find that the decree obtained by them is only a paper decree as the owner is a man of straw. The owner himself would be an innocent sufferer. It is for this reason that the legislature, in its wisdom, has made insurance, at least third party insurance, compulsory. The aim and purpose being that an insurance company would be available to pay. The business of the company is insurance. In all businesses there is an element of risk. All persons carrying on business must take risks associated with that business. Thus it is equitable that the business which is run for making profits also bears the risk associated with it. At the same time innocent parties must not be made to suffer or loss. These provisions meet these requirements. We are thus in agreement with what is laid down in the

aforementioned cases viz. that in order to avoid liability it is not sufficient to show that the person driving at the time of accident was not duly licensed. The insurance company must establish that the breach was on the part of the insured.

Section 3 of the Motor Vehicles Act, 1988 prohibits driving of a motor vehicle in any public place unless the driver has an effective driving licence. Further, Section 180 of the Motor Vehicles Act makes an owner or person in charge of a motor vehicle punishable with imprisonment or fine if he causes or permits a person without a licence to drive the vehicle. It is clear that the punishment u/s 180 can only be imposed if the owner or person in charge of the vehicle ?causes or permits? driving by a person not duly licensed. Thus there can be no punishment if a person without a licence drives without permission of the owner. Section 149(2)(a)(ii) merely recognises this condition. It therefore, only absolves the insurance company where there is a breach by the insured.

When an owner is hiring a driver he will therefore have to check whether the driver has a driving licence. If the driver produces a driving licence which on the face of it looks genuine, the owner is not expected to find out whether the licence has in fact been issued by a competent authority or not. The owner would 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 licence shown to them is valid or not. Thus where the owner has satisfied himself that the driver has a licence and is driving competently there would be no breach of Section 149(2)(a)(ii). The insurance company would not then be absolved of liability. If it ultimately turns out that the licence was fake, the Insurance Company would continue to remain liable unless they prove that the owner/insured was aware or had noticed that the licence 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., cases. We are in full agreement with the views expressed therein and see no reason to take a different view.

18. In *National Insurance Co. Ltd. Vs. Swaran Singh and Others*, the defences raised by the National Insurance Company (the Appellant before the Supreme Court) purported to be in terms of Section 149(2)(a)(ii) of the Motor Vehicles Act, 1988, were: (a) driving licence produced by the driver or owner of the vehicle was fake one; (b) driver did not have any licence whatsoever; (c) licence, although were granted to the concerned driver but on expiry thereof, the same had not been renewed; (d) licence granted to the driver being for one class or description of vehicle but the vehicle involved in the accident was of different class or description; and (e) the vehicle in question was driver by a person having a learner?s licence.

19. Tracing the legislative history of the Motor Vehicles Act and its provisions, the Hon^{ble} Supreme Court as regards the liability of the Insurance Company in the event of the driver of the offending vehicle is found to be not holding a valid and effective driving licence, has held as under:

(i) Chapter XI of the Motor Vehicles Act, 1988 providing compulsory insurance of vehicles against third party risks is a social welfare legislation to extend relief by compensation to victims of accidents caused by use of motor vehicles. The provisions of compulsory insurance coverage of all vehicles are with this paramount object and the provisions of the Act have to be so interpreted as to effectuate the said object.

(ii) Insurer is entitled to raise a defence in a claim Petitions filed u/s 163A or Section 166 of the Motor Vehicles Act, 1988 inter alia in terms of Section 149(2)(a)(ii) of the said Act.

(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 wherefor 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 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) If a vehicle at the time of accident was driven by a person having a learner's licence, the insurance companies would be liable to satisfy the decree.

(ix) The claims tribunal constituted u/s 165 read with Section 168 is empowered to adjudicate all claims in respect of the accidents involving death or of bodily injury or damage to property of third party arising in use of motor vehicle. The said power of the tribunal is not restricted to decide the claims inter se between claimant or claimants on one side and insured, insurer and driver on the other. In the course of adjudicating the claim for compensation and to decide the availability of defence or defences to the insurer, the Tribunal has necessarily the power and jurisdiction to decide disputes inter se between insurer and the insured. The decision rendered on the claims and disputes inter se between the insurer and insured in the course of adjudication of claim for compensation by the claimants and the award made thereon is enforceable and executable in the same manner as provided in Section 174 of the Act for enforcement and execution of the award in favour of the claimants.

(x) Where on adjudication of the claim under the Act the tribunal arrives at a conclusion that the insurer has satisfactorily proved its defence in accordance with the provisions of Section 149(2) read with Sub-section (7), as interpreted by this Court above, the Tribunal can direct that the insurer is liable to be reimbursed by the insured for the compensation and other amounts which it has been compelled to pay to the third party under the award of the tribunal. Such determination of claim by the Tribunal will be enforceable and the money found due to the insurer from the insured will be recoverable on a certificate issued by the tribunal to the Collector in the same manner u/s 174 of the Act as arrears of land revenue. The certificate will be issued for the recovery as arrears of land revenue only if, as required by Sub-section (3) of Section 168 of the Act, the insured fails to deposit the amount awarded in favour of the insurer within thirty days from the date of announcement of the award by the tribunal.

(xi) The provisions contained in Sub-section (4) with proviso thereunder and Sub-section (5) which are intended to cover specified contingencies mentioned therein to enable the insurer to recover amount paid under the contract of insurance on behalf of the insured can be taken recourse of by the tribunal and be extended to claims and defences of insurer against insured by relegating them to the remedy before regular Court in cases where on given facts and circumstances adjudication of their claims inter se might delay the adjudication of the claims of the victims.

20. In the present cases, the learned Tribunal in holding that the driver of the offending bus was not holding a valid driving licence has held that the endorsement on the driving licence authorising the driver to drive a vehicle of the class or description which was involved in the accident was fake and fictitious.

21. As stated above, the defence raised by the Appellant Insurance Company is to the effect that the driver was not holding a valid and effective driving licence at the relevant time. It has neither been pleaded nor proved that the owner(s) of the offending vehicle were knowing that the driving licence was not valid and inspite of such knowledge had permitted the driver to drive the vehicle and thereby a breach of the terms and conditions of the insurance policy has been committed by the insured.

22. The Appellant - Insurance Company, therefore, has failed to discharge the onus placed upon them to show that the breach of the policy condition, that is, disqualification of the driver or invalid driving licence of the driver, as contained in Section 149(2)(a)(ii) of the Motor Vehicles Act, 1988 was committed by the insured. There is neither evidence nor pleadings to the effect that the insured was guilty of negligence and failed to exercise care in the matter of fulfilling the condition of the insurance policy regarding use of vehicle by duly licensed driver or one who was not disqualified to drive at the relevant time.

23. Following the ratio laid down in National Insurance Company v. Swaran Singh's case (supra), the learned Tribunal has rightly held and found the Appellant- Insurance Company to be liable.

24. Resultantly, all the present six appeals are dismissed. No orders as to costs.