

(2007) 05 AHC CK 0325
In the Allahabad High Court

National Insurance Company Ltd.

APPELLANT

Vs

Mohd. Asif and Others

RESPONDENT

Date of Decision : 15-05-2007

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 23 Rule 1, Order 23 Rule 3

Citation : (2007) 4 AWC 3759

Hon'ble Judges : V.C. Misra, J;Amitava Lala, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Amitava Lala, J.—This appeal has been preferred by the Insurance Company by making the claimants as well as the owner of the vehicle as respondents her-in. No one appeared on behalf of the owner during the course of hearing on several occasions. It has been contended by the parties that the owner was remained absent even throughout the proceedings before the Tribunal.

2. An issue was framed by the Tribunal as to whether the driver of the vehicle was possessing a valid licence or not? In absence of the owner, obviously that issue stood settled between the contesting parties, i.e. the Insurance Company and the claimants. Admittedly the Insurance Company neither called the owner nor the driver to produce as witness to prove its case. On the other hand a plea has been taken about the non availability of valid licence by the driver of the vehicle at the time of accident. The appellant contended that in spite of service of the summons, no one i.e. neither the owner nor the driver appeared.

3. It is to be noted that in a case of third party risk, the owner as well the Insurance Company, either jointly or severally have liability to discharge in favour of the claimants. The fact is undisputed that the claimants have suffered loss. Now the question for consideration is whether the suffering will be compensated by the Insurance Company as an agent of the principal i.e. the owner or by the owner himself. Thus it is a dispute amongst themselves. Third party cannot be

made to suffer. This observation has been made by the Supreme Court and various High Courts on numerous occasions.

4. In support of the case, learned Counsel appearing for the appellant Insurance Company placed reliance on a Division Bench judgment reported in 2003 (3) T.A.C. 849 National Insurance Co. Ltd. v. Brij Pal Singh and Anr. wherein it has been observed that some sort of practice has developed in the State of U.P. where in spite of service of summons, the driver and the owner of the offending vehicle are not remaining present and it is absolutely impossible for the Insurance Company to lead evidence to show that the driver did possess valid licence or not and thereby the Insurance Company always fasten with the liability towards third party. That observation might have an application in the case where witnesses were put in to appearance to prove the case of not having valid licence. Such is a matter between the insurer and insured. But how the tribunal will come to any conclusion in such situation, has been considered subsequently by our High Court as well as by the Supreme Court to which we have to throw some light.

5. In New India Assurance Co. Ltd. Vs. Krishna Murari and Another, the Division bench of this Court has considered the case from the angle of third party who sustained injury or death. It has been categorically held that the liability to prove that the vehicle was being driven by the person having no valid licence lies upon the insurer. The insurer and the insured have been made jointly and severely liable to pay the compensation to the claimants. It is the duty of the insurer to satisfy judgment against persons insured in respect of third party risk and if the insurer satisfies that insured had violated the terms and conditions stipulated in the insurance policy, it would be entitled to make the recovery of that amount from the insured. Even in the said judgment the question of consideration of the driving licence arose and Court held that this Court cannot lay down any criteria as to how the said burden would be discharged, inasmuch as the same would depend upon the facts and circumstances of each case.

6. In Narcinva V. Kamat and Ors. v. Alfredo Antonio Doe Martins and Ors. reported in 1985 (2) T.A.C. 396, the Supreme Court, even in considering the case under the old Act i.e. Motor Vehicles Act, 1939, in respect of validity of the driving licence, held that liability to prove breach of term of contract is upon the Insurance Company and once it failed to prove that aspect, its liability remains intact and unhampered and, therefore, the Insurance Company is bound to satisfy the award. It is also held by a Division Bench of Madhya Pradesh High Court in Smt. Sham Kunwar and Ors. v. Kamal Singh and Ors. 2000 (1) T.A.C. 129 (M.P.) that burden squarely lies upon the Insurer to prove breach of conditions of policy that driver had no valid driving licence to escape liability of payment of compensation. Therefore, in totality, we cannot say that the Insurance Company will not be liable to pay any compensation to third party. It is open to the Insurance Company to recover the amount from the insured. Insurance Company is not debarred from such entitlement but that cannot debar the third party, who

is not at fault. Therefore, we cannot accept the explanation as made by the learned Counsel for the appellant.

7. So far as the other point about applicability of Order XXIII Rules 1 and 3 of the CPC is concerned, the same cannot be factually accepted by this Court that when on the date of the withdrawal of the application the second application was pending, there is no bar in making second application. There is no limitation in filing claim petition. Learned Counsel for the appellant contended that propriety demands that at the time of moving withdrawal application, the person concerned would have obtained leave from the court to file application afresh. In such circumstances of the case, we are of the view that when the application was subsisting prior to withdrawal, there was no occasion to obtain leave for filing such application.

8. Upon considering all the aspects of the matter, we do not find any cogent reason to interfere with the impugned judgment and award of the Tribunal in this appeal. Thus, the appeal stands dismissed. No order is passed as to costs. However, the statutory deposit made before this Court will be remitted to the Tribunal as expeditiously as possible to adjust with the claim of the claimants.