

(2008) 12 DEL CK 0141

In the Delhi High Court

Case No : MAC App. No. 681 of 2007 and CM No. 16443 of 2007

National Insurance Co. Ltd.

APPELLANT

Vs

Smt. Bela Jain and Others

RESPONDENT

Date of Decision : 08-12-2008

Acts Referred:

Motor Vehicles Act, 1988 — Section 10(2), 149(1), 149(2), 166, 170(2)

Citation : (2009) ACJ 1189

Hon'ble Judges : Vidya Bhushan Gupta, J

Bench : Single Bench

Advocate : Pradeep Gaur and Associate, for the Appellant; Ashok Popli, for Respondent Nos. 1 to 3 and Rajesh Tyagi and Aparna Bhardwaj, for the Respondent

Final Decision : Allowed

Judgement

V.B. Gupta, J.—By this common judgment, I shall dispose of the above two appeals filed by the Appellant-Insurance company.

2. These two appeals have been filed u/s 173 of the Motor Vehicles Act, 1988 (for short as "Act") against the impugned judgment dated 12th September, 2007 passed by the Dr. T.R. Naval, Judge, MACT (for short as "Tribunal").

3. Brief facts of this case are that on 18th July, 2004 at 1.20 P.M., deceased Mukesh Jain, was driving his two wheeler scooter No. DAI-1835 on which his son namely Master Shashank Jain was pillion rider. When they reached near SDM office, Geeta Colony, Delhi, all of a sudden the offending motorcycle bearing No. DL-7S-G-3282 being driven by its driver respondent Jatin Singh, in a very rash and negligent manner, without blowing any horn, tried to overtake the scooter of the deceased and in that process struck against the scooter of the deceased with a great force due to which the deceased and his son were thrown on the road. The deceased was immediately admitted to the hospital but he could not survive and died. Master Shashank sustained grievous injuries.

4. The driver and owner of the offending vehicle in their written statement have admitted the factum of accident. However, their defence is that deceased was driving the scooter in a rash and negligent manner and without helmet. The deceased suddenly turned the scooter to the right side and struck against the offending vehicle. The accident was caused due to sole negligence of the deceased and there was no fault of the motor cyclist.

5. The appellant in its written statement has admitted the factum of insurance. However, it has taken a preliminary objection stating that appellant shall not be liable to indemnify, in case it is found that at the time of alleged accident, the alleged driver was driving the offending vehicle without holding any effective and valid driving licence or was driving without licence, as it a breach of the terms and conditions of the policy.

6. The Tribunal vide impugned judgment awarded compensation of Rs. 8,35,067/- to the legal heirs of the deceased in the death case, while injured Master Shashank was awarded Rs. 24,900/- as compensation.

7. The appellant was held liable to pay compensation to the claimants, but was given recovery rights to recover the same from the owner and driver.

8. Being dissatisfied with the impugned judgment, appellant has filed present two appeals.

9. It has been contended by learned Counsel for the appellant that the Tribunal on the one hand has held that the driver of the offending vehicle was minor and was not holding any driving licence but on the other hand it directed the appellant to pay first the award amount and then recover from the insured/owner of the vehicle. These findings of the Tribunal are liable to be modified in the light of judgment passed by the Apex Court in the case titled as National Insurance Co. Ltd. v. Kusum Rai and Ors. (2006) 2 ACC 19 (SC) in which it has been laid down that;

As there was breach of condition of contract of insurance policy by the insured, as such the insurance company was exonerated from its liability.

10. This Court was also on this view in FAO No. 476/2003 decided on 14th April, 2007 titled National Insurance Co. v. Hari Chand and Ors.

11. It is further contended that present case, is a case of "no driving licence" and once the Tribunal has observed that this is a case of willful breach, then the insurance company being the insurer cannot be liable to pay compensation. The owner of the offending vehicle has not pleaded in its written statement that the motor cycle was being driven by its driver without his consent. Since the breach of the contract between the insured and the insurer was fundamental, the insurance company is not liable to pay any compensation and in support of his contention, learned Counsel also cited National Insurance Co. Ltd. Vs. Swaran Singh and Others,

12. Lastly, it has been contended by learned Counsel for the appellant that the appeal filed by the insured/owner of the offending vehicle, has already been dismissed by this Court see MAC App. No .697/07 titled Sh. Jawahar Singh v. Smt. Bala Jain and Ors. decided on 10th December, 2007 by Kailash Gambhir, J.

13. On the other hand, it has been contended by learned Counsel for the insured/owner that, the driver of offending motor cycle was driving the vehicle without his consent and it is a case of unauthorized possession and the breach was contractual and as such the liability rest upon the insured.

14. In support of his contention, learned Counsel cited decision of Apex Court reported as Oriental Insurance Co. Ltd. Vs. Zaharulnisha and Others, .

