

(1997) 01 KAR CK 0013
In the Karnataka High Court
Case No : M.F.A. No. 199 of 1992

National Insurance Co. Ltd.	Vs	APPELLANT
T. Sharanappa and Another		RESPONDENT

Date of Decision : 06-01-1997

Acts Referred:

Motor Vehicles Act, 1939 — Section 96 (2) (b) (ii)
Motor Vehicles Act, 1988 — Section 149

Citation : (1999) ACJ 502 : (1997) 2 CivCC 122 : (1997) 3 KarLJ 240

Hon'ble Judges : Hari Nath Tilhari, J

Bench : Single Bench

Advocate : M. Sowri Raju, for the Appellant; K. Suryanarayana Rao and S.V. Prakash, for the Respondent

Final Decision : Dismissed

Judgement

Hari Nath Tilhari, J.—Heard the learned Counsel for the appellant, Mr. M. Sowri Raju and Mr. K. Suryanarayana Rao for respondent No. 1, that is, the injured as well as Mr. S.V. Prakash, counsel for the owner of the moped, respondent No. 2.

2. The only question that has been raised before me by the learned Counsel for the appellant in the context of the facts of the case is to the effect that the learned Tribunal committed error of law as well as error of fact in holding that the insurance company, that is, the appellant, that is, respondent No. 2 in the claim petition; has failed to make out a case u/s 96 (2) (b) (ii) and as such, there is the liability of insurance company to pay the compensation money to the claimant-respondent No. 1 in the appeal?

3. The learned Counsel has submitted that the above finding is based on non-application of the mind to the facts that the owner of the vehicle did not appear in the witness-box as well as he failed to produce the licence. The learned Counsel further submitted that an adverse presumption should have been drawn against the owner of the vehicle, that is, respondent No. 2 in the present appeal and the Tribunal should have held that he being the owner of the vehicle is only

liable to pay.

4. This contention of learned Counsel for the appellant has been hotly contested by Mr. S.V. Prakash, counsel for respondent No. 2 in the appeal as well as by Mr. Suryanarayana Rao, learned Counsel for the claimant-respondent No. 1 in the appeal.

5. Before I proceed to examine the contentions of either side, I think it proper to mention few facts. The claimant T. Sharanappa, namely, respondent No. 1 in this appeal was injured in an accident which had taken place on 21.1.1988, at about 5.30 p.m. on a road in Narasimha-rajapura Town of Chikmagalur District which had occurred according to the claimant's case, on account of the rash and negligent driving of moped vehicle bearing No. CTA 6417, belonging to N. Shankarappa, who was respondent No. 1 in the claim petition and who has been arrayed as respondent No. 2 in the memo of appeal.

6. In the claim petition, it has also been asserted that the present appellant, that is, respondent No. 2 in the claim petition being an insurer of the said vehicle was made a party, namely, the respondent No. 2 in the claim petition. The owner of the vehicle, that is, the present respondent No. 2, who was respondent No. 1 in the claim petition as well as the insurance company filed their written objections challenging the claim petition and denying the allegations made in the claim petition. The owner of the vehicle, that is, N. Shankarappa, who is respondent No. 2 in the appeal, had alleged and asserted that the vehicle was insured one and if any claim was to be decreed or awarded, then the insurance company was liable to answer the claim as on the date of accident, the vehicle was covered by the valid insurance policy. It may be mentioned here that insurance company, who was the respondent No. 2 in the claim petition, apart from filing the written statement or the objections, filed the additional objections as well, denied its liability and denied the claimant's claim as well as allegations made in the claim petition.

7. By virtue of additional objections, the insurance company pleaded that it was not liable to pay any compensation or to indemnify the owner of the vehicle towards the compensation which may be found payable to the petitioner-claimant. It also pleaded that there has been breach of the conditions and the vehicle was being driven without obtaining a valid driving licence on the date of occurrence by the respondent No. 1 in the claim petition, that is, by N. Shankarappa. It took the plea that on the date of occurrence, N. Shankarappa had no valid driving licence. As such, the company was not liable to pay any damage or to reimburse the same to the owner of the vehicle.