15. On the other hand, it has been contended by learned Counsel for the claimants that the insurance company has not discharged the onus which was upon it to show as to what conditions of the policy has been violated by the minor, who was driving the offending vehicle. No such plea has been taken by the appellant in its written statement. Since it failed to take such a plea in the written statement, the appellant is liable to pay compensation and the present appeal is not maintainable.

16. Chapter XI of the Act, 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.

17. In a plethora of cases, the Apex Court and various High Courts have held that, if there is a condition in the insurance policy that only a licensed driver is to drive the vehicle, the insurance company would not be liable in case there is a breach.

18. There could be no doubt that in order to escape liability, not only it should be proved that the driver of the vehicle was not having a licence at the time of the accident, but also the insurance company should prove that the driver was disqualified from holding or obtaining a licence or never had any licence at all. Merely proving that on the date of the accident, the driver did not have a licence, is not enough to hold that the insurance company is not liable for claim. The onus of proving that the driver of the vehicle never had a licence or was disqualified from holding a licence is on the insurance company.

19. The Apex Court in *Narcinva V. Kamat and Another Vs. Alfredo Antonio Doe Martins and Others*, observed;

When the Insurance Company complains of a breach of the term of contract, which would permit it to disown its liability under the contract of insurance, the burden is squarely on the Insurance Company 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 such evidence is led". With this principle of law in view, the evidence has to be judged. Merely non-production of licence or non-examination of the driver of the vehicle is not enough nor any adverse inference can be drawn against the person holding that because of non-examination of the driver or non-production of the licence, the burden is discharged by a mere question in cross examination nor the owner is under any obligation to furnish the evidence so as to enable the Insurance Company not to wriggle out its liability under the contract of insurance.

20. When the Insurance Company takes the plea that it is not liable to pay compensation or indemnify the insured, as the driver was not holding a valid licence for driving the vehicle on the date of the accident and the vehicle was being driven in breach of the terms of the policy, the Insurance Company has to discharge the burden by placing legal and cogent evidence before the Tribunal see *Narcinva v. Alfredo* (supra) : and a Division Bench case of this Court in *Shajadibai v. Babookhan and Ors.* 1988 (1) ACC 24.

21. It is an admitted fact that appeal filed by the owner was dismissed and in that appeal the owner has nowhere taken up the defence, which he has taken in the present proceedings.

22. The case of the appellant in short is that it is not liable to pay any compensation as the offending vehicle was not being driven by duly authorised person having a valid licence.

23. The defence of owner/insured before the Tribunal was, that he being the owner of the offending vehicle, had kept the key of the offending vehicle in his house but the respondent/driver who is his nephew, took the key and drove the vehicle without his consent and, therefore, he is not liable to pay any compensation.

24. On this issue the Tribunal has held that;

On perusal of file, I find that written statement of respondent No. 2 is silent on this aspect. R1W4/respondent No. 2 in his examination in chief deposed that the key of his motor-cycle was lying on the Dining Table and on 18.7.2004, Jatin took the key of his motor-cycle without his consent and knowledge and he never gave his motor-cycle to Jatin and he was not responsible to pay any compensation as he did not give the key to Jatin for driving the motor-cycle. In cross-examination, he admitted that he had cordial relations with the family of Jatin but he denied the suggestion that Jatin had driven his motor-cycle with his permission and consent. As held in case *Brij Mohan* (Supra), evidence of Respondent No. 2 cannot be looked into as it was beyond pleadings.

25. The Tribunal further held;

Keeping in view the principles of Law laid down in case of *Brij Mohan* (supra), *Mala Prasad & Ishwar Chand and Ors.* (supra) and *Sohan Lal* (supra) do not exonerate the owner from the liability, therefore, arguments of Counsel for

Respondent No. 2 that Respondent No. 2 owner is not liable to pay any compensation, is not convincing.

26. I do not find any reason to disagree with this finding of the Tribunal.

27. In Kusum Rai (supra) the Apex Court has considered Swaran Singh's case (supra) and held;

7. In a proceeding arising out of a claim petition filed u/s 166 of the Motor Vehicles Act, the insurance company is a necessary party as it is required to indemnify the owner or driver of the vehicle. Even in a case where the owner colludes with the claimants or is not otherwise represented, the insurance company can contest the matter on merits of the claim petition upon obtaining leave of the court as is provided under Sub-section (2) of Section 170 of the Act. However, there does not exist any embargo in raising a defence which comes within the purview of Sub-section (2) of Section 149 of the Act which reads as under:

149. Duty of insurers to satisfy judgments and award against persons insured in respect of third party risks.

(1) xxx xxx xxx

(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 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 nondisclosure of a material fact or by a representation of fact which was false in some material particular.