8. After framing the material issues, the Tribunal held that the occurrence in question was the result of negligent driving of the motor vehicle by N. Shankarappa, the respondent No. 1 in the claim petition, that is, the present respondent No. 2 in the appeal and as a result of the accident that had taken place due to the rash and negligent driving of the moped by N. Shankarappa, the

claimant, that is, the present respondent No. 1 in the appeal, was hit at the ankle of his right leg and he suffered the injuries. The Tribunal on examination of the material on record held that the claimant, that is, the present respondent No. 1 in the appeal, was entitled to a sum of Rs. 15,000 for injury, pain, suffering and mental shock and he was further held to be entitled to a sum of Rs. 2,500 as damages for expenditure towards medical treatment and other incidental charges. A sum of Rs. 1,500 was awarded to him for temporary loss of enjoyment of life and thus, the Tribunal held the claimant-petitioner, namely, the present respondent No. 1 in the appeal, to be entitled to the damages to the tune of Rs. 19,000 with interest at the rate of 6 per cent per annum from the date of the petition till the date of payment along with the costs as determined. The Tribunal further found that the insurance company which was respondent No. 2 in the claim petition, namely, the present appellant failed to discharge its burden of proof of the requisite conditions of Section 96 (2) (b) (ii) of the Motor Vehicles Act, 1939 for short, "the Act" and so is liable as well under the award to pay the amount awarded.

9. As mentioned earlier, from the above decision and award, the insurance company has come up in appeal. Before I proceed, it would be just and proper to quote Section 96, Sub-section (2) of the Act, 1939. It reads:

96 (2). No sum shall be payable by an insurer under Sub-section (1) in respect of any judgment unless before or after the commencement of the proceedings in which the judgment is given, the insurer had notice through the court of the bringing of the proceedings, or in respect of any judgment 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) xxx xxx xxx (b) 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

10. The defence taken by the insurance company was that N. Shankarappa, the present respondent No. 2, who was the respondent No. 1 in the claim petition, did not have the driving licence and as such, there was a breach of condition under Clause (b) (ii) to Sub-section (2) of Section 96.

11. A reading of Sub-section (2) of Section 96 per se gives a special defence and provides that sum shall not be payable under Sub-section (1) of Section 96, in respect of any judgment unless before or after the commencement of the proceedings, in which the judgment is given, the insurer has been given the notice through the court of those proceedings. It further provides that when a notice is given to the insurer, it is open to the insurer to defend himself on the grounds mentioned in Clauses (i) (a), (i) (b) or (i) (c) of Sub-section (2). When a person has to defend an action and he has to say that no money is to be realised from him over any liability fastened on him as an insurer, in view of certain facts and circumstances pleaded by him and alleged to be covered by Section 96 (2), where the primary burden of proof lies on him to prove those facts which are necessarily to be pleaded and proved by him in order to avail that defence and protection. When the insurance company pleaded that there was breach of any condition by the insured and as such, the insurance company was not liable to pay any compensation to the injured, the company had to establish by evidence that defence plea against the claimant to deny the claimant the relief sought by the insurance company as the burden has been fastened on it with reference to the claim of the claimant. The Motor Vehicles Act and particularly, the provisions of the Section 96 are beneficial provisions which have been enacted with specific purpose to assist the injured or the heirs of the deceased in realising the real compensation without undue delay as delay defeats the relief and justice and provisions relating to third party insurance and relating thereto being social welfare legislation, have to be interpreted keeping pace with the scheme of the Act.

12. Their Lordships of the Supreme Court in the case of Skandia Insurance Co. Ltd. Vs. Kokilaben Chandravadan and Others, have been pleased to observe as follows:

In order to divine the intention of the legislature in the course of interpretation of the relevant provisions there can scarcely be a better test than that of probing into the motive and philosophy of the relevant provisions keeping in mind the goals to be achieved by enacting the same. Ordinarily, it is not the concern of the legislature whether the owner of the vehicle insures his vehicle or not. If the vehicle is not insured any legal liability arising on account of third party risk will have to be borne by the owner of the vehicle. Why then has the legislature insisted on a person using a motor vehicle in a public place to insure against third party risk by enacting Section 94. Surely the obligation has not been imposed in order to promote the business of the insurers engaged in the business of automobile insurance. The provision has been inserted in order to protect the members of the community travelling in vehicles or using the roads