9. We have noticed hereinbefore that the Tribunal has not gone into the said question. It proceeded on the basis that the case was covered by Kamla (supra). The correctness of the said decision came up for consideration before this Court in National Insurance Co. Ltd. Vs. Swaran Singh and Others, , wherein this Court clearly held:

The owner of a motor vehicle in terms of Section 5 of the Act has a responsibility to see that no vehicle is driven except by a person who does not satisfy the provisions of Section 3 or 4 of the Act. In a case, therefore, where the driver of the vehicle, admittedly, did not hold any licence and the same was allowed consciously to be driven by the owner of the vehicle by such person, the insurer is entitled to succeed in its defence and avoid liability. The matter, however, may be different where a disputed question of fact arises as to whether the driver had a valid licence or where the owner of the vehicle committed a breach of the terms of the contract of insurance as also the provisions of the Act by consciously allowing any person to drive a vehicle who did not have a valid driving licence. In a given case, the driver of the vehicle may not have any hand in it at all e.g. a case where an accident takes place owing to a mechanical fault or vis major. (See Jitendra Kumar).

11. This Court in Swaran Singh (supra) clearly laid down that the liability of the insurance company vis-a-vis the owner would depend upon several factors. The owner would be liable for payment of compensation in a case where the driver was not having a licence at all. It was the obligation on the part of the owner to take adequate care to see that the driver had an appropriate licence to drive the vehicle.

15. In Nanjappan (supra), this Court opined:

8. Therefore, while setting aside the judgment of the High court we direct in terms of what has been stated in Baljit Kaur's case (supra) that the insurer shall pay the quantum of compensation fixed by the Tribunal, about which there was no dispute raised, to the respondents-claimants within three months from today. That for the purpose of recovering the same from the insured, the insurer shall not be required to file a suit. It may initiate a proceeding before the concerned Executing Court as if the dispute between the insurer and the owner was the subject matter of determination before the Tribunal and the issue is decided against the owner and in favour of the insurer. Before release of the amount to the insured, owner of the vehicle shall be issued a notice and he shall be required to furnish security for the entire amount which the insurer will pay to the claimants. The offending vehicle shall be attached, as a part of the security.

If necessity arises the Executing Court shall take assistance of the concerned Regional Transport authority. The Executing Court shall pass appropriate orders in accordance with law as to the manner in which the insured, owner of the vehicle shall make payment to the insurer. In case there is any default it shall be open to the Executing Court to direct realization by disposal of the securities to be furnished or from any other property or properties of the owner of the vehicle, the insured. The appeal is disposed of in the aforesaid terms, with no order as to costs.

28. Similarly, in *Zaharulnisha* case (*supra*), the Apex Court held that;

In the light of the above settled proposition of law, the appellant-insurance company cannot be held liable to pay the amount of compensation to the claimants for the cause of death of Shukurullah in road accident which had occurred due to rash and negligent driving of scooter by Ram Surat who admittedly had no valid and effective licence to drive the vehicle on the day of accident. The scooterist was possessing driving licence of driving HMV and he was driving totally different class of vehicle which act of his is in violation of Section 10(2) of the MV Act.

In the result, the appeal is allowed to the limited extent and it is directed that the appellant-insurance company though not liable to pay the amount of compensation, but in the nature of this case it shall satisfy the award and shall have the right to recover the amount deposited by it along with interest from the owner of the vehicle, viz, respondent No. 8 particularly in view of the fact that no appeal was preferred by him nor has he chosen to appear before this court to contest this appeal. This direction is given in the light of the judgments of this Court in *National Insurance Co. Ltd. Vs. Baljit Kaur and Others*, and *Deddappa and Others Vs. The Branch Manager, National Insurance Co. Ltd.*, .

29. Under the circumstances, though in the present case, the appellant-Insurance Company is not liable to pay the amount of compensation but in the nature of this case it shall satisfy the award and shall pay the quantum of compensation fixed by the Tribunal, about which there was no dispute raised, to the respondents-claimants within three months from today. That for the purpose of recovering the same from the insured, the insurer shall not be required to file a suit. It may initiate a proceeding before the concerned Executing Court as if the dispute between the insurer and the owner was the subject matter of determination before the Tribunal and the issue is decided against the owner and in favour of the insurer. Before release of the amount to the claimants, owner of the vehicle shall be issued a notice and he shall be required to furnish security for the entire amount which the insurer will pay to the claimants. The offending vehicle shall be attached, as a part of the security. If necessity arises the Executing Court shall take assistance of the concerned Regional Transport authority. The Executing Court shall pass appropriate orders in accordance with law as to the manner in which the insured, owner of the vehicle shall make payment to the insurer. In case there is any default it shall be open to the

Executing Court to direct realization by disposal of the securities to be furnished or from any other property or properties of the owner of the vehicle, the insured. This direction is given in the light of the Judgments of the Apex Court in Oriental Insurance Co. Ltd. v. Nanjappan and Ors. (2004) ACC S24 (SC) National Insurance Co. Ltd. Vs. Baljit Kaur and Others, and Deddappa and Others Vs. The Branch Manager, National Insurance Co. Ltd., .

30. Both the appeals are disposed of in the aforesaid terms, with no order as to costs.

31. Copy of this Judgment be sent to all the Tribunal for information and compliance.

32. Trial Court record be sent back.

33. Copy of this judgment be placed in MAC App. No. 683 of 2007.