from the risk attendant upon the user of motor vehicles or the roads. The law may provide for compensation to victims of the accidents who sustain injuries in the course of an automobile accident or compensation to the dependants of the victims in the case of a fatal accident. However, such protection would remain a protection on paper unless there is a guarantee that the compensation awarded by the courts would be recoverable from the persons held liable for the consequences of the accident. A court can only pass an award or a decree. It cannot ensure that such an award or decree results in the amount awarded being actually recovered, from the person held liable who may not have the resources. The exercise undertaken by the law courts would then be an exercise in futility. And the outcome of the legal proceedings which by the very nature of things involve the time cost and money cost invested from the scarce resources of the community would make a mockery of the injured victims, or the dependants of the deceased victim of the accident, who themselves are obliged to incur not inconsiderable expenditure of time, money and energy in litigation. To overcome this ugly situation the legislature has made it obligatory that no motor vehicle shall be used unless a third party insurance is in force. To use the vehicle without the requisite third party insurance being in force is a penal offence. [See Section 94 of the Motor Vehicles Act]. The legislature was also faced with another problem. The insurance policy might provide for liability walled in by conditions which may be specified in the contract of policy. In order to make the protection real, the legislature has also provided that the judgment obtained shall not be defeated by the incorporation of exclusion clauses other than those authorised by Section 96 and by providing that except and save to the extent permitted by Section 96 it will be the obligation of the insurance company to satisfy the judgment obtained against persons insured against third party risks (vide Section 96). In other words, the legislature has insisted and made it incumbent on the user of a motor vehicle to be armed with an insurance policy covering third party risks which is in conformity with the provisions enacted by the legislature. It is so provided in order to ensure that the injured victims of automobile accidents or the dependants of the victims of fatal accidents are really compensated in terms of money and not in terms of promise. Such a benign provision enacted by the legislature having regard to the fact that in the modern age the use of motor vehicles notwithstanding the attendant hazards, has become an inescapable fact of life, has to be interpreted in a meaningful manner which serves rather than defeats the purpose of the legislation. The provision has, therefore, to be interpreted in the twilight of the aforesaid perspective.

(Emphasis added)

Keeping these observations in view, in my opinion, the provisions of Section 96 (2), when it provided a right of defence on certain grounds to the insurer the intention of the legislature has been that it shall be pleaded and proved strictly. The burden of proof did lay on the insurer in order to make out a defence case, it has to prove by evidence on record that there has been breach of a specific condition, such as the condition including the one (sic) that the driving of the

vehicle by any person, who is not duly licensed. In other words, it had positively to prove that the person, who was driving the vehicle at the time of the accident, had no driving licence. The intention of the legislature is to provide a defence to the insurance company against the claimant and to save it from the liability of the claimant's claim. Keeping this in view, it has to be examined whether the findings recorded by the Tribunal suffer from any error of law. This fact had to be proved just like proof of other facts and in order to prove this fact, the party had to adduce evidence in the proceedings or the relevant evidence from the person or persons having possession of those material documentary evidence.

13. In this case, the company has examined its Assistant Branch Manager, M.V. Puttaswamy as DW 1. In para 2, in the course of his examination-in-chief, DW 1 states as under:

I know respondent No. 1. He had no driving licence to drive his motor bike in question at the time of accident. This fact was revealed during my enquiry.

14. Respondent No. 1 "s motor bike was duly insured with the insurance company under its insurance policy which is at Exh. D-2, as at the time of accident. Since the respondent No. 1 had no driving licence to drive that motor cycle, respondent No. 2 is not liable to indemnify him. In the course of his cross-examination, DW 1 states as under: "I have enquired in the R.T.O. office at Chikmagalur, whether respondent No. 1 had driving licence to drive his motor cycle. / did not make any such enquiry in the R.T.O. office at Shimoga. I have no documents showing my enquiry in the R.T.O. office at Chikmagalur" The statement made in cross-examination per se is sufficient to hold the statement of DW 1, which he had made in examination-in-chief has been unreliable. He has stated in the course of his cross-examination, he made enquiry from the R.T.O. office, Chikmagalur, as to whether respondent No. 1 had a driving licence to drive his motor cycle. Anyway, enquiries are to be made not orally, but in writing or if enquiry has personally been made or inspection has personally been made, it is nowhere stated as to. who was that person who had gone to make enquiries and from whom it was made. Enquiries if made in writing, the document must have been in possession of DW 1 and it ought to have been produced. But, he clearly says, "I have no documents showing my enquiries in R.T.O. office, Chikmagalur". This per se shows that really, DW 1 had not made any enquiries from the R.T.O. office. He clearly admits that he did not make any enquiry from the R.T.O. office, Shimoga. This statement per se shows and it is clear that he did not make any enquiries. The bald statement made in the cross-examination by DW 1 to the effect that respondent No. 1, N. Shankarappa, had no driving licence and he had made enquiries appear to be false and unreliable. There is one more circumstance which goes against the present appellant, who was respondent No. 2 in the claim petition. In the circumstances mentioned in the original written statement, no such plea was taken, instead the company took the plea to the effect that the vehicle was not insured. In the written statement dated 18.9.1988/7.11.1988, it has been stated that this respondent is an

unnecessary party to the proceedings, as no policy is issued in favour of the respondent No. 1 with respect to the vehicle in question. This plea was admittedly false. The insurance company has taken a false plea to the effect that no policy has been issued by it in favour of respondent No. 1 in respect of vehicle in question. The policy is already on record. It is Exh. D-2. It appears that the company has taken a false plea to shirk its responsibility and later, it tried to take the other defence and earlier, its Manager said: "I made enquiries and I came to know that the respondent No. 1 in the claim petition had no driving licence, on being cross-examined, it came out that he made really no enquiries from the R.T.O. The burden was on the present appellant, who was respondent No. 2 in the claim petition, to have got the enquiries first made and then summoned the records from the R.T.O. offices. It could have summoned some official from the office of the R.T.O., calling upon him to produce the licence relating to N. Shankarappa and his motor moped and if there would have been no driving licence issued in his favour, definitely the witness coming from the R.T.O."s office, would have so stated on the basis of the facts. Nothing has been done by the insurance company. Learned counsel for the appellant urged that it was the duty of respondent No. 1, N. Shankarappa, to appear in the witness-box and to have produced the licence, if he had any. He submitted that an application was made by the insurance company to the court for a direction to respondent No. 1, to appear and to produce licence, in reply to which a memo was filed on behalf of N. Shankarappa that his licence was not traceable. When respondent No. 1 had filed memo that his licence was not traceable, then it was a duty cast on the insurance company to have summoned the documents from the R.T.O. A technical argument has been advanced by the learned Counsel for the insurance company that because of the failure of respondent No. 1, N. Shankarappa to appear in the witness-box, as per the appellant's contention an adverse presumption should be drawn, in my opinion the present dispute is between the claimant on one side and the two respondents, I mean to say, the owner of the vehicle and the insurance company on the other side, there was no question of drawing an adverse inference against the claimant, that is the present respondent No. 1 in the appeal, because the claim had been made by the respondent No. 1, an injured for compensation and when the vehicle was insured and covered by policy, the liability u/s 96 (1) did lay on the company to pay the sums awarded. May it be that the liability of the company may run with that of the owner. Inter se the respondents to claim petition such a technical plea of the company cannot be allowed to frustrate the object of the Act. There the liability for compensation did lie both on the owner of the moped as well as insurance company, as the vehicle was insured one, particularly when the insurance company remained inactive and did not take any due and proper steps to prove that N. Shankarappa had no driving licence, insurance company cannot be allowed to escape the liability, as it has not made out a case in defence and particularly when one of the defences taken earlier appears to be false, that is, it had taken a false defence that the vehicle was not insured one. In the circumstances, the DW1's evidence cannot be reliable evidence. When I so hold,

I find support for my view from the Division Bench decision of this Court in the case of United India Fire and General Insurance Co. Ltd., Bangalore Vs. Kum. Naga Ratna, decided by the Division Bench consisting of G.N. Sabhahit, J. and D.R. Vithal Rao, J. which held that a person, simply because he had admitted his guilt in the court, cannot be taken to have admitted that he had no licence.

15. I may quote the following observations from the Division Bench judgment referred to above:

As pointed out in the afforested Pradesh decision, it was for the insurance company to summon the driver. That the driver had not stepped into the witness-box cannot in any way prejudice the claim of the petitioner who has suffered the injuries. The company has not taken any steps to summon the driver to come with the licence. The insurance company could have again summoned the R.T.O. to produce the relevant licence, if any, or at any rate, produced the certified copy of the licence from the R.T.O.'s office, or an endorsement from the R.T.O. that the driver had no licence. This, we observe, because the learned Counsel for the appellant submitted that the burden is of a negative nature. We are only pointing out the various ways by which insurance company could have proved that the driver had no licence on the date of the accident.

I further find support for my view from the decision of the Supreme Court in the case of Bishan Devi and Another Vs. Sirbaksh Singh and Others, their Lordships of the Supreme Court also observed:

Under Section 96 (2) (b) (ii) the insurer can defend a claim for compensation on the ground that the vehicle was driven by a person who was not duly licensed. Apart from making the averment in his written statement the insurer did not take any steps to establish that the vehicle was driven by a person who was not properly licensed...It is the duty of the insurer to have substantiated the plea.

16. It is well established that unless it is established on material on record that it was the insured, who had wilfully violated conditions of the policy by allowing the driving of a motor cycle by a person not duly licensed, the insurer will have to be deemed as a judgment-debtor for the liability in view of provisions of Section 96 (1) of the Act of 1939, which is analogous to Section 149, Sub-section (1) of the Act of 1988.

17. In the present case, in my opinion, the Tribunal has rightly found out that the insurance company failed to discharge its burden to prove or to establish that the respondent No. 1 in the claim petition had no driving licence and he was driving the motor vehicle (moped) without a valid licence.

18. As the insurance company, the present appellant in the appeal, that is, respondent No. 2 in the claim petition, failed to establish its defence, it cannot be said that there is no liability on it to pay the compensation, in my opinion, there is no substance in the contention of the learned Counsel for the appellant. The appeal is devoid of merits and is hereby dismissed. Costs are made easy.